

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 58.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

DECEMBER, 1893—FEBRUARY, 1894.

ST. PAUL:
WEST PUBLISHING CO.
1894.

Copyright, 1894,

BY

WEST PUBLISHING COMPANY.

FEDERAL REPORTER, VOLUME 58.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.
HON. LE BARON B. COLT, CIRCUIT JUDGE.
HON. WILLIAM L. PUTNAM, CIRCUIT JUDGE.
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.¹
HON. WILLIAM J. WALLACE, CIRCUIT JUDGE.
HON. E. HENRY LACOMBE, CIRCUIT JUDGE.
HON. NATHANIEL SHIPMAN, CIRCUIT JUDGE.
HON. WILLIAM K. TOWNSEND, DISTRICT JUDGE, CONNECTICUT.
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. GEORGE SHIRAS, JR., CIRCUIT JUSTICE.
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.

¹Deceased July 7, 1893.

HON. GEORGE M. DALLAS, CIRCUIT JUDGE.

HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.

HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.

HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.

HON. JOSEPH BUFFINGTON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.

HON. NATHAN GOFF, CIRCUIT JUDGE.

HON. CHARLES H. SIMONTON, CIRCUIT JUDGE.¹

HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.

HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.

HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.

HON. CHARLES H. SIMONTON, DISTRICT JUDGE, E. and W. D. SOUTH CAROLINA.¹

HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.

HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.

HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. HOWELL E. JACKSON, CIRCUIT JUSTICE.

HON. DON A. PARDEE, CIRCUIT JUDGE.

HON. A. P. McCORMICK, CIRCUIT JUDGE.

HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.

HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.

HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.

HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.

HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.

HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.

HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.²

HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.

HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.

HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.

HON. JOHN B. RECTOR, DISTRICT JUDGE, N. D. TEXAS.

HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.

HON. HOWELL E. JACKSON, CIRCUIT JUDGE.³

¹Commissioned Circuit Judge, Dec. 19, 1893.

²Deceased Dec. 1, 1893.

³Commissioned Associate Justice Supreme Court, Feb. 13, 1893.

HON. WILLIAM H. TAFT, CIRCUIT JUDGE.
HON. HORACE H. LURTON, CIRCUIT JUDGE.
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.
HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.¹
HON. WILLIAM A. WOODS, CIRCUIT JUDGE.
HON. JAMES G. JENKINS, CIRCUIT JUDGE.²
HON. PETER S. GROSSCUP, DISTRICT JUDGE, N. D. ILLINOIS.
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.
HON. JAMES G. JENKINS, DISTRICT JUDGE, E. D. WISCONSIN.²
HON. WILLIAM H. SEAMAN, DISTRICT JUDGE, E. D. WISCONSIN.
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.
HON. HENRY C. CALDWELL, CIRCUIT JUDGE.
HON. WALTER H. SANBORN, CIRCUIT JUDGE.
HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.
HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.
HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.
HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.
HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.
HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

¹Appointed Secretary of State, U. S. March 6, 1893.

²Commissioned Circuit Judge, March 23, 1893.

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.

HON. JOSEPH McKENNA, CIRCUIT JUDGE.

HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.

HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.

HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.

HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.

HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.

HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.

HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.

HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

CASES REPORTED.

	Page		Page
A. Crossman, The, Donnelly v. (D. C.)	808	Bank of Little Rock, Exchange Nat. Bank of Spokane v. (C. C. A.)	140
Adams, Barnard v. (C. C.)	313	Barges 2 and 4, McMullen v. (D. C.)	425
Advance, The, Ammon v. (D. C.)	698	Barnard v. Adams (C. C.)	313
Akeley Lumber Co. v. Rauhen (C. C. A.)	668	Battler, The (D. C.)	704
Aldrich, United States v. (C. C. A.)	688	Baugh & Sons Co., Johnson v. (D. C.)	424
Allen, United States v. (C. C. A.)	864	Baumgardner v. Bono Fertilizer Co., two cases (C. C.)	1
Allianca, The, Ammon v. (D. C.)	698	Bell, Nebraska & K. Farm Loan Co. v. (C. C. A.)	326
Amacker v. Northern Pac. R. Co. (C. C. A.)	850	Benson, In re (C. C.)	962
Amato v. Jacobus (C. C. A.)	855	Berger, Jones v. (C. C.)	1006
American Bell Tel. Co. v. Brown Telephone & Telegraph Co. (C. C.)	409	Berkeley, The, Deas v. (D. C.)	920
American Bell Tel. Co. v. Western Tel. Const. Co. (C. C.)	410	Bluefield Waterworks & Imp. Co., Saunders v. (C. C.)	133
American Buckle & Cartridge Co., Winchester Repeating Arms Co. v. (C. C.)	309	Boggs v. Wann (C. C.)	681
Ammon v. The Advance (D. C.)	698	Bono Fertilizer Co., Baumgardner v., two cases (C. C.)	1
Ammon v. The Allianca (D. C.)	698	Book v. Justice Min. Co. (C. C.)	106
Ammon v. The Vigilancia (D. C.)	698	Book v. Justice Min. Co. (C. C.)	827
Anderson v. Monroe (C. C. A.)	401	Bosler, Detwiler v. (C. C.)	249
Anderson v. Patterson (C. C. A.)	401	Boulton, Brower v. (C. C. A.)	888
Anderson v. Riggs (C. C. A.)	401	Bound v. South Carolina R. Co. (C. C. A.)	473
Anderson, Monroe v. (C. C. A.)	398	Bradley Manuf'g Co. v. Eagle Manuf'g Co. (C. C. A.)	721
Anderson, Patterson v. (C. C. A.)	398	Briggs v. Stroud (C. C.)	717
Anderson, Price v. (C. C. A.)	398	British & Foreign Marine Ins. Co., New York Cent. & H. R. R. Co. v. (D. C.)	916
Anderson, Riggs v. (C. C. A.)	398	Brittle Silver Co., Rust v. (C. C. A.)	611
Andrews, United States v. (D. C.)	861	Bromiley, United States v. (D. C.)	554
Anerly, The (D. C.)	794	Brower v. Boulton (C. C. A.)	888
Arnold v. Chesebrough (C. C. A.)	833	Brown v. Grand Rapids Parlor Furniture Co. (C. C. A.)	286
Arrow, The, McAllister v. (C. C. A.)	813	Brown, Republican Mountain Silver Mines v. (C. C. A.)	644
Ascherson, Pottsville Iron & Steel Co. v. (C. C. A.)	319	Brown, United States v. (C. C.)	558
Atlantic & G. W. R. Co., Reinach v. (C. C.)	33	Brown, Walker v. (C. C.)	23
Atlantic & Pac. R. Co. v. Laird (C. C. A.)	760	Brown Folding Mach. Co. v. Stone-metz Printers' Mach. Co. (C. C. A.)	571
Aultman, Miller & Co., McCormick Harvesting Mach. Co. v. (C. C.)	773	Brown Telephone & Telegraph Co., American Bell Tel. Co. v. (C. C.)	409
Aultman & Co., McCormick Harvesting Mach. Co. v. (C. C.)	773	Brummelkamp, Providence Wash. Ins. Co. v. (C. C.)	918
Babcock v. Clarkson (C. C.)	581	Brush Electric Co. v. Milford & Hopedale St. R. Co. (C. C.)	387
Bagley & Sewall Co. v. Empire Wood-Pulp Co. (C. C. A.)	212	Burt, Warren v. (C. C. A.)	101
Ballard v. McCluskey (C. C.)	880	Butte City St. R. Co., Pacific Cable R. Co. v. (C. C.)	420
Ball Glove Fastening Co., Ball & Socket Fastener Co. v. (C. C. A.)	818	Cary Manuf'g Co. v. De Haven (C. C.)	786
Ball & Socket Fastener Co. v. Ball Glove Fastening Co. (C. C. A.)	818	C. Aultman & Co., McCormick Harvesting Mach. Co. v. (C. C.)	773
Baltimore Steam-Packet Co., Pen-nefeather v. (C. C.)	481		
Banca di Genova v. The Sophie Wilhelmine (C. C. A.)	890		

	Page		Page
Central Trust Co. of New York v. Cincinnati, J. & M. R. Co. (C. C.)	500	Davidson v. Mexican Nat. R. Co. (C. C.)	653
Central Vt. R. Co., Swift v. (C. C.)	538	Davis Electrical Works, Edison Electric Light Co. v. (C. C.)	878
Charles Scribner's Sons, Evans v. (C. C.)	303	Deas v. The Berkeley (D. C.)	920
Chase v. Fillebrown (C. C.)	374	De Haven, Cary Manuf'g Co. v. (C. C.)	786
Chattanooga Medicine Co. v. Thedford (C. C.)	347	Delaware, L. & W. R. Co., Swift v. (C. C.)	858
Chesebrough, Arnold v. (C. C. A.)	833	Delemater v. Heath (C. C. A.)	414
Chicago, M. & St. P. R. Co. v. Evans (C. C. A.)	433	Denargo Land Co. v. Porter (C. C.)	856
Chilian, The, Godwin v. (D. C.)	697	Denver, U. & P. R. Co. v. Porter (C. C.)	856
China & Japan Trading Co., United States v. (C. C. A.)	690	Detwiler v. Bosler (C. C.)	249
Chinese Relators, In re (C. C.)	554	Devroe, The (D. C.)	805
Church, New York & N. E. R. Co. v. (C. C. A.)	600	Dietz Co. v. C. T. Ham Manuf'g Co. (C. C.)	367
Cilley, In re (C. C.)	977	Dizer, McKay & Copeland Lasting Mach. Co. v. (C. C.)	353
Cincinnati, J. & M. R. Co., Central Trust Co. of New York v. (C. C.)	500	Dr. B. L. Bull Vegetable Medicine Co., Meyer v. (C. C. A.)	834
City Bank of Hartford, Press Co. v. (C. C. A.)	321	Donnelly v. The A. Crossman (D. C.)	808
City Nat. Bank of Birmingham, Dun v. (C. C. A.)	174	Dorgan, Manufacturers' Accident Indemnity Co. v. (C. C. A.)	945
City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.)	935	Driscoll, The J. J. (D. C.)	811
City of Ft. Wayne, Ross v. (C. C.)	404	Duluth Storage & Forwarding Co., Prentice v. (C. C. A.)	437
City of Madison v. Daley (C. C.)	751	Dun v. City Nat. Bank of Birmingham (C. C. A.)	174
City of Minneapolis v. Lundin (C. C. A.)	525	Eagle Manuf'g Co., David Bradley Manuf'g Co. v. (C. C. A.)	721
City of Oakland, Southern Pac. R. Co. v. (C. C.)	50	Eagle Manuf'g Co., Moline Plow Co. v. (C. C. A.)	721
Claffin, McKay & Copeland Lasting Mach. Co. v. (C. C.)	353	E. A. Packer, The (C. C. A.)	251
Clarkson, Babcock v. (C. C.)	581	Eddy v. Evans (C. C. A.)	151
Cleveland Target Co., Peoria Target Co. v. (C. C. A.)	227	Edge Moor Bridge Works v. Fields (C. C. A.)	173
Clow, Wesley v. (C. C.)	181	Edison Electric Light Co. v. Davis Electrical Works (C. C.)	878
Columbia Chemical Works v. Ruth-erford (C. C.)	787	Edison Electric Light Co. v. Mt. Morris Electric Light Co. (C. C. A.)	572
Commercial Union Assur. Co., Minor v. (D. C.)	801	Edison Electric Light Co. v. United Electric Light & Power Co. (C. C. A.)	572
Concho, The (D. C.)	811	Edison Lamp Co., United States Electric Lighting Co. v. (C. C. A.)	692
Concord, The, Lunney v. (D. C.)	913	Eiffert v. Craps (C. C. A.)	470
Consolidated Piedmont Cable Co. v. Pacific Cable R. Co., two cases (C. C. A.)	226	Elder v. Richmond Gold & Silver Min. Co. (C. C. A.)	536
Converse v. Matthews (C. C.)	246	Electrical Supply Co., Industrial & Mining Guaranty Co. v. (C. C. A.)	732
Corbin Cabinet Lock Co. v. Yale & Towne Manuf'g Co. (C. C.)	563	Elliott Button-Fastener Co., Heaton-Peninsular Button-Fastener Co. v. (C. C.)	220
Cornwell v. Rogers (C. C. A.)	927	Empire Wood-Pulp Co., Ragley & Sewall Co. v. (C. C. A.)	212
Craft, Equitable Mortg. Co. v. (C. C.)	613	Enchantress, The, Hard v. (D. C.)	910
Craps, Eiffert v. (C. C. A.)	470	Equitable Life Assur. Soc. of the United States v. Winning (C. C. A.)	541
Crossman, The A. (D. C.)	808	Equitable Mortg. Co. v. Craft (C. C.)	613
Crystal River Min. Co., Oscamp v. (C. C. A.)	293	Evans v. Charles Scribner's Sons (C. C.)	303
C. T. Ham Manuf'g Co., R. E. Dietz Co. v. (C. C.)	367	Evans v. Union Pac. R. Co. (C. C.)	497
Cudahy Packing Co., Sioux Nat. Bank of Sioux City v. (C. C.)	20	Evans, Chicago, M. & St. P. R. Co. v. (C. C. A.)	433
Curtain, Talley v. (C. C. A.)	4		
Curtis v. Newton (C. C.)	495		
Curtis v. Overman Wheel Co. (C. C. A.)	784		
Daley, City of Madison v. (C. C.)	751		
David Bradley Manuf'g Co. v. Eagle Manuf'g Co. (C. C. A.)	721		

	Page		Page
Evans, Eddy v. (C. C. A.).....	151	Greenville, The, New York & N. R. Co. v. (D. C.).....	805
Ewart Manuf'g Co., Fassett v. (C. C.).....	360	Gregg, Sanford v. (C. C.).....	620
Exchange Bank v. Hubbard (C. C.).....	530	Grimes Dry-Goods Co. v. Malcolm (C. C. A.).....	670
Exchange Nat. Bank of Spokane v. Bank of Little Rock (C. C. A.)..	140	Guildhall, The, Schulze-Berge v. (D. C.).....	796
Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.)....	257	Gulf Stream, The, Inland & Seaboard Coasting Co. v. (D. C.)...	604
Farmers' Loan & Trust Co. v. Oregon & W. T. R. Co. (C. C.)....	639	Ham Manuf'g Co., R. E. Dietz Co. v. (C. C.).....	367
Farmers' & Merchants' Bank of Clay Center v. Farwell (C. C. A.).....	633	Hammond Buckle Co. v. Goodyear Rubber Co. (C. C. A.).....	411
Farwell, Farmers' & Merchants' Bank of Clay Center v. (C. C. A.).....	633	Hanan v. Sage (C. C.).....	651
Fassett v. Ewart Manuf'g Co. (C. C.).....	360	Hard v. The Enchantress (D. C.)..	910
Featherston v. The Jackson (D. C.).....	607	Hardin, Jordan v. (C. C. A.).....	140
Ferguson, Greenbank v. (C. C.).....	18	Hays, Scheffel v. (C. C. A.).....	457
Fields, Edge Moor Bridge Works v. (C. C. A.).....	173	Hazard Powder Co. v. Volger (C. C. A.).....	152
Fillebrown, Chase v. (C. C.).....	374	Hazard Powder Co. v. Volger (C. C. A.).....	158
Fisher, Knight v. (C. C.).....	991	H. B. Rawson, The (D. C.).....	811
Fitchburg R. Co., Swift v. (C. C.)..	858	H. C. Akeley Lumber Co. v. Rauen (C. C. A.).....	668
Ford, Memphis Land & Timber Co. v. (C. C. A.).....	452	Heath, Delemater v. (C. C. A.).....	414
Forgie v. Oil-Well Supply Co. (C. C. A.).....	871	Heaton-Peninsular Button-Fastener Co. v. Elliott Button-Fastener Co. (C. C.).....	220
Ft. Wayne, T. H. & S. W. R. Co., Skinner v. (C. C.).....	55	Helena Hot Springs & Smelter R. Co., Gilchrist v. (C. C.).....	708
Fosdick v. Lowell Machine Shop (C. C.).....	817	Henson, St. Louis S. W. R. Co. v. (C. C. A.).....	531
Franklin Brass Co. of Buchanan, Phoenix Assur. Co. of London v. (C. C. A.).....	166	Heulings v. Reid (C. C.).....	868
Frari, Southwestern Virginia Imp. Co. v. (C. C. A.).....	171	Heyman, Pohl v. (C. C.).....	568
Frederick, German Ins. Co. of Freeport v. (C. C. A.).....	144	Hillyer, United States v. (C. C. A.).....	678
Freund, Untermyer v. (C. C. A.).....	205	Hirzel v. United States (C. C. A.)..	772
Fuller v. United States (D. C.).....	329	Hitchcock Manuf'g Co., Parry Manuf'g Co. v. (C. C.).....	402
Fullerton, Little Josephine Min. Co. v. (C. C. A.).....	521	Holden v. Scudder (C. C.).....	932
F. & M. Schaefer Brewing Co., Pohl v. (C. C.).....	568	Holman, Jones v. (C. C.).....	973
Galgate Ship Co. v. Starr & Co. (D. C.).....	894	Housman, Rodwell Manuf'g Co. v. (C. C.).....	870
Gatlin, Thompson v. (C. C. A.).....	534	Hoyle v. Kerr (C. C. A.).....	395
George, Warner v. (C. C.).....	435	Hubbard, Exchange Bank v. (C. C.).....	530
Germania Iron Co. v. United States (C. C. A.).....	334	Hudgins, Riddle v. (C. C. A.).....	490
German Ins. Co. of Freeport v. Frederick (C. C. A.).....	144	Imperial Life Ins. Co., Stier v. (C. C.).....	843
Gibson Co., Roker Spring Co. v., three cases (C. C.).....	217	Industrial & Mining Guaranty Co. v. Electrical Supply Co. (C. C. A.).....	732
Gilbert v. Reinhardt Numbering Machine Co. (C. C.).....	975	Inland & Seaboard Coasting Co. v. The Gulf Stream (D. C.).....	604
Gilchrist v. Helena Hot Springs & Smelter R. Co. (C. C.).....	708	Jackson v. Munks (C. C.).....	596
Godwin v. The Chilian (D. C.).....	697	Jackson, The, Featherston v. (D. C.).....	607
Goodyear Rubber Co., Hammond Buckle Co. v. (C. C. A.).....	411	Jacobus, Amato v. (C. C. A.).....	855
Goss Pump & Rubber Bucket Manuf'g Co., Temple Pump Co. v. (C. C. A.).....	196	Jersey City Gaslight Co. v. United Gas Imp. Co. (C. C. A.).....	323
Graffin, Peace River Phosphate Co. v. (C. C.).....	550	J. J. Driscoll, The, Reed v. (D. C.).....	811
Grand Rapids Parlor Furniture Co., Brown v. (C. C. A.).....	286	John G. Stevens, The, In re (D. C.).....	792
Grant v. United States (C. C. A.)..	694	Johnson v. Baugh & Sons Co. (D. C.).....	424
Greenbank v. Ferguson (C. C.).....	18	Johnson Railroad Signal Co., Union Switch & Signal Co. v. (C. C.).....	385
		Jones v. Berger (C. C.).....	1006
		Jones v. Holman (C. C.).....	973
		Jordan v. Hardin (C. C. A.).....	140
		Josephine B., The, Woodberry v. (C. C. A.).....	813

	Page		Page
Jos. R. Peebles' Sons Co., Krauss v. (C. C.).....	585	Mead, In re (D. C.).....	312
Justice Min. Co., Book v. (C. C.)..	106	Mellon, Smith & Davis Manuf'g Co. v. (C. C. A.).....	705
Justice Min. Co., Book v. (C. C.)..	827	Memphis Land & Timber Co. v. Ford (C. C. A.).....	452
Kanawha & O. R. Co., Mercantile Trust Co. v. (C. C. A.).....	6	Mercantile Trust Co. v. Kanawha & O. R. Co. (C. C. A.).....	6
Kansas Trust & Banking Co., Risk v. (C. C.).....	45	Mergenthaler Linotype Co., Rogers Typographic Co. v. (C. C.).....	693
Kelley-Goodfellow Shoe Co. v. Milligan (C. C. A.).....	161	Mexican Nat. R. Co., Davidson v. (C. C.).....	653
Kendall, Russell v. (C. C.).....	381	Meyer v. Dr. B. L. Bull Vegetable Medicine Co. (C. C. A.).....	884
Kern, Russell v. (C. C.).....	332	Meyer v. Pacific Mail Steamship Co. (D. C.).....	923
Kerr, Hoyle v. (C. C. A.).....	395	Milburn v. Nord-Deutscher Lloyd (D. C.).....	603
Knight, v. Fisher (C. C.).....	991	Milford & Hopedale St. R. Co., Brush Electric Co. v. (C. C.).....	387
Kohn, Ward v. (C. C. A.).....	462	Milligan, Kelley-Goodfellow Shoe Co. v. (C. C. A.).....	161
Krauss v. Jos. R. Peebles' Sons Co. (C. C.).....	585	Minnesota Iron Co., Pond v. (C. C.)	448
La Compagnie Generale Transatlantique v. O'Sullivan, two cases (C. C. A.).....	427	Minor v. Commercial Union Assur. Co. (D. C.).....	801
Laird, Atlantic & Pac. R. Co. v. (C. C. A.).....	760	Minor v. Wilson (C. C.).....	616
La Normandie (C. C. A.).....	427	Mitchell v. The Mary Sanford (D. C.).....	926
Leach, United States v. (C. C.).....	557	Mitchell, United States v. (D. C.).....	993
Lee, Northwestern Stove Repair Co. v. (C. C. A.).....	182	Moline Plow Co. v. Eagle Manuf'g Co. (C. C. A.).....	721
Little Josephine Min. Co. v. Fullerton (C. C. A.).....	521	Monroe v. Anderson (C. C. A.).....	598
Llewellyn, Provident Sav. Life Assur. Soc. of New York v. (C. C. A.).....	940	Monroe, Anderson v. (C. C. A.).....	401
Lowell Machine Shop, Fosdick v. (C. C.).....	817	Montana Mining Co., St. Louis Mining & Milling Co. of Montana v. (C. C.).....	129
Lowell M. Palmer, The, Mace v. (D. C.).....	701	Mt. Morris Electric Light Co., Edison Electric Light Co. v. (C. C. A.).....	572
Lundin, City of Minneapolis v. (C. C. A.).....	525	Mulvane, Wescott v. (C. C. A.).....	305
Lunney v. The Concord (D. C.).....	913	Munks, Jackson v. (C. C.).....	596
McAllister v. The Arrow (C. C. A.)	813	Mutual Ben. Life Ins. Co. v. Robinson (C. C. A.).....	723
McCabe, United States v. (C. C.).....	557	Nantahala Marble & Talc Co., Thomas v. (C. C. A.).....	485
McCluskey, Ballard v. (C. C.).....	880	National Docks & N. J. J. C. R. Co., Pennsylvania R. Co. v. (C. C.).....	929
McCormick Harvesting Mach. Co. v. Aultman, Miller & Co. (C. C.)	773	Nebraska & K. Farm Loan Co. v. Bell (C. C. A.).....	326
McCormick Harvesting Mach. Co. v. C. Aultman & Co. (C. C.).....	773	New Jersey Lighterage Co., Scully v. (C. C. A.).....	251
Mace v. The Lowell M. Palmer (D. C.).....	701	Newman, Rush v. (C. C. A.).....	158
Mace, United States v. (C. C.).....	557	Newton, Curtis v. (C. C.).....	495
McKay & Copeland Lasting Mach. Co. v. Clafin (C. C.).....	353	New York Cent. & H. R. R. Co. v. British & Foreign Marine Ins. Co. (D. C.).....	916
McKay & Copeland Lasting Mach. Co. v. Dizer (C. C.).....	353	New York, C. & St. L. R. Co., Swift v. (C. C.).....	858
McMullen v. Barges 2 and 4 (D. C.).....	425	New York Filter Co. v. Schwarzwald (C. C.).....	577
Magee, United States v. (C. C.).....	557	New York, L. E. & W. R. Co., New York, P. & O. R. Co. v. (C. C.)	268
Malcolm, W. B. Grimes Dry-Goods Co. v. (C. C. A.).....	670	New York Life Ins. Co. v. Savage (C. C. A.).....	338
Malcolm McDonald Lumber Co., Seymour v. (C. C. A.).....	957	New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. (C. C.)	268
Manufacturers' Accident Indemnity Co. v. Dorgan (C. C. A.).....	945	New York Recorder Co., O'Shaughnessy v. (C. C.).....	653
Marthinson, United States v. (D. C.)	765	New York & N. E. R. Co. v. Church (C. C. A.).....	600
Maryland Cent. R. Co., Street v. (C. C.).....	47		
Mary Sanford, The, Mitchell v. (D. C.).....	926		
Matthews, Converse v. (C. C.).....	246		
Maud, The (C. C. A.).....	813		

	Page		Page
New York & N. R. Co. v. The Greenville (D. C.).....	805	Pohl v. F. & M. Schaefer Brewing Co. (C. C.).....	568
Nord-Deutscher Lloyd, Milburn v. (D. C.).....	603	Pohl v. Heyman (C. C.).....	568
North British & Mercantile Ins. Co. of London and Edinburgh, Shattuck v. (C. G. A.).....	609	Pond v. Minnesota Iron Co. (C. C.)	448
Northern Pac. Coal Co. v. Rich- mond (C. C. A.).....	756	Porter, Denargo Land Co. v. (C. C.)	856
Northern Pac. R. Co., Amacker v. (C. C. A.).....	850	Porter, Denver, U. & P. R. Co. v. (C. C.).....	856
Northern Pac. R. Co., Farmers' Loan & Trust Co. v. (C. C.).....	257	Pottsville Iron & Steel Co. v. As- cherson (C. C. A.).....	319
Northern Pac. R. Co., Smith v. (C. C. A.).....	513	Prentice v. Duluth Storage & For- warding Co. (C. C. A.).....	437
Northwestern Stove Repair Co. v. Lee (C. C. A.).....	182	Prentice v. United States & Central American Steamship Co., two cases (D. C.).....	702
N. & W. No. 4, The, and Boston Towboat Co., Sherborne v. (D. C.)	794	Press Co. v. City Bank of Hart- ford (C. C. A.).....	321
Oil-Well Supply Co., Forgie v. (C. C. A.).....	871	Price v. Anderson (C. C. A.).....	398
Oregon & W. T. R. Co., Farmers' Loan & Trust Co. v. (C. C.).....	639	Providence Wash. Ins. Co. v. Brummelkamp (C. C.).....	918
Oscamp v. Crystal River Min. Co. (C. C. A.).....	293	Provident Sav. Life Assur. Soc. of New York v. Llewellyn (C. C. A.)	940
Osgood, Standard Folding Bed Co. v. (C. C. A.).....	583	Rauen, H. C. Akeley Lumber Co. v. (C. C. A.).....	668
O'Shaughnessy v. New York Re- corder Co. (C. C.).....	653	Rawson, The H. B. (D. C.).....	811
O'Sullivan, La Compagnie Generale Transatlantique v., two cases (C. C. A.).....	427	R. E. Dietz Co. v. C. T. Ham Man- uf'g Co. (C. C.).....	367
Overman Wheel Co., Curtis v. (C. C. A.).....	784	Reed v. The J. J. Driscoll (D. C.)..	811
Pacific Cable R. Co. v. Butte City St. R. Co. (C. C.).....	420	Reid, Heulings v. (C. C.).....	868
Pacific Cable R. Co., Consolidated Piedmont Cable Co. v., two cases (C. C. A.).....	226	Reinach v. Atlantic & G. W. R. Co. (C. C.).....	33
Pacific Mail Steamship Co., Meyer v. (D. C.).....	923	Reinhardt Numbering Machine Co., Gilbert v. (C. C.).....	975
Pacific Mut. Life Ins. Co. v. Snow- den (C. C. A.).....	342	Republic, The (D. C.).....	607
Packer, The E. A. (C. C. A.).....	251	Republican Mountain Silver Mines v. Brown (C. C. A.).....	644
Palmer, The Lowell M. (D. C.)...	701	Richmond, Northern Pac. Coal Co. v. (C. C. A.).....	756
Parry Manuf'g Co. v. Hitchcock Manuf'g Co. (C. C.).....	402	Richmond Gold & Silver Min. Co., Elder v. (C. C. A.).....	536
Patterson v. Anderson (C. C. A.)..	398	Ricker, Wickersham v. (C. C. A.)	282
Patterson, Anderson v. (C. C. A.)	401	Riddle v. Hudgins (C. C. A.).....	490
Pauly v. State Loan & Trust Co. (C. C. A.).....	666	Rigby, Vincent v. (C. C.).....	371
Peace River Phosphate Co. v. Graf- fin (C. C.).....	550	Riggs v. Anderson (C. C. A.).....	398
Peebles' Sons Co., Krauss v. (C. C.)	585	Riggs, Anderson v. (C. C. A.).....	401
Pennefeather v. Baltimore Steam- Packet Co. (C. C.).....	481	Risk v. Kansas Trust & Banking Co. (C. C.).....	45
Pennsylvania R. Co. v. National Docks & N. J. C. R. Co. (C. C.)	929	Robison, Mutual Ben. Life Ins. Co., v. (C. C. A.).....	723
Peoria Target Co. v. Cleveland Tar- get Co. (C. C. A.).....	227	Rocker Spring Co. v. William D. Gibson Co., three cases (C. C.)..	217
Philadelphia & R. R. Co., Swift v. (C. C.).....	858	Rodwell Manuf'g Co. v. Housman (C. C.).....	870
Philler, Yardley v. (C. C.).....	746	Rogers, Cornwell v. (C. C. A.).....	927
Phipps, Wright v. (C. C.).....	552	Rogers Typographic Co. v. Mergen- thaler Linotype Co. (C. C.).....	693
Phoenix, The (C. C. A.).....	927	Ross v. City of Ft. Wayne (C. C.)	404
Phoenix Assur. Co. of London v. Franklin Brass Co. of Buchanan (C. C. A.).....	166	Rush v. Newman (C. C. A.).....	158
		Russell v. Kendall (C. C.).....	381
		Russell v. Kern (C. C.).....	382
		Rust v. Brittle Silver Co. (C. G. A.)	611
		Rutherford, Columbia Chemical Works v. (C. C.).....	787
		Sage v. Winona & St. P. R. Co. (C. C. A.).....	297
		Sage, Hanan v. (C. C.).....	651
		St. Louis Mining & Milling Co. of Montana v. Montana Mining Co. (C. C.).....	129

	Page		Page
St. Louis S. W. R. Co. v. Henson (C. C. A.)	531	Swift v. Fitchburg R. Co. (C. C.)	858
Sanford, The Mary (D. C.)	926	Swift v. New York, C. & St. L. R. Co. (C. C.)	858
Sanford v. Gregg (C. C.)	620	Swift v. Philadelphia & R. R. Co. (C. C.)	858
Saul, United States v. (D. C.)	763	Sykes, United States v. (D. C.)	1000
Saunders v. Bluefield Waterworks & Imp. Co. (C. C.)	133	Talley v. Curtain (C. C. A.)	4
Savage, New York Life Ins. Co. v. (C. C. A.)	338	Temple Pump Co. v. Goss Pump & Rubber Bucket Manuf'g Co. (C. C. A.)	196
Schaefer Brewing Co., Pohl v. (C. C.)	568	Thedford v. Chattanooga Medicine Co. (C. C.)	347
Scheffel v. Hays (C. C. A.)	457	Thomas v. Nantabala Marble & Talc Co. (C. C. A.)	485
Schroder v. Tompkins (C. C.)	672	Thompson v. Gatlin (C. C. A.)	534
Schulze-Berge v. The Guildhall (D. C.)	796	Tompkins, Schroder v. (C. C.)	672
Schwarzwalder, New York Filter Co. v. (C. C.)	577	Trans-Missouri Freight Ass'n, United States v. (C. C. A.)	58
Scow No. 40, The (D. C.)	805	Union Pac. R. Co., Evans v. (C. C.)	497
Scribner's Sons, Evans v. (C. C.)	303	Union Paper-Bag Mach. Co. v. Waterbury (C. C.)	566
Scudder, Holden v. (C. C.)	932	Union Switch & Signal Co. v. Johnson Railroad Signal Co. (C. C.)	385
Scully v. New Jersey Lighterage Co. (C. C. A.)	251	United Electric Light & Power Co., Edison Electric Light Co. v. (C. C. A.)	572
Seguranca, The, Vanhoesen v. (D. C.)	908	United Gas Imp. Co., Jersey City Gaslight Co. v. (C. C. A.)	323
Seymour v. Malcolm McDonald Lumber Co. (C. C. A.)	957	United States v. Aldrich (C. C. A.)	688
Shattuck v. North British & Mercantile Ins. Co. of London and Edinburgh (C. C. A.)	609	United States v. Allen (C. C. A.)	864
Sherborne v. The N. & W. No. 4 and Boston Towboat Co. (D. C.)	794	United States v. Andrews (D. C.)	861
Sioux Nat. Bank of Sioux City v. Cudahy Packing Co. (C. C.)	20	United States v. Bromiley (D. C.)	554
Skinner v. Ft. Wayne, T. H. & S. W. R. Co. (C. C.)	55	United States v. Brown (C. C.)	558
Smith v. Northern Pac. R. Co. (C. C. A.)	513	United States v. China & Japan Trading Co. (C. C. A.)	690
Smith, Stewart v. (C. C. A.)	580	United States v. Hillyer (C. C. A.)	678
Smith & Davis Manuf'g Co. v. Mellon (C. C. A.)	705	United States v. Leach (C. C.)	557
Snowden, Pacific Mut. Life Ins. Co. v. (C. C. A.)	342	United States v. McCabe (C. C.)	557
Sophie Wilhelmine, The, Banca di Genova v. (C. C. A.)	890	United States v. Mace (C. C.)	557
South Carolina R. Co., Bound v. (C. C. A.)	473	United States v. Magee (C. C.)	557
Southern Pac. R. Co. v. City of Oakland (C. C.)	50	United States v. Marthinson (D. C.)	765
Southwestern Virginia Imp. Co. v. Frari (C. C. A.)	171	United States v. Mitchell (D. C.)	993
Sperry Electric Co., Western Electric Co. v. (C. C. A.)	186	United States v. Saul (D. C.)	763
Standard Folding Bed Co. v. Osgood (C. C. A.)	583	United States v. Sykes (D. C.)	1000
Starr & Co., Galgate Ship Co. v. (D. C.)	894	United States v. Trans-Missouri Freight Ass'n (C. C. A.)	58
State Loan & Trust Co., Pauly v. (C. C. A.)	666	United States v. Wallis (D. C.)	942
Stevens, The John G., In re (D. C.)	792	United States v. Wilson (D. C.)	768
Stewart v. Smith (C. C. A.)	580	United States, Fuller v. (D. C.)	329
Stier v. Imperial Life Ins. Co. (C. C.)	843	United States, Germania Iron Co. v. (C. C. A.)	334
Stonemetz Printers' Mach. Co., Brown Folding Mach. Co. v. (C. C. A.)	571	United States, Grant v. (C. C. A.)	694
Street v. Maryland Cent. R. Co. (C. C.)	47	United States, Hirzel v. (C. C. A.)	772
Stroud, Briggs v. (C. C.)	717	United States, Warren v. (C. C. A.)	559
Swift v. Central Vt. R. Co. (C. C.)	858	United States, Woodruff v. (C. C.)	766
Swift v. Delaware, L. & W. R. Co. (C. C.)	858	United States Electric Lighting Co. v. Edison Lamp Co. (C. C. A.)	692
		United States & Central American Steamship Co., Prentice v., two cases (D. C.)	702
		Untermeyer v. Freund (C. C. A.)	205
		Vanhoesen v. The Seguranca (D. C.)	908
		Vigilancia, The, Ammon v. (D. C.)	698
		Vincent v. Rigby (C. C.)	371
		Volger, Hazard Powder Co. v. (C. C. A.)	152

	Page		Page
Volger, Hazard Powder Co. v. (C. C. A.).....	158	William D. Gibson Co., Rocker Spring Co. v., three cases (C. C.)	217
Walker v. Brown (C. C.).....	23	Wilson, Minor v. (C. C.).....	616
Wallis, United States v. (D. C.)...	942	Wilson, United States v. (D. C.)..	768
Wann, Boggs v. (C. C.).....	681	Winchester Repeating Arms Co. v. American Buckle & Cartridge Co. (C. C.).....	309
Ward v. Kohn (C. C. A.).....	462	Winning, Equitable Life Assur. Soc. of the United States v. (C. C. A.)	541
Warner v. George (C. C.).....	435	Winona & St. P. R. Co., Sage v. (C. C. A.).....	297
Warren v. Burt (C. C. A.).....	101	Woodberry v. The Josephine B. (C. C. A.).....	813
Warren v. United States (C. C. A.)	559	Woodruff v United States (C. C.)..	766
Waterbury, Union Paper-Bag Mach. Co. v. (C. C.).....	566	Woonsocket Inst. for Savings, City of Cadillac v. (C. C. A.).....	935
W. B. Grimes Dry-Goods Co. v. Malcolm (C. C. A.).....	670	Worthen, In re (C. C.).....	467
Wescott v. Mulvane (C. C. A.)....	305	Wright v. Phipps (C. C.).....	552
Wesley v. Clow (C. C.).....	181	Yale & Towne Manuf'g Co., Corbin Cabinet Lock Co. v. (C. C.).....	563
Western Electric Co. v. Sperry Electric Co. (C. C. A.).....	186	Yardley v. Philler (C. C.).....	746
Western Tel. Const. Co., American Bell Tel. Co. v. (C. C.).....	410		
Wickersham v. Ricker (C. C. A.)..	282		
Wilhelmine, The Sophie (C. C. A.)	890		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

BAUMGARDNER v. BONO FERTILIZER CO. et al., (two cases.)

(Circuit Court, W. D. Virginia. October 20, 1893.)

1. SERVICE OF PROCESS—PUBLICATION—ATTACHMENT.

Service upon a nonresident by publication prior to attachment of his property is a nullity, and is not made good by a subsequent attachment.

2. REMOVAL OF CAUSES—WAIVER OF RIGHT—SPECIAL APPEARANCE IN STATE COURT.

Where a nonresident defendant, appearing specially for the purpose, procures the setting aside of a judgment against him for want of service, moves to dismiss the case, and takes a bill of exceptions to the court's denial thereof, this does not constitute a general appearance, or a waiver of his right to remove the cause to a federal court.

At Law. These are two actions on the case, brought by J. H. Baumgardner against the Bono Fertilizer Company and others in the circuit court of Wythe county, Va., and thence removed by defendant. Heard on motion to remand. Denied.

Statement by PAUL, District Judge:

These cases were removed into this court from the circuit court of Wythe county, Va., by an order of that court entered at its February term, 1893. The actions were brought on the 18th day of April, 1891, and the declarations filed at first July rules, 1891. On the 18th day of April, 1891, what purported to be an order of publication was made in one of the cases, which was the only process or notice issued against the defendants, or any of them, all of whom were nonresidents of the state of Virginia. At the September term, 1891, of the circuit court of Wythe county, there being no appearance on the part of the defendants, or any of them, juries were impaneled, verdicts rendered, and judgments entered for \$5,000 in each case. At the September term, 1892, of the circuit court of Wythe county the defendants filed a petition therein, praying that these cases be reopened, and the judgments expunged from the record, on the following grounds: "First. Because more than one month had elapsed after the return day of the process executed without the declaration being filed, when it was the duty of the clerk to enter the suits dismissed, ipso facto, and therefore the cases were improperly on the docket at the September term, 1892. The declarations were not filed until the first July rules, 1891, when by the order of publication they ought to have been filed within four weeks from the 18th of April, 1891. Second. Because your petitioners being nonresidents of the commonwealth of Virginia, and not being served with process in the state, or in Wythe county,

or anywhere, the so-called 'judgments' against them were nullities, and are void." Thereupon the court entered an order setting aside the judgments entered at the September term, 1891, but refused to dismiss the suits, holding that there had been a valid execution of the orders of publication in the cases; that the declarations had been properly filed therein, and that, after the institution of the suits, and since the rendition of the judgments therein, the plaintiff had filed proper affidavits, and sued out attachments, in each of the suits; that said attachments had been duly executed on one R. W. Price, in Wythe county, a debtor of the defendants, and that said Price had that day appeared and answered the attachments, acknowledging himself indebted to one of the defendants, to wit, the Bono Fertilizer Company, in the sum of \$167, with interest thereon from May 1, 1891. It further appears from the papers in these cases that after the rendition of the judgments at the September term, 1891, of the circuit court of Wythe county, what purported to be attachments were issued and levied on certain real estate in the city of Bristol as the property of J. Marshall Smith, one of the defendants. The order of the court also gave leave to the petitioners to plead to both of said actions if they desired to do so, and the order then proceeds as follows: "And thereupon, this day, again came the defendants, by their attorney, and moved the court to dismiss the said actions on the ground that the petitioners, and each of them, are nonresidents of the commonwealth of Virginia, and that no service of process had been had on either of said petitioners in the commonwealth of Virginia or in Wythe county; said counsel in open court stating that he only appeared for the purpose of raising the question of jurisdiction. On consideration whereof the court overruled said motion to dismiss, to which action of the court the petitioners excepted, and tendered their bill of exceptions." And the cases were continued until the February term, 1893, of the court. whereupon the circuit court of Wythe county, Va., ordered the removal of the cases into this court.

Walker & Caldwell and Blair & Blair, for plaintiff.
W. S. Poage, for defendants.

PAUL, District Judge, (after stating the facts.) The plaintiff contends that these cases were improperly removed into this court, because—

First. The petition for removal was not filed "before the defendants were required by the laws of the state of Virginia, or the rule of the state court, to answer or plead to the declaration, or complaint, of the plaintiff," as required by section 1 of the act of congress of March 3, 1887, as corrected by the act of August 13, 1888. An examination of the record shows that there was no time, from the institution of these actions to the time when the application for removal into this court was made, at which the defendants were required to plead to the plaintiff's declaration. There had never been any proper process served on the defendants, or any of them. It is not claimed that there had ever been any personal service of process on them, or any of them. It is admitted that all the defendants were and are nonresidents of the state of Virginia. The circuit court of Wythe county could acquire jurisdiction of these cases only by personal service of process on the defendants, or some of them, or by attaching some property found within the jurisdiction of the court belonging to the defendants, or some of them, and following this up by an order of publication giving notice of the institution of the action and the attachment of the property of the defendants, or some of them. It appears that in this case no attachment issued until after the rendition of the judgments at the Sep-

tember term, 1891, of the court, and that no order of publication was made after such attachment was issued, and that there was no personal service of process on the defendants, or any of them. Code Va. 1887, § 2959, provides that:

"If at the time of, or after the institution of, any action at law for the recovery of * * * damages for a wrong, the plaintiff, his agent, or attorney shall make affidavit stating that the plaintiff's claim is believed to be just * * * a certain sum which (at the least) the affiant believes the plaintiff is entitled to or ought to recover, and stating also * * * to the best of affiant's belief * * * that the defendants, or one of the defendants, is not a resident of this state, and has estate or debts owing to said defendant within the county or corporation where the action is * * * the clerk of the court where the action is shall issue an attachment as the case may require."

As to an attachment so issued, section 2979 of the Code of Virginia of 1887 provides that when it is "returned executed, if the defendant has not been served with a copy of the attachment, or with process in the suit wherein the attachment issued, an order of publication shall be made against him," which order of publication section 3231 of the Code of Virginia of 1887 provides shall require the defendants "to appear within 15 days after due publication thereof, and do what is necessary to protect their interest." It is very clear that no order of publication requiring the defendants to appear within 15 days after publication thereof, and do what is necessary to protect their interests, can be made until after an attachment has been issued and levied and return made thereon. If the clerk issue an order of publication without these requirements of the law having been complied with, as was done in these cases, such an order of publication is a mere nullity. "When an order of publication is substituted for personal service, the substituted service of process by publication against nonresidents is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court." *Pennoyer v. Neff*, 95 U. S. 714.

The second ground urged by the plaintiff for remanding these cases to the state court is that the appearance of the defendants by counsel at the September term, 1892, of the circuit court of Wythe county, said counsel moving the court to vacate the judgments entered at the September term, 1891, of the court, then moving the court to dismiss the cases because process had not been served on the defendants, and taking a bill of exceptions to the order of the court overruling the latter motion, was such an appearance as to amount to a waiver of notice, notwithstanding the statement of the defendants' counsel in open court that he appeared only for the purpose of objecting to the jurisdiction of the court. It is clearly settled by the authorities that the special appearance of a defendant for the purpose of objecting to the jurisdiction of the court on the ground of the illegality of the service of the process, or for any other reason, is not a waiver of the defendant's right to have his case removed into the federal court. In these cases counsel for the defendants expressly stated in open court that he appeared only for the purpose of objecting to the jurisdiction of the court for want

of proper service of process. At no time did the defendants submit themselves to the jurisdiction of the court on the merits of the cases.

It is claimed that the taking of a bill of exceptions by the defendants to the order of the court overruling the motion of the defendants to dismiss these cases was a waiver of objection to the jurisdiction of the court. As laid down by Mr. Foster, (Fed. Pr. § 101,) the doctrine of the law is that:

"After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit on the merits."

In *Harkness v. Hyde*, 98 U. S. 476, the supreme court of the United States held that—

"Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor, after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits."

See, also, *Farmer v. Association*, 50 Fed. Rep. 829.

These cases were properly removed into this court, and the motion to remand them must be overruled.

TALLEY v. CURTAIN et al.

(Circuit Court of Appeals, Fourth Circuit. June 13, 1893.)

No. 33.

APPEAL—REVIEWABLE ORDERS—FINAL DECREE.

A decree of a federal court is final, for the purposes of an appeal, when it ends the litigation on the merits so that, if affirmed, nothing would be left to the trial court but to execute it. A decree setting aside an assignment, and ordering a reference to ascertain the amounts and priorities of creditors' claims, is not final, within the rule.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Equity. Creditors' bill by Curtain & Corner, suing for themselves and others, against Williamson Talley, trustee of Ernest H. Chalkley, to set aside a deed of trust from Chalkley to Talley. A decree was entered setting aside the deed. 46 Fed. Rep. 580. Defendants appealed, and the decree was reversed in part. 4 C. C. A. 177, 54 Fed. Rep. 43. Appellees now move for a rehearing. Denied.

Legh R. Page and James Alston Cabell, for appellants.

Wm. Flegenheimer and A. L. Holladay, for appellees.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and MORRIS, District Judge.

GOFF, Circuit Judge. In this case the appellees ask for a rehearing. The decree entered by this court, of which a rehearing is desired, was passed during the February term, 1893. Under rule

29, a petition was duly presented, and the matters arising thereon were continued until the present term.

It is claimed that the decree of the court below, rendered August 6, 1891, was a final decree, and that, as no appeal was taken from it within the time prescribed by law, this court is without jurisdiction, and that the appeal should have been dismissed.

This question was fully considered by the court before the decree complained of was entered. We did not consider the decree of August 6, 1891, a final decree. The test of what is a final decree is stated by Chief Justice Waite in *Mower v. Fletcher*, 114 U. S. 128, 5 Sup. Ct. Rep. 799, in the following words:

"That judgment is final, for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."

In this case the decree of August 6, 1891, sets aside the deed of assignment made by Ernest H. Chalkley to Williamson Talley, trustee, as fraudulent and void; but it then proceeds to provide for a reference to ascertain who are creditors of Chalkley, the amounts and respective priorities of their claims, and directs the master to report such other matters germane to the suit that any party to the record might require. Surely that decree did not terminate the litigation between the parties to said suit. There is some apparent conflict in the cases on this subject, and it is frequently a difficult matter to determine when decrees in equity are final, in connection with the law relating to appeals. But in this case the decree of the court below does not dispose of the property described in the deed and in the possession of the court, nor does it determine who the creditors of Chalkley are, nor find the sum due any of them. In fact, among the numerous prayers for relief asked for in the bill, the only one disposed of by the decree is that relating to the fraudulent character of the assignment. Had this court simply affirmed the decree, would there have been anything for the court below to have done, other than carry into effect the provisions of the decree appealed from? Certainly there would; and this disposes of the question as to it being a final decree.

We see no reason for changing the conclusion reached in the opinion heretofore filed in this case. We see no error in the decree filed herein at the February term, 1893. No one of the judges concurring in the judgment entered desires a rehearing, and the motion is denied.

This conclusion is reached by the court as constituted when the decree complained of was rendered, by whom the petition for rehearing was considered. The court, as so constituted, has been consulted, with the result stated. Motion denied.

Chief Justice FULLER and Judge T. J. MORRIS concur in this announcement.

MERCANTILE TRUST CO. v. KANAWHA & O. RY. CO. et al., (ADAMS
EXP. CO., Intervener.)

(Circuit Court of Appeals, Sixth Circuit. July 12, 1893.)

No. 70.

1. APPEAL—PARTIES—WHO MUST JOIN.

After confirmation of a foreclosure sale of a railroad, a decree was made, declaring certificates issued by a receiver in a former suit a prior lien on the proceeds of the sale, which were less than one-half the mortgage indebtedness. There was no liability for a deficiency on the part of the stockholders, or otherwise. *Held* that, the railroad corporation having become practically defunct by the decree of foreclosure, the sale, and the subsequent decree of confirmation, and having no interest in the proceeds, it need not be joined as an appellant from the decree, but that the appeal might be prosecuted by the complainant alone. *Hardee v. Wilson*, 13 Sup. Ct. Rep. 39, 146 U. S. 179, distinguished.

2. SAME—SEVERANCE.

After confirmation of the sale, stipulations as to evidence were entered into between the holder of the certificates, who had intervened in the suit, and the complainant, and thereafter the court proceeded as if the railway company had no interest in the proceeds. *Held* a substantial severance of the interests of complainant and the defendant railroad corporation.

3. RAILROAD COMPANIES—MORTGAGES—FORECLOSURE—VESTING TITLE FREE FROM LIENS—RECEIVER'S CERTIFICATES.

A final decree in a foreclosure suit against a railroad company, whereby the purchasers at the foreclosure sale are vested with a title free from all liens for receiver's debts, operates to set aside so much of a previous order authorizing the issue of receiver's certificates as made them a paramount lien on the road, and transfers the lien of the certificates, if any, to the proceeds of the sale.

4. SAME—DUTY OF HOLDER OF RECEIVER'S CERTIFICATES.

The holder of receiver's certificates is put upon inquiry as to all that has been done in the litigation in which the certificates were authorized, and is charged with notice of all subsequent proceedings therein, and that by final action of the court the validity or security of the certificates may be prejudicially affected; the holder's duty being to advise the court of his claim at an early day.

5. SAME—LACHES—RES JUDICATA.

An order authorizing a receiver in a foreclosure suit against a railroad company to issue certificates was made ex parte, the issue was without notice to the court or to the parties to the suit, and the proceeds were not used for the purpose specified in the order, or for any other purpose of the receiver, or for the benefit of the property or the parties to the cause. The holder made no demand for three years, until after the foreclosure sale had been confirmed and the debts of the receiver judicially ascertained, the certificates in question not being included, and a final decree of confirmation and distribution had been made. *Held*, that the holder of the certificates was guilty of gross laches, and was estopped by the decree from seeking payment of his claim against the purchasers or distributees. *Vilas v. Page*, 13 N. E. Rep. 743, 106 N. Y. 439, distinguished.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

In Equity. Suit by the Mercantile Trust Company against the Kanawha & Ohio Railway Company and others for foreclosure of a

mortgage. The Adams Express Company intervened by petition, claiming a lien prior to the mortgage for certificates issued to the express company by a receiver in a previous suit for foreclosure of a former mortgage on the same property. A decree was made declaring said certificates a first lien on the property. Complainant appeals. Reversed.

Statement by TAFT, Circuit Judge:

The principal action in the court below was by the Mercantile Trust Company, as trustee, to foreclose a railroad mortgage against the Kanawha & Ohio Railway Company. The mortgaged road lay partly in Ohio and partly in West Virginia. The decree, which was here appealed from, was based on an intervening petition filed by the Adams Express Company, and declared that certain receiver's certificates held and owned by the intervener were a lien upon the railroad, prior in right to the mortgage of complainant, and directed their payment, with interest, in the sum of about \$53,000, out of the proceeds of sale. The road had been bid off at a little more than half of the mortgage debt. The certificates ordered paid had been issued by Thomas R. Sharp, receiver of the part of the railroad lying in West Virginia, appointed by the district court of the United States for West Virginia, exercising circuit court powers, in a previous foreclosure suit begun in that court in November, 1883, by the Central Trust Company against the then owner of the railroad, the Ohio Central Railway Company. The result of that suit was the purchase of the railroad at the foreclosure sale by a committee of the then bondholders, and the organization by them of the Kanawha & Ohio Railway Company, the defendant and mortgagor below, as a consolidated corporation of Ohio and West Virginia, to own and operate it. The force of the receiver's certificates held by the appellee, as liens upon the railroad, depended upon the proceedings in the West Virginia suit in which they were issued, and reference must be made to those proceedings in some detail.

As already stated, the West Virginia suit was begun in November, 1883, and on the next day Sharp was appointed receiver to take charge of and operate so much of the road as lay in West Virginia. On December 13, 1883, the court entered an order as follows: "On reading and filing the verified petition of Thomas R. Sharp, receiver of the Ohio Central Railroad, and it appearing therefrom that it is necessary for the protection and preservation of the property of said railroad company that certain bridges should be repaired, and certain portions of roadbed of said railroad be ditched and ballasted, and certain necessary expenses of maintenance, repair, and management be provided for, and that a sum not exceeding fifty thousand dollars will be required for the purposes aforesaid, on motion of William H. De Lancy, solicitor for said receiver, ordered, that said Thomas R. Sharp, receiver of the Ohio Central Railroad Company, be, and he is hereby, authorized and empowered to issue certificates of indebtedness to an amount not exceeding fifty thousand dollars, and bearing interest at the rate of six per cent. per annum, and payable not exceeding twelve months after date, at the city of New York, for the purposes aforesaid, with power to renew the same; that said certificates shall be a first and paramount lien on so much of the property of the said Ohio Central Railroad Company now in his possession, or which he may hereafter get actual possession of, and the revenues thereof; that the said receiver shall not negotiate said certificates at less than their face value without the further order of the court. And it is further ordered that the said receiver pay said certificates so issued as aforesaid, and the interest thereon, out of the revenues of said railroad company, as received by him from time to time."

And on March 24, 1884, the court modified the foregoing order as follows: "On reading and filing the verified petition of Thomas R. Sharp, receiver of the Ohio Central Railroad Company, and it appearing therefrom that the said receiver cannot sell or negotiate the certificates of indebtedness heretofore authorized to be issued by order of this court dated the 13th of December, 1883, without paying a commission for the sale or negotiation of the same: Now, on motion of William H. De Lancy, solicitor for said peti-

tioner, it is ordered that said Thomas R. Sharp, receiver of the Ohio Central Railroad Company, be, and he is hereby, authorized, empowered, and directed to sell or negotiate the certificates of indebtedness heretofore authorized to be issued by him by order of this court dated the 13th of December, 1883, upon such terms and at such rates as he may deem proper, and as he may be able to obtain."

Sharp, the receiver, issued 10 certificates to the Adams Express Company, all like the following:

"Ohio Central Railroad Co., Receiver's Office, April 16, 1884.

"In pursuance of an order of the district court of the United States for the district of West Virginia, this is to certify that Thomas R. Sharp, as receiver of the Ohio Central Railroad Company, will pay to Adams Express Company, or order, one day after date, the sum of fourteen thousand three hundred dollars, with interest at the rate of six per cent. per annum. This certificate is a first and paramount lien on the property and revenue of the Ohio Central Railroad Company in possession of Thomas R. Sharp, receiver, is transferable by indorsement, and payable at 50 Broadway, New York city.

"Thos. R. Sharp,

"Receiver Ohio Central Railroad Co."

The amounts of the ten certificates varied. The first three were issued on the 16th of April, 1884, and the last one April 3, 1885, and they aggregated \$35,535.39. The money received by Sharp from the Adams Express Company was not used for the purpose specified in the order of December 13, 1883, or for any other purpose of the receiver, or for the benefit of the property held therein or of the parties to the cause. Neither the district court of West Virginia, nor the purchasers, nor the Mercantile Trust Company, nor the Kanawha & Ohio Railway Company, knew of the existence of said certificates until three years after they were issued, and until two years after the cause in which their issue had been authorized had been finally adjudicated, and had completely passed from the jurisdiction of the court. The Adams Express Company never demanded of the Kanawha & Ohio Railway Company payment of the certificates, nor in any way, until the filing of its intervening petition in the action below, did it seek to enforce the lien which it claimed on the railroad property. On May 26, 1885, the decree of the foreclosure was entered in the action in the West Virginia district court. The decree of sale provided for the payment of \$50,000 of the purchase money in cash, and for the payment of the remainder in bonds and coupons, to be taken at such value as the holders would be entitled to receive on distribution if the entire purchase price had been paid in money. The decree further provided: "But, so far as the purchaser shall pay the purchase money in bonds and coupons, such payments shall not be final until the same is reported to, and shall be supervised and approved by, the court. It is further ordered, adjudged, and decreed that the funds arising from said sale shall remain subject to the further order of the court, and that all questions touching said fund and the distribution thereof, not disposed of by the foregoing decree, are reversed."

The property was sold to Davis, Gallup, and Homans, purchasing trustees for the bondholders, for \$600,000, and \$50,000 was deposited, as required by the decree. The purchasing trustees also transferred to the depository of the court 5,103 of the mortgage bonds secured by the mortgage which was foreclosed. The sale was confirmed, but the decree of confirmation provided that, because it appeared that the portion of said purchase price necessary to be paid in cash could not be fully ascertained and determined until the coming in of the report thereafter ordered and the action of the court thereon, the conveyance which the commissioners were ordered to execute to the purchasers should be made subject to the payment of any sums which the court might thereafter direct to be paid in cash on account of said purchase money, and that a vendor's lien should be reserved in said deed on the property and premises thereby conveyed for the security of such payment, with the right to resell on rule said property and premises, or any part thereof, if such payment should not be made within 30 days from

the order of the court to that effect. The decree further appointed Joseph Ruffner a commissioner to ascertain and report to the court the amount of indebtedness due from the said receivers, or either of them, and he was ordered to file his report at or before the special term to be held in the month of January, 1886. The two receivers referred to were Sharp, appointed in West Virginia, and another appointed by the circuit court for the southern district of Ohio in an ancillary suit to sell in foreclosure the Ohio part of the road. The same decrees and orders of sale and confirmation were entered concurrently in both courts.

On the 19th of December, 1885, the special commissioners conveyed the railroad to the purchasing trustees, and the conveyance contained this qualifying clause: "This conveyance is made subject to the payment of any sums which either of said courts may direct to be paid in cash on account of the purchase money, and a vendor's lien is hereby reserved upon the property and premises hereby conveyed, for the security of such payment, with the right reserved to either of said courts to resell on rule said property and premises, or any part thereof, if any such payment shall not be made within thirty days after the order of either of said courts to that effect."

The purchasing trustees conveyed the West Virginia part of the road to a corporation under the laws of West Virginia, known as the Kanawha & Ohio Railway Company, and the Ohio part of the road to the Ohio & Kanawha Railway Company, a corporation organized under the laws of Ohio. The deeds by which these conveyances were made contained the following: "Subject, however, to any and all obligations and liabilities assumed or incurred by the parties of the first part hereto, or by the committee hereinbefore named, in the various acts and things done by them, in making or carrying into effect the said agreement of organization, or in making the sale or procuring the purchase of the property hereby conveyed."

April 19, 1886, the two new companies were consolidated under the name of the Kanawha & Ohio Railway Company, the agreement subjecting the consolidated company to all the obligations of the two constituent companies.

On May 26, 1886, Commissioner Ruffner, appointed in the decree of confirmation and sale, filed his report, which contained a statement of the liabilities of Thomas R. Sharp, receiver, in which report the name of the Adams Express Company did not appear, nor did it appear therein that any certificates had been issued by the receiver. On the 10th day of June, 1886, the West Virginia court entered its further decree, in which was recited the report of Sharp, receiver, showing his disbursements made in accordance with the previous order of the court. Sharp's report, Ruffner's report, and the conveyances made by the commissioners to the purchasing trustees were approved and confirmed. The decree required the purchasers to pay to the receiver an additional sum on the purchase price in money, to enable the receiver to pay all his indebtedness, as reported by Ruffner and approved by the court. The total cash paid by the purchasers was \$176,000. The remainder of the purchase money they were permitted to pay by turning over bonds of such an amount that, if the whole purchase price had been paid in money, the holders of these bonds would have been entitled to receive, on distribution, such remainder. The decree concluded: "It is further ordered, adjudged, and decreed that upon payment of the balance of the purchase money aforesaid, and the sums herein directed to be paid by them, the said Thomas R. Sharp, as special commissioner, shall make, execute, acknowledge, and deliver to said purchasers or their assigns, as they may direct, good and sufficient deeds of release, releasing and discharging all the liens upon all the property herein sold and conveyed to said purchasers, which were retained and reserved in and by the said decree of confirmation of sale made herein on the 12th day of December, 1885, and by deed of the special commissioners of sale to the said purchasers; and, upon such payments as aforesaid being made, it is declared and decreed that said liens are released and discharged."

On October 13, 1887, Thomas R. Sharp, special commissioner, having theretofore received payment of all sums directed to be paid to him in the decree

of June 10, 1886, executed and delivered to the Kanawha & Ohio Railway Company his deed of release in accordance with the decree, whereby he released and quitclaimed unto the railroad company all the property mentioned and described in his deed of December 19, 1885; and the deed further contained the following clause: "And the said Thomas R. Sharp, as special commissioner as aforesaid, doth hereby release and discharge all the liens upon all the property in all the causes aforesaid sold and conveyed, which were retained and reserved in and by the said decree of confirmation of sale made in said causes in the district court of the United States for the district of West Virginia on the 12th day of December, 1885, and by said decree of confirmation of sale made in said causes in the circuit court of the United States for the southern district of Ohio, eastern division, on the 15th day of December, 1885, and by the deed of the special commissioners aforesaid, except the lien hereinbefore expressly reserved and retained upon the property in the state of Ohio."

The lien so reserved had no relation whatever to the claim of the Adams Express Company herein.

Before this appeal was heard on its merits, a motion was made on behalf of appellee to dismiss it on the ground that the decree appealed from was a joint decree against the Central Trust Company and the Kanawha & Ohio Railway Company, and that the trust company had appealed without either joining the defendant railway company or instituting any proceeding in the nature of a summons and severance. The facts upon which the motion to dismiss turned were as follows:

The claim of the Adams Express Company was for a lien prior to and adverse to the mortgage which was the basis of the main action, and the express company was therefore neither a necessary nor a proper party to the action as an intervener, but it was allowed to file its petition under the following agreement spread upon the minutes of the court: "The parties hereto consent to said application and to the adjudication of said lien in this suit; it being agreed that the sale under the decree herein shall be free from said alleged lien, and that the same, if adjudicated in favor of said Adams Express Company, shall be transferred to the proceeds of sale, and paid out of the same."

This entry was made upon the same day upon which the decree of sale and foreclosure was entered. The intervening petition was filed at once, and in due course the Adams Express Company and the Kanawha & Ohio Railway Company filed answers. Thereafter, on March 4, 1890, the railroad was sold under the decree, and the sale was confirmed April 7, 1890. Upon April 27, 1891, and upon May 5, 1892, stipulations as to the evidence to be used upon the hearing of the express company's petition were entered into, and subsequently placed on the minutes of the court. These stipulations were signed by the solicitors for the Central Trust Company and the Adams Express Company. The solicitor for the defendant railway company did not sign either stipulation.

On June 6, 1892, the circuit court entered the decree appealed from, as follows: "This cause coming on to be heard upon the intervening petition of the Adams Express Company, the answers thereto and the evidence was argued by counsel and submitted to the court; upon consideration whereof the court finds that there is due to said the Adams Express Company, upon the receiver's certificates mentioned in the said intervening petition, the sum of \$53,058.04, with interest from this date, and that for the payment thereof said Adams Express Company has a first and prior lien upon the property involved in this suit, which, under the stipulation of the parties herein, has been transferred to the proceeds of sale of said railway heretofore made. It is therefore ordered, adjudged, and decreed that there be paid to said Adams Express Company, out of the proceeds of said sale, said sum of \$53,058.04, with interest from this date, and also its costs."

The Kanawha & Ohio Railway Company was a corporation of Ohio and West Virginia. The mortgage foreclosed below covered all its property and franchises of every character. The bonds issued by the company, and secured by the mortgage, amounted to \$1,160,000. They contained on their face a stipulation that the stockholders of the Kanawha & Ohio Railway Company

were released from any liability on their stock beyond the paid-up capital of the company. The road sold for \$505,000. The mortgage debt was more than double that amount.

Thomas Thacher and Stevenson Burke, for appellant.

Ramsey, Maxwell & Ramsey, (Lawrence Maxwell, Jr., of counsel,) for appellee.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, (after stating the facts as above.) Two questions are presented for our consideration. The first one arises on the motion to dismiss, and the second on the merits.

First. It is argued that the decree of the circuit court, appealed from, affected equally the Kanawha & Ohio Railway Company and the Mercantile Trust Company, and that therefore, in order to give this court jurisdiction of the appeal, both the trust company and the railway company should have been made appellants, or some proceedings in the nature of a summons and severance against the railway company should have been had in the court below. We are of opinion that the circumstances of this case and the character of the decree entitled the trust company to bring this appeal alone. By the decree of foreclosure and sale, and the decree of confirmation, the Kanawha & Ohio Railway Company, which was the defendant below, was deprived of everything it had except its franchise to be a corporation. For all practical purposes it became defunct. Under the decree of confirmation in the court below, its property had passed from it to the purchaser free of all liens and claims, and the proceeds of sale, which amounted to not more than half of the bonded debt due the complainant, became the property of the complainant. To these proceeds, by stipulation of all the parties, the lien, if any, which the Adams Express Company had, was transferred. The only shadow of an interest which it can be contended that the Kanawha & Ohio Railway has in a reversal of the order of the circuit court in favor of the Adams Express Company is that, if it is reversed, the unpaid indebtedness on the bonds of the railway company will be reduced by the amount ordered paid to the Adams Express Company. As the Kanawha & Ohio Railway Company is a defunct corporation, with no means with which to pay its debts and no franchises to exercise, the amount of its indebtedness, which it never can pay, and never will pay, is wholly immaterial. If its stockholders were liable for the unpaid portion of the mortgage debt to an amount equal to their capital stock, as provided by the Ohio statute and constitution, there might be some ground for saying that the Kanawha & Ohio Railway Company had an appreciable interest in the decree, requiring its presence in the appeal proceeding or a severance. But the contract in the bonds expressly waives such liability. The complainant did not seek to obtain a judgment for the unpaid balance on the bonds against the company; doubtless, for the very good reason that the foreclosure and sale under the mortgage would de-

prive the company of all means and power to pay another dollar upon the claim. After the sale for less than the face of the mortgage the railway company became a mere nominal party to the suit, with no interest whatever in the distribution of the proceeds. After the confirmation of the sale, the only controversy remaining was between the complainant and the Adams Express Company, because the order only affected the proceeds, and, in any possible aspect of the case, they were the only parties entitled to share therein.

The sale was confirmed on the 7th day of April, 1890. Thereafter stipulations with reference to evidence were entered into, to which only the Adams Express Company and the complainant were parties. The court below proceeded as if the railway company had no interest in the proceeds, and we think that in this the court was right. This constituted a substantial severance of the interests of the railway company and the trust company. It would be yielding to the merest technicality to hold, under such circumstances, that the omission of a nominal and useless party from the appeal proceedings should deprive the real party in interest of its right to have the question re-examined on its merits by the appellate court.

But how as to the authorities? Undoubtedly, the general rule is that all parties named as defendant, where the decree is a joint one in favor of the complainant, must join in the appeal. *Owings v. Kincannon*, 7 Pet. 399; *Mussina v. Cavazos*, 6 Wall. 355; *Masterson v. Herndon*, 10 Wall. 416; *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. Rep. 39. But this rule is not inexorable. In *Forgay v. Conrad*, 6 How. 201, a bill was filed by an assignee of a bankrupt against the bankrupt and three other defendants to set aside three several deeds to each as fraudulent. The deeds were set aside by decree of the court below, and one of the alleged fraudulent grantees took an appeal. A motion to dismiss was made on the ground that the other three defendants below were not joined. The motion to dismiss was overruled. The supreme court, speaking by Chief Justice Taney, said:

"The appeal is taken by Samuel A. Forgay and Ann Fogarty, otherwise called Ann Wells, and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to them at different times and by separate conveyances, as mentioned in the proceedings, and it was not, therefore, necessary that they should join in this appeal."

The railway company in the present action would seem to have no more real interest in the appeal from the order in favor of the Adams Express Company than the bankrupt in the case of *Forgay v. Conrad* had in appealing from the decree in that case.

In *Brewster v. Wakefield*, 22 How. 118, the bill was to foreclose a mortgage, and subsequent lienholders were made parties. A decree of foreclosure was entered. The mortgagor alone appealed from the amount of the judgment rendered against him on the mortgage debt. It was held that it was not necessary to make the lien claimants parties to the appeal. Chief Justice Taney said:

"Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were not necessary parties to a proceeding in equity to foreclose the mortgage, and none of them have appeared to the suit to contest the claim of Wakefield. And if it had been otherwise, yet the question in controversy here is the amount due from the appellant; and in the case of Forgay v. Conrad, 6 How. 201, this court decided that a defendant in equity, whose interest is separate from the other defendants, may appeal without them."

And yet it is very evident that the other lienholders were very substantially interested with the mortgagor in reducing the amount due from the mortgagor to the mortgagee, because such a reduction would necessarily give them a better chance of collecting their claims out of the mortgaged property.

In *Germain v. Mason*, 12 Wall. 259, suit was brought by Mason and others to recover judgment for work and material furnished, and for the establishment of a mechanic's lien prior to those of a number of other lien claimants, made parties defendant. Judgment was rendered against Germain for the amount claimed, and it was decreed to be a lien prior to all the rest. It was held that Germain might appeal alone from this decree without bringing in the other lien claimants, although it established the debt of Mason as a paramount lien on the real estate as to all the other defendants. It is very clear in this case that the interest of the other lien claimants to have the judgment in favor of Mason against Germain set aside was substantial, and that it affected the security of the other liens.

In *Railroad Co. v. Johnson*, 15 Wall. 8, a mortgagee filed a bill for foreclosure against his mortgagor, and against certain trustees who held shares of stock as collateral security for the same debt, praying for the foreclosure of the land mortgaged, and the sale of it and the stock. The decree was against the mortgagor for foreclosure, and against the trustees for sale of the collateral. The mortgagor sued out a writ of error. It was held that the trustees were not necessary parties to the writ.

In *Milner v. Meek*, 95 U. S. 252, an assignee in bankruptcy brought suit in equity to sell land of the bankrupt, and to secure an adjustment of the liens upon the land against all the lien claimants and the general creditors. The decree determined the amount and priority of the several liens. It was held that one lien claimant who was defeated might appeal without making the other lien claimants parties to the appeal.

In *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. Rep. 147, a plaintiff brought trespass to try title against one defendant. The other defendants were made parties on their own motion, according to the Texas practice, and claimed title to the land through the plaintiff, and adverse to both the plaintiff and the defendant. It was held that it was not necessary for the three defendants to join in a writ of error, because their interests were distinct. Mr. Justice Matthews says, (page 164, 119 U. S., and page 151, 7 Sup. Ct. Rep.):

"In equity, where interventions pro interesse suo have been permitted to those affected by the proceedings, but not parties to the original contro-

versy, or where the original parties have distinct and separable interests, the same general rule applies to appeals as to joint decrees; but it has always been held that, where the decree is final and separate or separable, those not affected by it are not necessary parties to the appeal. *Forgay v. Conrad*, 6 How. 201."

We think it quite clear from the foregoing authorities that the railway company, considering its defunct condition, had no such interest in reversing the decree in favor of the Adams Express Company as to make it a necessary party to the appeal. It certainly had no direct interest in the proceeds, and the indirect interest—that of reducing its indebtedness—was as immaterial as if the road had passed through bankruptcy. The order was not made against the railroad company, but was made against the proceeds which belonged to the trust company. By the decree of foreclosure and sale, the railway company was deprived of all interest in the subject-matter which the order in favor of the Adams Express Company affected, namely, the proceeds of sale. It is well settled that a party to a decree or order who has parted with all his interest in the subject-matter thereof, and cannot be injured by such decree, cannot appeal from the decree. *Kelly v. Israel*, 11 Paige, 147; *Mills v. Hoag*, 7 Paige, 18.

Much reliance is placed on the case of *Hardee v. Wilson*, ubi supra. The original action in that case was by the complainant against a debtor who had conveyed real estate of his own to himself, in trust for his wife, and had thereafter conveyed the same land to one Hardee, with the purpose, as charged, of hindering, delaying, and defrauding his creditors. The decree below declared that the conveyance of the debtor in trust to himself for his wife was fraudulent, because made for the purpose alleged, and that the subsequent conveyance to Hardee was in reality a mere security for a debt. Hardee appealed. It was held that he should have joined with him the debtor and his wife. The decree of the court below obviously was to the disadvantage of the debtor and his wife. They had, therefore, an appealable interest in reversing it, though it may be difficult to see why their interest was not so separable from that of Hardee that he might, under previous decisions of the supreme court, have appealed alone. However this may be, the case at bar seems to us clearly distinguishable from the Hardee Case, in the two respects already mentioned: First, the course of the proceedings below showed a substantial severance and ousting from the controversy of the railway company; secondly, there was an absence of interest in the railway company to reverse the decree as a whole, or any part of it.

An examination of the cases in the supreme court (and there are many of them) where, on the question of the distribution of the proceeds, the foreclosing complainant has appealed from a decree in favor of an intervening claimant, shows that the supreme court has not regarded it as necessary to join in the appeal the defunct corporation, whose life was substantially ended by the confirmation of the sale in foreclosure. Thus, in *Fosdick v. Schall*, 99 U. S. 235,

the original action was by trustees against a railway company to foreclose the mortgage and sell the entire property, franchises, and rights of the company. The question which the court had to consider in that case was whether certain rolling stock belonged to the mortgagor company so that it was covered by the mortgage, or whether it belonged to an intervening claimant, who alleged that, under the contract by which the company acquired the use of the rolling stock, the title still remained in him. The court below held that the vendor of the rolling stock still held the title in himself; that he was entitled to rent out of the proceeds of the sale of the mortgaged property. From this decree the complainants, representing the bondholders who would be entitled to the proceeds, appealed. The defendant railway company did not appeal. The appeal was considered on its merits. It is said the case is not authority, because the question of jurisdiction was not raised. It is, however, the well-known custom and disposition of the supreme court to make an independent examination of the record in every case for jurisdictional defects, and the fact that the question was not made by counsel by no means establishes that it was not considered by the court. The presumption is otherwise with respect to such a question. See, also, *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. Rep. 265.

Second. We come now to the merits of the order in favor of the Adams Express Company. It is well established in the federal courts, by numerous decisions of the supreme court of the United States, that a court of equity which, in foreclosure or other suit, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance, or necessary betterment of the road, and may, by its order, make the loans thus incurred a paramount lien on the income and corpus. *Wallace v. Loomis*, 97 U. S. 146; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809. The court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders, but, by virtue of its custody of the property and its jurisdiction of the parties, it pledges its own faith to the lender that it will enforce such a lien against the property and the parties as a condition of its releasing the property, and of its enforcing any equities in favor of any of those who invoke its assistance. Now, it may enforce the lien in one of two ways: It may directly order out of the proceeds of sale the prior payment of the loans, or it may impose a continuing lien on the property by providing in its decree for sale that the purchaser shall take it subject to such a lien. If the latter method is followed, then a lien is established by contract with the purchaser in favor of the lender, which, appearing in the chain of title by which the purchaser holds, is attached to the property in the hands of all subsequent grantees of the purchaser, and may, of course, be enforced by the lender in an independent action. *Swann v. Clark*, 110 U. S. 602, 4 Sup. Ct. Rep. 241. But the court may order the sale of the property free of all liens, in which case the purchaser takes a title freed from the burden,

as well of receiver's loans as of mortgage debts, and the pledge of the court that the receiver's debts shall constitute a paramount lien can only be fulfilled by the court in its distribution of the proceeds of sale. It is very clear from the record of the proceedings of the district court of West Virginia in the first foreclosure suit against this railroad that the final order and decree of that court was intended to and did vest in the purchasers a title free of all liens for receiver's debts. There was a deed of release expressly declaring and effectuating this intention. This was inconsistent with the order making the receiver's certificates, to be issued, a paramount lien on the road, and pro tanto it set that order aside, and transferred the lien, if any, to the proceeds of the sale.

But it is contended, and it was so held by the learned court below, that the permission given to the purchasing committee to pay part of the purchase money in bonds which were themselves subsequent in priority of lien to receiver's debts prevented the purchasers from taking as bona fide purchasers of the property for cash, without notice. The argument is that, as the bonds represented a lien inferior to the receiver's debts, the substitution of the property for them in the hands of the bondholders preserved the prior lien of the receiver's debts in the property in spite of the terms of the release, because the deposit of the bonds was only a constructive payment. *Vilas v. Page*, 106 N. Y. 439, 13 N. E. Rep. 743. The purchasers were permitted to deposit bonds in payment of the purchase price after paying into court sufficient cash to extinguish all costs and liens prior to the bonds, as adjudicated by the court; the bonds to be taken as equivalent to the cash which, if the price had been paid in money, their holders would have received on distribution. This was precisely the same as if the purchasers had paid the whole price in money, and had then withdrawn, on distribution, their pro rata share of the proceeds. Their rights cannot be different because they did not go through this useless formality. The railroad property, to the extent that it was paid for by bonds, was, in the hands of the purchasing bondholders, proceeds of sale. The real question here is, therefore, whether the holder of receiver's certificates could follow the proceeds of the sale into the hands of bondholders receiving the same on distribution by final decree of the court, because that court had failed to redeem its pledge to make the receiver's debts a paramount lien by providing on distribution for their payment. If the holder of receiver's certificates were in court at the time of the entry of the decree of distribution, protesting against and excepting to the same, it seems perfectly manifest that his only recourse would be by appeal from the decree, and, on a failure to appeal, the decree would finally cut off his rights. The controversy would then have become *res judicata*. He would be thereby estopped in any subsequent independent action to recover against the bondholders his equitable share of the proceeds of the sale. Does the Adams Express Company, as a holder of receiver's certificates, stand in any better position than if it had been present by counsel in court when the final decrees of confirmation,

release, and distribution were entered, objecting to the same? It is very clear that it does not. When the Adams Express Company received from Sharp the evidences of indebtedness on which it now relies for its lien, it was informed, by what was written thereon, that Sharp was a receiver acting under order of the district court of West Virginia, and having custody for the court of the Ohio Central Railroad, of which the court had taken possession in a case then pending before it, and that the lien assured to the express company on the face of the certificates was dependent on an order and adjudication of that court.

The doctrine of *lis pendens* would charge any one, who purchased this railroad, or acquired an interest in it, pending the litigation, with notice of the litigation, and would subject the property in his hands to the final action of the court, without his being brought into court as a party. If this be true of one acquiring an interest by deed, conveyance, or mortgage, a *fortiori* must it be true of one whose interest is acquired, and has its existence, only by virtue of the litigation.

The express company was put upon inquiry, then, as to all that had been done in that litigation, and was charged with notice of all the subsequent proceedings therein, much as if it had been a party to the record. It is said that the company had the right to await notice from the receiver before presenting its claims. We do not think so. If it relied on the receiver, it was a personal trust, in which it has been deceived, and must bear the loss. It was its plain duty at an early day to advise the court of its claim against the receiver and the railroad. Inquiry would have shown it that the order authorizing the issue of these certificates was made *ex parte*. It was charged with notice, therefore, that by final action of the court the validity or security of the certificates might be prejudicially affected. Said Mr. Justice Blatchford, speaking for the supreme court in *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434-456, 6 Sup. Ct. Rep. 809:

"The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments."

For three years the company made no demand of any kind. This was laches of the grossest character, and entitles it to no consideration in a court of equity. Meantime an officer of the court had been especially authorized by decree of the court to investigate and report on the receiver's debts, and a final decree had been entered, adjudicating, in effect, that there were certain valid debts, not including that of the express company, and no others, and ordering confirmation and distribution. This is a final decree, unappealed from and unreversed. It estops the express company, as an alleged creditor of the receiver in the first foreclosure sale, from seeking payment of its claims against either the purchasers or the distributees in that suit.

The case of *Vilas v. Page*, 106 N. Y. 439, 13 N. E. Rep. 743, which the court below relied on, is in our opinion quite distinguishable from the case at bar, because in that case, by the decree and by express agreement between the parties to the foreclosure suit, a lien was secured to the holder of the receiver's certificates, upon the property mortgaged, and the title of the vendees was made subject to the claim of the holder of the receiver's certificates, if any should be finally adjudged.

The decree in favor of the Adams Express Company is reversed, with instructions to dismiss its intervening petition.

GREENBANK v. FERGUSON et al.

(Circuit Court, N. D. Illinois. August 24, 1893.)

QUIETING TITLE—DEED AS MORTGAGE—FRAUDULENT CONVEYANCE.

The grantee in a deed absolute in form brought suit to set aside, as a cloud on his title, a subsequent deed from his grantor. He claimed that his deed was given in payment of a note, but it appeared that he did not surrender the note, that he regarded his grantor as still indebted to him, and that he permitted his grantor to continue to pay the taxes and collect the rent. The grantor testified that the deed was given to keep the land from his creditors. *Held*, that the grantee had no right to the relief prayed, since his deed was either an equitable mortgage or a fraudulent conveyance, which a court of equity would not aid.

In Equity. On exceptions to master's report. Suit by John Greenbank against John S. Ferguson, Rachel Ferguson, D. B. Ransom, William Kelsey Reed, Henry C. Reed, James W. Converse, and the Illinois Land & Loan Company to set aside certain deeds as clouds on complainant's title. Bill of revivor against representative of Rachel Ferguson. There was a reference to a master, who reported in favor of the complainant. Defendants except. Bill dismissed.

The master's report was as follows:

1. I, Henry W. Bishop, master in chancery, to whom, by an order of the court entered on the 12th day of December, A. D. 1892, in the above-entitled cause, the same was referred for the purposes in said order expressed, hereby report that I have been attended at various times by Mr. Levi Sprague, solicitor for the complainant, and Messrs. Peckham & Brown and Mr. Pease, solicitors for the defendants, and by the witnesses whose testimony is herewith reported. The exhibits which are referred to in connection with the testimony have been examined by me, and also the evidence of witnesses taken elsewhere by stipulation of the parties hereto. I have also heard the arguments of counsel at length, and carefully examined the testimony and depositions and exhibits referred to in connection with the pleadings in the case. Upon consideration of all which, I find and report, as a matter of fact, that the material allegations of the bill and bill of revivor herein are sustained by the proofs.

2. That the deed of John Ferguson, dated November 10, A. D. 1874, and set out in said bill, conveying to said complainant the premises in question, was executed, acknowledged, and delivered to said complainant in the manner and for the purposes in said bill and bill of revivor set forth, and was accepted in full payment of a certain promissory note of the said defendant John Ferguson, which note was dated April 10, 1874, and was for the payment to said complainant of the sum of ten hundred and thirty-five

dollars. I find, also, that said deed was given and accepted as an absolute conveyance of said premises; that subsequently, and on the 25th day of January, A. D. 1882, said defendant John S. Ferguson and his then wife, Rachel Ferguson, at the request of said Rachel, executed and delivered to one D. B. Ransom a conveyance of the same premises without consideration, and without an actual delivery thereof to said grantee, which deed was recorded on the 28th day of March, A. D. 1887, and before the date of the record of said deed to complainant; that afterwards, and upon the same day last mentioned, the said Ransom conveyed said premises to said Rachel Ferguson, which last conveyance was also prior to the date of the record of said complainant's deed, and was without consideration.

3. That afterwards, to wit, on the 24th day of December, A. D. 1891, the said Rachel Ferguson died, leaving a last will and testament whereby she bequeathed to her husband, the said John S. Ferguson, defendant, the premises in question; that on the 19th day of August, 1874, William Kelsey Reed and Sarah C. Reed, his wife, executed and delivered their certain quitclaim deed of that date, conveying the said premises to the Illinois Loan & Land Company, which deed was on the 2d day of September, A. D. 1874, recorded in the office of the recorder of deeds in and for the county of Cook aforesaid, which said deed, I find, is shown, as a matter of fact, to have been made without right or title; that afterwards, to wit, on the 28th of June, A. D. 1875, said Illinois Loan & Land Company executed and delivered its deed of conveyance of said premises to Henry C. Reed, which deed was afterwards, to wit, on the 2d day of August, A. D. 1875, recorded in the office of the recorder of deeds in said county of Cook, which deed, I find, also, was made without right; that afterwards, to wit, on the 12th day of November, A. D. 1881, said Reed and his wife executed and delivered a quitclaim deed conveying said premises to James W. Converse, which deed was on the 11th day of August, A. D. 1882, recorded in the office of the recorder of deeds in and for said Cook county; that said last-mentioned deed was made without right.

I recommend, therefore, that an order be entered herein in conformity with these findings.

Levi Sprague, for complainant.

Peckham & Brown, and Mr. Pease, for defendants.

WOODS, Circuit Judge. I am not able to agree with the master's view of this case. I am convinced that the conveyance of November 10, 1874, instead of having been executed in discharge of the debt evidenced by the promissory note of April 10, 1874, was intended as a security additional to that theretofore given for the payment of that note, and perhaps for any other liability of Ferguson to Greenbank which might be incurred; and, this being so, the deed, though absolute in form, was, in equity, only a mortgage, and affords no support for this action. Or, if this is not so, then the deed was made, in fraud of creditors, upon a secret trust for Ferguson, or for his wife and children. The complainant, after receiving the deed, though in straitened circumstances, did not act as if he considered the land his. He retained possession of the note, which, if paid, should have been surrendered. He permitted Ferguson to pay the taxes upon the land, and to receive the rents from it. His testimony is by no means positive to the contrary; and his letters, especially that of April 2, 1891, show that he regarded Ferguson as still indebted to him; and that if the debt were paid the land ought to be reconveyed. The testimony of Ransom shows that Mrs. Ferguson understood that Greenbank had advanced money, and held the deed as a security. If guided by Ferguson's testimony alone, the court

would be compelled to find that the deed was made with the intent to put the property beyond the reach of Ferguson's creditors, and that Greenbank, having received and held the deed in furtherance of that design, has no standing in equity.

It follows that the conclusions of the master should be set aside, and the bill dismissed, at the complainant's costs, but without prejudice to his rights as mortgagee. So ordered.

SIoux NAT. BANK OF SIoux CITY v. CUDAHY PACKING CO.

(Circuit Court, N. D. Iowa, W. D. October 16, 1893.)

1. EQUITY JURISDICTION—REMEDY AT LAW.

A packing company making daily purchases of stock gave to the sellers tickets for the amounts due, payable at the office of a trust company. By arrangement between the trust and packing company, the former paid these tickets on presentation, and received from the latter a draft for the amount, payable at Chicago or Omaha banks. The trust company, becoming insolvent, was unable to pay the tickets issued on a certain day, and thereupon made an arrangement with a bank to advance the necessary money, indorsing to it the corresponding draft of the packing company. The packing company refused to pay this draft, on the ground that, at the time the same was drawn, it had on deposit with the trust company a sum in excess of the amount of the draft, which it claimed should be set off against the draft. *Held*, that a bill by the bank against the packing company setting up these facts should be dismissed, because complainant had an adequate remedy at law.

2. SAME—SUBROGATION.

There was no ground for the application of the doctrine of subrogation, on the theory that the bank was entitled to succeed to the rights of the ticket holders who had been paid with its money, as the bank held, in the draft itself, all the security upon which it advanced the money.

In Equity. Suit by the Sioux National Bank of Sioux City against the Cudahy Packing Company. On demurrer to the bill, on the ground that it fails to show a case for equitable relief. Demurrer sustained.

Joy, Call & Joy, for complainant.

Lewis & Holmes, for defendant.

SHIRAS, District Judge. As averred in the bill, the facts in this case are as follows: The Cudahy Packing Company is engaged in the pork-packing business at Chicago, Omaha, and Sioux City, and in conducting this business at the latter place, in the spring of 1893, it made daily purchases of hogs, giving to the persons selling the same tickets for the amounts due, which were payable at the office of the Union Loan & Trust Company in Sioux City. The arrangement between this company and the packing company was to the effect that the former would pay the tickets upon presentation, and the packing company would deliver to it an instrument, termed a "voucher," whereby the packing company declared itself to be "a debtor to the Union Loan & Trust Co. for the purchase of live stock this day, as follows: * * * When approved and dated and signed, this voucher becomes a draft of the Cudahy

Packing Co., of South Omaha, Neb., payable through the Union Stock Yards National Bank of South Omaha, or the Bankers' National Bank of Chicago, for ———." It is further averred in the bill that on the 24th day of April, 1893, the Cudahy Packing Company executed a voucher in the usual form, whereby it acknowledged itself to be a debtor to the Union Loan & Trust Company in the sum of \$13,509.52, and the same was duly approved, dated, and signed by the proper officers of the packing company, and thereby became a draft for the said sum of \$13,509.52, drawn upon the Cudahy Packing Company, and as such was delivered to the Union Loan & Trust Company; that the latter was in fact in an insolvent condition, and had not in hand the money necessary to pay the tickets drawn on it by the packing company, and delivered to the persons from whom that company had made purchases of live stock; that thereupon the Union Loan & Trust Company applied to the Sioux National Bank to advance the money necessary to pay the tickets, and to that end the trust company delivered to said bank the draft above described, and thereupon the bank accepted the draft, and gave the trust company credit for the amount thereof, and agreed to pay and did pay the checks of the trust company given in payment of the ticket presented to it, and issued by the packing company for the live stock bought by it. It is further averred that the packing company was promptly notified of the action thus taken, but that, upon presentation of the draft to it, it refused to accept or pay the same, assigning as a reason that, at the time the draft was executed, it had on deposit with said Union Loan & Trust Company a sum in excess of the amount of the draft, which it claims is a set-off to the draft delivered to the complainant.

It is averred in the bill that, under the circumstances set forth, the defendant company is equitably estopped from claiming the set-off against the draft, and the prayer is that the defendant be decreed to pay the amount of said draft, with interest and costs. To this bill a demurrer is interposed, upon the ground that the remedy at law is complete and adequate, and that the facts averred fail to show cause for equitable relief. According to the averments of the bill, the agreement under which the bank advanced the sum needed for the payment of the ticket drawn upon the trust company was a contract between the trust company and the bank with which the packing company had no connection. The bank agreed with the trust company that it would give credit to the trust company, and pay its checks for the given amount, and in consideration thereof the trust company delivered to the bank the voucher or draft executed by the packing company. From the averments of the bill it does not appear that the trust company attempted to create, or that it had the authority to create, any relation of debtor and creditor between the bank and the packing company, other or different from that growing out of the execution and delivery of the vouchers or draft. It is that instrument, read in the light of the attending circumstances, which determines the relation between the complainant and defendant. It is, in substance, averred in the bill, that this instrument is an inland bill of ex-

change or commercial draft, and that the holder thereof is entitled to all the rights of a purchaser for value of negotiable paper. To secure and enforce these rights, if they in fact exist, does not require the aid of a court of equity.

The question whether the defendant can set off against this draft in the hands of the bank the deposit held by it in the trust company is a question which can be fully determined in a law action. There is nothing, therefore, in the averments in the bill which shows a necessity for invoking the aid of a court of equity in order to solve the questions at issue between the parties, or to secure adequate relief to the complainant. In argument it is claimed by counsel for complainant that the bank is entitled to be subrogated to the rights of the holders of the tickets which were taken up by the money passed to the credit of the trust company under the arrangement already stated.

No foundation is laid in the bill for relief of this character, nor do the facts alleged constitute a case for the application of the doctrine of subrogation. These tickets gave the holders thereof the right to demand payment thereof from the trust company, as the agent of the packing company. When presented to the trust company, they were paid by checks drawn by the trust company upon a deposit made to the credit of the trust company in the Sioux National Bank. To secure this credit, the trust company had indorsed to the bank the draft furnished by the packing company. The bank holds all the security upon which it agreed to advance the money to the trust company. It did not buy the tickets from the holders thereof, nor did it rely thereon in making the advance to the trust company. No grounds exist for holding that the bank has succeeded to the rights of the ticket holders, and, even if such ground did exist, the holders of the tickets have no existing rights against the packing company. The acceptance by them of the tickets in question gave them the right to demand of the trust company payment of the sum for which the tickets called, and the trust company has discharged the obligation resting upon it by paying the tickets upon presentation. All the obligations created by the execution and delivery of the tickets have been thus fully performed. It is true that, to provide the means to pay these tickets, the trust company secured a loan from the Sioux Bank, but that fact did not have the effect of making the bank the equitable owner of the tickets. It might be true that the bank could be subrogated to the rights of the trust company as against the packing company, but that is what the bank is desirous of avoiding. But, however this may be, it is clear that the complainant is seeking to enforce the rights belonging to it as owner of the vouchers or draft delivered to it by the trust company, and to do so does not require the aid of a court of equity.

The remedy at law being adequate, it follows that the demurrer must be and is sustained.

WALKER et al. v. BROWN et al.

(Circuit Court, S. D. Iowa, Central Division. September 9, 1893.)

1. EQUITY JURISDICTION—REMEDY AT LAW—CONTRACT LIEN.

An agreement made with a prospective creditor of a mercantile firm by one who has loaned bonds to it that such bonds, "or the value thereof," shall not be returned to him until any money owing to such creditor shall be paid, and that the bonds, "or the value thereof," shall remain at the risk of the firm's business so far as any claim of such creditor is concerned, does not create a lien on the bonds themselves, for the owner has a right to take them back at any time by paying their value into the firm; and hence the taking of them back without leaving their value is a mere breach of contract, for which the proper remedy is damages at law, and a bill in equity will not lie to subject the bonds or their proceeds to the creditor's debt.

2. BILL OF DISCOVERY—WHEN SUSTAINABLE.

A bill brought against an administrator to enforce an alleged lien upon certain bonds or their proceeds belonging to the estate, there being in fact no lien, cannot be sustained as a bill for discovery, merely, because of a prayer for disclosure as to the whereabouts of said bonds, and whether they or their proceeds now constitute part of the estate, and for an accounting touching the assets of the estate and the administrator's dealing therewith, especially when the answer fully shows the whereabouts of the bonds.

3. SAME—TRUSTS—ADMINISTRATOR AND CREDITOR OF ESTATE.

A creditor of an estate is not such a cestui que trust of the administrator as will entitle him to maintain a bill in equity in the federal courts for the purpose of securing accounting by the administrator and payment, merely on the ground of the trust relation, unaided by averments of fraud, maladministration, or nonadministration.

In Equity. Bill dismissed for want of jurisdiction.

Willits, Robbins & Case, for complainants.

Kauffman & Guernsey, for respondents.

WOOLSON, District Judge. This is an action in equity, brought by James H. Walker, Columbus R. Cummings, and William B. Howard, residents and citizens of the state of Illinois, and doing business under the name and style of James H. Walker & Co., against Anna L. Brown, in her own right and as administratrix, and Willis S. Brown and Edward L. Marsh, as administrators, of the estate of Talmadge E. Brown, deceased, all of said respondents being residents and citizens of the state of Iowa.

The facts, as contended for by complainants, are substantially as follows: That in the summer of 1889 a corporation known as the Lloyd Mercantile Company, doing business at Ellensburg, Wash., was indebted to said Walker & Co. for merchandise sold to said company. That about August 1, 1889, a copartnership under the name and style of Lloyd & Co. succeeded to the assets and assumed the liabilities of said mercantile company. That said Lloyd & Co. applied to said Walker & Co. for sales of merchandise upon credit. That, as said Walker & Co. understood, one Talmadge E. Brown had been a stockholder in said mercantile company, and his relation was now changed, as to said new company, to that of a creditor of said Lloyd & Co. That Walker & Co. declined to make said sales upon credit to said Lloyd & Co.

That at that time said Brown had \$15,000 in bonds, (of the city of Memphis, Tenn.,) which he had loaned to J. C. Lloyd, (one of the members of Lloyd & Co.,) to be and which were used as security for a loan of that amount at the Union National Bank of Chicago, Ill. That at the instance of said Walker & Co., and to enable said Lloyd & Co. to obtain credit with Walker & Co., said Brown wrote and delivered to said Walker & Co. a letter and agreement, as follows:

"Chicago, Sept. 21, 1889.

"Messrs. Jas. H. Walker & Co., Chicago, Ill.—Gentlemen: I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd & Co., Ellensburg, Wash. Ter., is with the understanding that any indebtedness they may be owing to you at any time shall be paid before the return to me of these bonds, or the value thereof, and that these bonds, or the value thereof, are at the risk of the business of Lloyd & Co., so far as any claim you may have against said Lloyd & Co. is concerned.

"Yours, truly,

T. E. Brown."

—And thereupon said Walker & Co. sold and delivered to said Lloyd & Co., on credit, and between August 20, 1889, and December 11, 1889, a large quantity of merchandise, in value, and for which said Lloyd & Co. agreed to pay, over \$12,000. That thereafter said Brown, "for the purpose of avoiding and escaping from the effects of his said agreement" with said Walker & Co., "and without any equivalent or consideration moving from said Brown to said Lloyd & Co.," took said bonds into his (Brown's) possession, and retained same till his death, and the same came, as a part of his estate, into the hands of respondents as his administratrix and administrators. That said complainants did not know of said bonds having been so taken up by said Brown until after all of said indebtedness had been contracted by Lloyd & Co. That Lloyd & Co. have become wholly insolvent, and are unable to pay said debt; and therefore complainants pray discovery as to whereabouts of said bonds, and by whom held and claimed, and further pray—

(1) A specific lien on said bonds, or any part thereof, if owned by the estate of said Brown, and that same be sold, and proceeds thereof to the amount of the unpaid indebtedness of said Lloyd & Co., which is averred to be over \$13,000, be paid complainants.

(2) If said bonds have been sold or exchanged for other properties, which are now traceable to the hands of said administrators, that a lien in like manner be adjudged thereon in favor of complainants, and same sold, proceeds applied, etc.

(3) If the bonds or proceeds do not now form a part of said estate in said administrators' hands, complainants may be adjudged creditors of said estate, and their claim be herein established to amount found due.

(4) That "said administrators be ordered to render and state under the direction of this court an account of all their doings as such administrators touching the administration and management of said estate, as well as of all creditors or other claimants upon said estate."

The proof is not entirely, although mostly, in harmony with these contended-for facts. It is proven that Lloyd & Co.'s account with complainants shows over \$13,000 due for merchandise by Lloyd & Co. purchased; that complainants refused to sell Lloyd & Co. said merchandise on credit until said Brown wrote and delivered to them said letter or agreement, (above set out in full,) and that said sales were made on the strength of said letter; that Brown never was a stockholder in the Lloyd Mercantile Company; that said Memphis bonds were never the property of said mercantile company, but were the property of said Brown, and the same, to wit, \$10,000 about October 26, 1889, and \$5,000 about December 11, 1889, were taken up and returned to said Brown, and without the knowledge of said complainants, but that at the time of their taking up an equal amount of money was paid into said Union National Bank, and the debt for whose payment they stood thereby paid off; that about December 25, 1889, Lloyd & Co. failed, and their property has all been disposed of under judgments against them; that before said Brown's death he gave to his wife, respondent Anna L. Brown, said Memphis bonds, and same are now her property, in her own right. The evidence has also gone into other lines, particularly the methods to secure and obtain payment of complainants' debt after failure of Lloyd & Co., and what is claimed worked a payment of said debt.

The first point of defense we meet, which is made in the answer and vigorously urged on the trial, is that complainants, under the evidence, have no standing in equity in this case, and that whatever remedy complainants have lies at law; that they have "a plain, adequate, and complete remedy at law." There is little opportunity for dispute as to the doctrine prevailing in the federal courts on this point. Section 723 of the Revised Statutes is in these words: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The court is bound to enforce this demand in any case falling under it; and if counsel did not raise the point, in a case where the same applied, it is the duty of the court, *sua sponte*, to take notice of the point, and act accordingly. *Parker v. Woolen Co.*, 2 Black, 545; *Lewis v. Cocks*, 23 Wall. 466; *Killian v. Ebbinghaus*, 110 U. S. 574, 4 Sup. Ct. Rep. 232. *Insurance Co. v. Bailey*, 13 Wall. 621, applies with noticeable vigor the doctrine of this section. Bailey took out two policies in the insurance company on his own life in the name of his wife. After his death, due proofs thereof, in accordance with the terms of the policy, were presented to the company, who refused to pay the amount of the insurance therein expressed, on the ground that the policies were obtained by fraudulent representations, etc., of material facts; and thereupon the company instituted this action in equity to enjoin the wife, the beneficiary, from assigning or disposing of the policies, and prayed for decree adjudging the policies void, and that she deliver the same up to be canceled, etc. The court below dismissed the bill. After quoting the sixteenth section of the judiciary act,—which

is now section 723 of the Revised Statutes,—and citing a number of cases in which that section had come under consideration in the supreme court, the court thereupon announce as their decision that:

"Wherever a court of law in such a case [enforcement of a legal right] is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury;" citing, among other cases, *Insurance Co. v. Delevan*, 8 Paige, 422; *Alexander v. Muirhead*, 2 Desaus, Eq. 162; *Insurance Co. v. Stanchfield*, 5 Amer. Law Rev. 564.

After a somewhat minute consideration of the classes of cases wherein equity is given jurisdiction, the court, returning to the facts before them, find that—

"By the death of the cestui que vie the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof. This condition complied with, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and, if so, it is difficult to see what remedy, more perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures them a trial by jury. Where a party, if this theory of the controversy is correct, has a good defense at law to a 'purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied preventive remedies."

To the same general effect, and largely on the same reasoning, is the case of *Insurance Co. v. Stanchfield*, 1 Dill. 424. In that case a fire insurance company, after loss of buildings therein described, brought suit to cancel the policy, on account of fraudulent representations, etc.

"Chancery," says Lord Bacon, "is ordained to supply the law, not to subvert the law;" in other words, the parties must litigate in the law courts, unless there are good and legal reasons for invoking the aid of equity. In the case before us no reason is set forth in the bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. * * * If the facts averred in the bill are true, they constitute a complete defense to such an action, and nothing is set forth showing that any obstacles stand in the way of making this defense at law. * * * If no hardship, no injustice, will result, and no reason appears for not leaving these parties to their rights and remedies at law, equity will leave them there."

Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. Rep. 249, illustrates with great distinctness how the federal courts apply section 723. Defendant contracted with plaintiffs to deliver at a date named a lot of cattle at a given price. Before the arrival of the named date, by representing one Mosty as good, solvent, able to fill the contract, etc., defendant succeeded in inducing plaintiffs to take, in lieu of the contract he had signed, an assignment without recourse on him of a contract he (defendant) had with Mosty to deliver cattle at the date and place named in the original contract. Thereupon plaintiff, relying on defendant's representations, surrendered to defendant the original contract, and accepted from defendant his assignment of the Mosty contract. As a fact, as defendant at the time

well knew, Mosty was then insolvent, and unable to perform the contract. Plaintiffs now bring their bill in equity, to cancel the assignment of the Mosty contract, to decree the original contract in force, and for recovery of \$15,000 paid to defendant by plaintiff on the contract, and for recovery of \$10,000 damages, etc. After quoting and briefly commenting on what is now section 723, Mr. Justice Gray, speaking for the court, says:

"A suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or degree, on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits, as in *Boyce v. Grundy*, 3 Pet. 210; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 586; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820."

More extended quotations and further citations would seem unnecessary, but the same doctrine will be found applied in *Hipp v. Babin*, 19 How. 271; *Grand Chute v. Winegar*, 15 Wall. 376; *Lewis v. Cocks*, 23 Wall. 466; *Root v. Railway Co.*, 105 U. S. 189; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232; *New York Guaranty & Indemnity Co. v. Memphis Water Co.*, 107 U. S. 205, 2 Sup. Ct. Rep. 279.

Counsel for complainants, while not combating the general doctrine announced in the cases cited, insist they do not apply in this case, because of the discovery sought herein. The basis of this discovery is thus stated in the bill:

"Your orators further show that the true condition and character of said estate, and whether said Memphis bonds, or the proceeds thereof, either in money or other property, now form a part of said estate, cannot be ascertained without a discovery from said defendants, as hereinafter indicated, and unless an accounting shall be had under the direction of this court by said administrators, touching the assets and property of said Talmadge E. Brown, which have come into their hands as such administrators, and their dealings therewith."

The answer filed herein to the bill will dispose of this matter if any doubt appear on the reading of the bill. The discovery, and only discovery, as to said bonds, prayed, is as to whether the bonds are in the hands of said administrators as a part of the estate, and, if not, as to where they are, and what disposition has been made of them. There is no charge of fraud on part of decedent Brown, except as to the return from Union National Bank of the Memphis bonds to him, and the fact of the return is admitted in the answer. As to that no discovery is necessary. Besides, the death of said Brown precludes further discovery as to that point.

It cannot be seriously claimed that the prayer for an accounting by respondents of all their acts as administrators is in the nature of a discovery prayed. The interrogatories attached to the bill are as to the whereabouts and condition of said Memphis bonds. The answer shows they were given by said Brown to his wife, who held them at the time of his death, and still owns them. In fact, if equity jurisdiction be made to depend on discovery herein, that juris-

diction cannot be sustained. The progress of courts under the later legislation, which has made parties in civil actions witnesses competent in their own behalf and compulsory on behalf of opposing parties, has greatly narrowed the field wherein the courts are disposed to sustain discovery as a legitimate basis for equity jurisdiction. Judge Dillon, in *Insurance Co. v. Stanchfield*, supra, speaking of this point, says:

"Bills for discovery had their origin at a time when at law a party was not entitled to and could not obtain the evidence of his adversary. [And he proceeds to cite the state statutes and federal statutes which make parties competent witnesses in their own behalf or at the command of the opposite party.] The effect of this legislation is to remove the grounds or reasons which originally existed for bills of discovery, and it may admit of doubt whether a bill merely to obtain discovery in aid of another action or defense ought longer to be sustained; but this is a point not now necessary to be determined. If the present bill be treated as one for discovery and relief, and as one where the necessity of obtaining a discovery is the ground of equity jurisdiction, the discovery sought has failed, for the answer denies all the essential averments of the bill charging fraud, and, where this is the result, the bill must be dismissed."

The supreme court of the United States, in *Brown v. Swann*, 10 Pet. 497, had occasion to consider the same point. That case came to the supreme court on appeal from the District of Columbia, and brought under consideration a statute of the state of Virginia. In speaking of this statute and its effect, the court say:

"When the legislature of the state of Virginia passed the statute it fixed the extent of the jurisdiction of a court of equity to compel a discovery under oath from an interested party in a suit either at law or equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery and other bills in chancery, which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only on the knowledge of a person a party to a private transaction with the person seeking the disclosure; in other words, it is a bill to discover facts which cannot be proved according to the existing forms of procedure at law. The jurisdiction of a court of equity in this regard rests upon the disability of courts of common law to obtain or to compel such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts can be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness, to prove what is sought from the conscience of an interested party. Courts of chancery have, then, established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law. The rule to be applied to a bill seeking for discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant, and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony; and when the facts are desired to assist a court of law in the progress of a case, it should be affirmatively stated in the bill that they are wanted for such purpose. * * * Unless such averments are required, it is obvious that the boundaries between the chancery and common-law courts would be broken down, and that chancellors would find themselves, under bills for discovery from an interested party, engaged in the settlement of controversies by evidence allunde, which the common-law courts could have procured, under process of subpoena, in delaying proceedings at law, by pretenses that a discovery is wanted for the sake of justice, and in en-

joining judgments, upon indefinite allegations of the plaintiff having a knowledge of facts which gave to a defendant an equity to be released, though the defendant might have availed himself of the evidence of third persons to establish the same facts, in the progress of the cause, or of the powers of chancery to procure them, by a discovery to assist the court in deciding it, which last case is the case under consideration. * * * Surely it is not unreasonable that a complainant's bill, seeking discovery, for the want of all other testimony, should not be retained after the answer has denied the matter sought."

In 119 U. S. 355, 7 Sup. Ct. Rep. 249, (*Buzard v. Houston*, supra,) the supreme court say of the case then before them:

"It is enough to say that the case clearly falls within the statement of Chief Justice Marshall: 'But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of defendant discloses nothing, and the plaintiff supports himself by evidence in his own possession, unaided by the confessions of defendant, the established rules limiting jurisdiction of courts require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.'"

The letter or agreement of Brown of September 21, 1889, is above copied. Complainants' bill avers that thereby they "acquired an equitable lien in their favor upon said bonds, or the proceeds thereof, as a security for the payment of said indebtedness of Lloyd & Co. to your orators; and that, if said bonds have come in specie into the hands of the administrators, your orators are entitled by the decree of this court to have adjudged a lien in their favor for said indebtedness, and to have said bonds sold, and proceeds thereof applied to payment of said indebtedness, and, if said bonds have been sold or otherwise disposed of, and proceeds invested in other property, your orators are entitled to have said lien adjudged on said other property or proceeds; and that, if said bonds or other property or proceeds cannot be so traced, then said Brown in his lifetime was, and said administrators are now, liable to your orators for the value of said bonds," etc.

Let it be here noticed that no equitable lien is claimed on said bonds because of any attempt by Brown, in this letter or agreement, to give a lien thereon, which, by reason of mistake or failure, was not perfected into a lien. No basis for equity jurisdiction is thus claimed. This letter was prepared by Mr. Mason, who was the "credit man" of complainants, and Mr. Brown signed it as it was thus prepared. Whatever rights complainants may have thereon are based on the phraseology of the letter. So that this inquiry as to this letter is narrowed down to considering whether by this letter complainants acquired a lien on the bonds therein described. Upon the trial no such lien was claimed by counsel for complainants in the event that Mr. Brown deposited or paid in the value of the bonds in lieu of the bonds themselves. That is, it was conceded that by the very terms of the letter, Mr. Brown, if he so desired, could deposit with the Union National Bank the value of the bonds, and take up the bonds, or he could pay into the partnership of Lloyd & Co. \$15,000, (the value of the bonds,) and then take up the bonds. There was therefore no contract lien on the bonds. Wherein, then, is this action, in this matter, other than an action for damages, because of Mr.

Brown's failure to fulfill his agreement? He had agreed with complainants that he would leave the bonds, or their value, in the company as long as the company was indebted to complainants, and as to any such indebtedness these bonds, or their value, should be "at the risk of the business" of Lloyd & Co. It is now claimed that he did not leave said bonds, or their value, as agreed in said letter, and thereby the bonds, or their value, were not left, as to complainants, "at the risk of the business" of said company. In other words, that Brown violated his agreement, and that, because of Brown's failure to keep or fulfill his said agreement, complainants, who in their sales to Lloyd & Co. relied on such agreement, have been damaged. What is such a statement but that of an action at law? And wherein does the bill aver other matters, giving to this court the right to declare that by reason thereof respondents must submit to the court their defense, and shall be refused their demand that a jury shall pass thereon?

In *Buzard v. Houston*, supra, the supreme court of the United States declare with reference to a case wherein was the averment of fraud as a ground for action and prayer for cancellation of an assignment, thus presenting a stronger case for equity than does the case at bar, (page 350, 119 U. S., and page 252, 7 Sup. Ct. Rep.:)

"In *Newman v. May*, 13 Price, 749, Chief Baron Alexander said: 'It is not in every case of fraud that relief is to be administered by a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity.' The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate, and complete remedy. * * * If the exchange of the contracts was procured by fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action for deceit the plaintiffs might treat the assignment as void, and, upon delivering up that contract to the defendant, recover full damages for the nonperformance of the original agreement. * * * A judgment for pecuniary damages would adjust and determine all rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled. There is, therefore, no ground upon which the bill can be maintained."

But counsel for complainant insist that equity has jurisdiction herein, because of the trustee relation, which respondents, as administrators of estate of said Brown, sustain to complainants, who are creditors of said estate; that is, that any creditor of an estate is such a cestui que trust (using substantially the language of counsel) as to have a right (if the citizenship be proper) to go into a federal court with a bill in equity to have this estate, as to his claim, administered. The authorities cited by counsel do not appear to sustain so broad a statement of the proposition. He cites *Bank v. Jolly's Adm'r*, 18 How. 503; *Green's Adm'r v. Creighton*, 23 How. 106; *Payne v. Hook*, 7 Wall. 425; *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. Rep. 440.

In *Bank v. Jolly's Adm'r*, supra, the actual controversy was as to whether a state law, limiting to the courts of the state the remedies in matters of decedents' estates, could be applied to the federal courts, so as to prevent citizens of other states from litigating as to such matters in the federal courts. The bill was dismissed

below. The supreme court, holding such state remedies did not apply in the United States courts so as to prevent citizens of other states from litigating such matters therein, sustain the jurisdiction of the federal courts. A judgment had been obtained in the United States court, and execution thereon returned nulla bona. The bill averred assets in the hands of the administrators of greater amount than the judgment, and that said administrator was about to pay same to Jolly's heirs without paying plaintiff's said judgment. Thus this action was to prevent the funds alleged to be available to the judgment from being dispersed, and then for accounting and distribution so as to include payment of plaintiff's judgment; in other words, maladministration was an ingredient of the bill. But plaintiff had theretofore submitted his claim to a suit at law, and established it therein as a claim or judgment.

Payne v. Hook, *supra*, also presents peculiar elements of equity jurisdiction. In his statement of the case Justice Davis states:

"This bill charged gross misconduct on the part of the administrator,—that he made false settlements with the court of probate, withheld a true inventory of the property in his hands, used the money of the estate for his private gain, and obtained from complainant by fraudulent representations a receipt in full of her share of the estate, on a payment less than she was entitled to receive. The object of the bill is to obtain relief against the fraudulent proceedings, and to compel a true accounting of administration, in order that the real condition of the estate can be ascertained and the complainant paid what justly belongs to her."

If this statement does not contain sufficient to give undoubted equity jurisdiction to the case, the task would be difficult to invent a case which would confer it.

Lawrence v. Nelson, *supra*, did not present the point now under consideration. Nelson had established in the United States circuit court in the state of Arkansas a claim against the estate whose administrator Lawrence was, and obtained an order for its payment by Lawrence out of the funds of the estate. The domiciliary administration was in the state of Illinois. In fact, no administration had been taken in Arkansas; the administrator, as such, entering his appearance in the Arkansas action. The administrator filed a petition for rehearing, which was overruled. Within a year thereafter he filed in said Arkansas court a bill of review and for reversal of the decree ordering payment, etc. This was dismissed by the court for want of equity. Subsequently the administrator settled the estate in the Illinois probate court, without paying plaintiff's said established claim. The present bill charged the administrator with having falsely and fraudulently represented to said probate court that all claims and debts against said estate were fully paid, and that the estate had been distributed among the lawful heirs, and finally settled, and Lawrence discharged as administrator, etc. The bill called for an accounting, etc., and, if assets were all paid off, that the administrator be adjudged guilty of devastavit, and decreed to pay the claim,—a clear case of maladministration charged.

The bill in *Green's Adm'x v. Creighton*, 23 How. 90, charges devastavit upon the administrator of an estate on whose bond Kendall's in-

testate was surety; that the proper probate court, on an accounting by such administrator, found such administrator indebted to the estate over \$60,000, ordered it paid over, and that suit be brought on his bond. The bill further shows that said administrator and his said surety were dead, and the other sureties on the bond insolvent, but that said Kendall, as administratrix of said surety's estate, has assets in her hands for administration, and seeks discovery of assets, accounting, and payment. The opinion concludes:

"The remaining question to be considered is whether the debt described in the bill entitles the plaintiff to come into a court of equity under the circumstances. It is well settled that no one can proceed against the sureties on an administration bond at law who has not recovered a judgment against the administrator. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered, and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. In this case the original debtor has died insolvent. His surety has died insolvent. A portion of the assets belonging to the estate of the latter is in the hands of the surety of this administrator. A discovery of the nature and amount of the assets in hand, and their application to the payment of the debt, are required if they are subject to the application."

It thus appears that of the cases cited to sustain the bill on this point not one is on all fours with it, and, indeed, we find in each of them that the principles therein laid down do not sustain complainants' contention as to the present bill having standing in equity. The latest expression of the views of the supreme court of the United States is found in *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. Rep. 155, and it is believed such expression is in complete harmony with former decisions. In that case the railroad company had recovered judgment in the United States circuit court for the eastern district of Louisiana. After real and personal estate had been advertised for sale under execution issued on said judgment, and before sale, one of the judgment debtors died. A new sale was advertised, such debtor's representatives having been made parties to the proceedings under the execution. Before the day of the sale arrived, the public administrator moved the United States court for an order directing the marshal to withdraw advertisement of sale, and to desist from making sale, etc., on the ground that the advertised assets should be administered with decedent's other assets in the probate court of that state, and also for delivery to him (public administrator) of said property for such administration. The motion was sustained by the court below. On appeal the supreme court are brought to a direct consideration of certain features of the courts of the United States with reference to decedents' estates. The court declare:

"We do not question the general doctrine laid down in *Yonley v. Lavender*, 21 Wall. 276, to the effect that the administration laws of a state are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the federal courts in enforcement of individual rights, and that those laws upon the death of a party withdraw the estate of

the deceased from the operation of the execution laws of the state, and place them in the hands of his executor or administrator for the benefit of his creditors and distributees. But that doctrine only applies where the property has not been, previous to the death of the debtor, taken into custody by the federal court upon its process, and thus specifically appropriated to the satisfaction of such judgment. In this case, had Gomila died before the property in question had been seized upon process issued upon a judgment against him, the doctrine of the case cited might have been applicable. We do not recall any case now where the federal courts have not paid respect to the principle that all debts to be paid out of the decedent's estate are to be established in the court to which the law of his domicile has confided the general administration of estates; and that judgments against the deceased, unaccompanied by a seizure of property for their satisfaction, stand in the same position as other claims against his estate, and are to be paid in like manner. The jurisdiction of chancery to enforce the equitable rights of a nonresident creditor in the case of maladministration or nonadministration of the estate of a decedent, stands upon a different principle, (*Payne v. Hook*, 7 Wall. 425;) the rule prevailing, as stated in *Hyde v. Stone*, 20 How. 170, that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the state which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In the case at bar the showing is that Brown's estate is solvent, and no averment is made of fraud or maladministration or nonadministration or the like by the respondents as administrators thereof. Having arrived at the conclusion that the complainants have, with respect to the matters at issue in this case, a "plain, adequate, and complete remedy at law," it follows that the insistence of respondents upon their right to submit these matters to the verdict of a jury cannot be denied, and therefore this action in equity cannot be sustained. The decree of dismissal will follow the precedent in *Buzard v. Houston*, supra. The bill herein will be dismissed for want of jurisdiction, and at complainants' costs, but without prejudice to another action, at law.

REINACH v. ATLANTIC & G. W. R. CO. et al

(Circuit Court, S. D. Ohio. January, 1878.)

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP — BENEFICIARY AND HOSTILE TRUSTEE.

A suit to foreclose, brought by an alien railroad mortgage bondholder in his own right, is maintainable in a federal circuit court, although the trustee under the mortgage, who holds the legal title, is a citizen of the same state with some of the defendants; such suit being in hostility to the trustee, who refuses to act, and who is made a party defendant. Under such circumstances, the court will not look behind the parties to the record.

2. SAME—INJUNCTION—SUITS IN STATE COURTS.

A federal court has no power to enjoin a receiver in possession of a railroad under appointment of a state court from issuing receiver's certificates, or to restrain the parties in the state court from carrying out an agreement sanctioned by that court. Rev. St. § 720.

3. JUDGMENT — COLLATERAL ATTACK — JURISDICTIONAL AND QUASI JURISDICTIONAL FACTS.

There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those

quasi jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. In the absence of the former the judgment of the court is void, and may be attacked in collateral proceedings, while in respect to the latter it is conclusive, and cannot be questioned except on review.

4. SAME—STATE AND FEDERAL COURTS.

In a suit in a state court to foreclose a railroad mortgage, the trustees in a prior mortgage of a portion of the property filed a cross bill, claiming priority. Thereupon a committee appointed for the purposes of a former litigation by holders of the bonds secured by such prior mortgage entered into a contract postponing payment thereof, subject to approval of the court. The nature of the committee's appointment was brought to the attention of the court, but it confirmed and proceeded to carry out the contract for extension. *Held* that, as the court had jurisdiction of the subject-matter and the parties, the question of the committee's authority was only quasi-jurisdictional, and the court's decision thereof was conclusive, so that a federal court could not question the proceedings based thereon in a collateral proceeding brought by a bondholder who was a party to the contract appointing the committee. Such bondholder's remedy was by appeal from the decree of the state court.

In Equity. On motion for an injunction. Denied.
Statement by BROWN, District Judge.

This was a bill to foreclose a mortgage made on the 1st day of October, 1855, by the Atlantic & Great Western Railroad Company, to Flagg and Stedman, to secure the issue of \$4,000,000 of bonds, payable 21 years from date, i. e. on the 1st day of October, 1876. About \$2,500,000 of such bonds were alleged to be outstanding. The complainant, who is an alien, alleges to own \$15,000 of the same.

The defendants Schuchardt and Meyer were the successors of Flagg and Stedman as trustees under this mortgage, which was commonly known as the "Ohio Mortgage."

The railroad company subsequently made a second mortgage to John R. Penn, trustee, to secure \$18,485,000 of bonds to be issued thereunder. On such second mortgage, foreclosure proceedings were instituted in the court of common pleas for the county of Summit, in the state of Ohio, and under the decree entered therein in April, 1869, the mortgaged property was sold, subject, however, to the lien of the first or Ohio mortgage. The complainant alleges that the defendant Schuchardt and his then cotrustee, Flagg, filed in such foreclosure suit a cross bill or petition praying, *inter alia*, that the road might be sold, and the proceeds used in paying the principal and interest of the bonds represented by them; that the court, however, refused so to adjudge.

By the decree in the Penn foreclosure suit, it was, among other things, provided, that any purchaser under the decree should purchase the property subject to the lien of the said Ohio mortgage, and to the rights of its trustees, and, as declared in said decree, that if default were made in the payment of the principal of the bonds secured by said Ohio mortgage when the same became due, and such default should continue for 10 days thereafter, leave was thereby "given to the said Flagg and Schuchardt, or their successors in said trust, to apply to this court, or to one of the judges thereof in vacation, upon notice in writing to said Upson and Penn, or their successors in their respective trust, * * * for an order directing the clerk of this court to issue an order upon this judgment, and sell the said premises, property, and franchises covered by said mortgage to said Flagg and Stedman, * * * together with the subsequently acquired property." Such decree also authorized the court or judge to grant such order, and to direct an order of sale to issue upon the praecipe of said Flagg or Schuchardt, or their successors in trust, if it should be satisfactorily proven that such default had been made and continued.

On the institution of the Penn foreclosure suit, a large body of the owners of the bonds under the Ohio mortgage, who resided in Europe, for the purpose of protecting their interests in said suit, and in order to realize the

money due on their bonds, (which, the complainant alleges, were then supposed to be due by reason of the nonpayment of interest thereon,) associated themselves together, and constituted the firm of Wertheim & Gompertz and Frederick W. Oewel, all bankers in Amsterdam, as their agents for the purpose of representing them in the said suit, and of enforcing their rights under said bonds. A copy of the agreement so entered into was annexed to the bill.

It provided, among other things, that the holders of the bonds should surrender them to their said agents, and that they were to issue certificates therefor, and such bonds were to remain in the custody of the persons designated therein.

The complainant surrendered his bonds under said agreement, and received a certificate therefor.

The decree in the Penn foreclosure suit, adjudging that the principal of the Ohio mortgage had not become due, was claimed to have terminated the agreement, and the purposes for which it was entered into, although the owners of the bonds thereafter left the same in the custody of the said agents, who collected and remitted the interest thereon.

The purchasers under the Penn decree subsequently became the Atlantic & Great Western Railroad Company, and thereafter said company made another mortgage to the defendants Taylor and Dunphy, as trustees, and issued thereunder a large number of bonds, amounting to upwards of \$56,000,000. The company, shortly after the issuing of said bonds, became financially embarrassed; and thereupon, in 1874, the defendants Taylor and Dunphy commenced a suit in the common pleas of Summit county for the foreclosure of such mortgage, in which Schuchardt and Meyer intervened and filed a cross petition. In such suit the defendant Devereux was appointed receiver, and an order was made permitting the receiver to issue receiver's certificates for the running and other expenses of the road, which, it was conceded in the bill filed by Taylor and Dunphy, could not be paid from the earnings of the road. The order likewise provided that the receiver's certificates should take precedence of the lien created by the Ohio mortgage, under which Meyer and Schuchardt were then the acting trustees. Complainant alleges that instead of proceeding to the foreclosure of the Ohio mortgage when the same became due, or exercising the right conferred on them by the decree in the Penn suit, Meyer and Schuchardt consented to the other defendants procuring an order from the court in Summit county confirming an alleged contract for the extension of the payment of the principal of the Ohio mortgage for three years from its maturity. Such contract purported to be entered into by Wertheim & Gompertz and Oewel, claiming to represent a majority of the Ohio bondholders, and a committee on the part of subsequent lienors and of stockholders, the purport and result of which, it is claimed, would be to extend the time of payment of the principal due on the Ohio mortgage for three years; to permit the receiver, Devereux, during such three years, to remain in possession, and to create a prior lien to such first mortgage by the continued issuance of receiver's certificates for money necessary to be borrowed to pay the interest on the Ohio mortgage during such additional three years. The defendants Taylor and Dunphy, as such trustees and plaintiffs, petitioned the Summit county court to confirm such contract, and the defendants Schuchardt and Meyer represented to the court that a large majority of bondholders under the Ohio mortgage approved such contemplated contract; that a minority did not approve; but that they thought the contract would be for the benefit of the cestuis que trustent,—and submitted the entire matter to the consideration of the court. It was not shown to the said court that any of the bondholders had personally approved or ratified such contract, but its alleged ratification or approval consisted in its execution by Wertheim & Gompertz and Oewel, by an alleged attorney. The only authority in the premises possessed by Wertheim, Gompertz, and Oewel was derived from the agreement, which was called to the attention of the Summit county court. One Von Langen appeared, and objected to said extension of the mortgage, and called upon Meyer and Schuchardt to collect the principal due on the mortgage, which they refused to do.

The defendant Schuchardt, after the maturity of the mortgage, resigned his position as trustee by a letter of resignation addressed to the Atlantic &

Great Western Railroad Company, and by it accepted. The complainant averred that such alleged resignation was nugatory, and could not legally be effected in such manner, and that the defendant Schuchardt was still one of the trustees under said mortgage.

The complainant alleges that other bondholders, similarly situated, applied to the Summit county court for leave to intervene, and to be heard in opposition to the confirmation of said alleged contract; that their right in that respect was opposed by all the defendants, including the defendant Meyer, claiming that the application for the confirmation of said alleged contract was purely *ex parte*, and that he (Meyer) represented all the bondholders, and that they therefore had no right to intervene; that the court accepted such view, and declined to admit said dissenting bondholders to such suit. Complainant thereupon filed his bill in this court, and prayed:

(1) That the mortgage might be foreclosed, the property sold, and the moneys arising from the sale brought into court, to be distributed to the parties entitled thereto.

(2) That during the pendency of this suit the said Devereux, or some other fit and proper person, might be appointed receiver of the property covered by the said mortgage.

(3) That the said Devereux might be restrained from issuing any receiver's certificates, which should take precedence of the lien of the said mortgage; that the said Meyer might be decreed to deliver to complainant the said bonds so deposited by him under the said agreement with the Amsterdam bankers; and that, in default of his so doing, complainant might have the same relief upon the said certificate as if the said bonds represented thereby were produced by the said Meyer.

(4) That this court might prohibit the execution of any agreement by any party defendant whereby the time of payment of the said mortgage, or of the bonds issued thereunder, should be postponed, enlarged, or in any way prolonged.

(5) That any such agreement, if executed, might be set aside and declared to be illegal and void.

(6) That complainant might have such other relief, or such further and different relief, as should be just and equitable.

Charles M. Da Costa and Stanley Matthews, for complainant.

Mr. Adams, for defendant Meyer.

R. P. Ranney, for Taylor and Dunphy.

Durbin Ward, for Devereux, receiver.

Before SWING and BROWN, District Judges.

BROWN, District Judge, (orally, after stating the facts.) Entertaining, as we do, no serious doubts as to what our conclusion in this case ought to be, we have determined to dispose of it while the facts are fresh in our minds, and while the counsel who argued the case are present in court, although the limited time we have had for the examination of authorities will prevent that extended review of the facts and the law of the case which its importance, and the ability with which it was argued, invite.

1. The first defense made to this bill is that this court has no jurisdiction, inasmuch as the trustee who holds the legal title to the bonds is a citizen of the same state as several of the defendants. It appears, however, that the plaintiff, who is a bondholder under Mr. Meyer, trustee, is an alien,—a citizen of the republic of France; that the Atlantic & Great Western Railroad Company and Mr. Devereux, the receiver, are citizens of Ohio, though the latter is a resident of the northern district; that Schuchardt, Meyer, and

Dunphy are citizens of New York; and Taylor, a citizen of New Jersey. Under these circumstances, so far as the question of citizenship is concerned, we think the court has full jurisdiction of the case.

There is, undoubtedly, a class of cases which hold that, where an action is prosecuted by a merely nominal plaintiff,—a person who, by law or statute, is made a necessary plaintiff,—the jurisdiction of the court is to be determined by the real parties to the action; but we believe this doctrine is confined to that class of cases of which *Brown v. Strode*, 5 Cranch, 303, is the earliest example. This was an action upon an executor's bond, given to justices of the peace, in conformity with a statute of Virginia. The object of the suit was to recover a debt due from the testator, in his lifetime, to a British subject. The defendant being a citizen of Virginia, the court held it had jurisdiction of the case.

A somewhat similar case was that of *McNutt v. Bland*, 2 How. 10. This was an action on a bond given by a sheriff of a county in Mississippi to the governor of the state, and was prosecuted in the name of the governor for the use of citizens of New York. Upon demurrer it was held that the circuit court had jurisdiction. "In this case," said the court, "there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as an instrument of the state law to afford a remedy against the sheriff and his sureties, his name is on the bond, and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party. * * * Where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is, by some positive law compelled to use the name of a public officer, who has not, or ever had, any interest in or control over it, the courts will not consider any others as parties to the suit than the persons between whom the litigation before them exists."

The case of *Irvine v. Lowry*, 14 Pet. 293, draws clearly the distinction between the cases where the court can, and where it cannot, take jurisdiction. This suit was brought upon a promissory note against the defendant, the maker of the note, who was a citizen of the state of New York, by the plaintiff, the payee of the note, who was a citizen of Pennsylvania, for the use and benefit of a certain bank, part of the stockholders of which were also citizens of New York. The court observed:

"Nothing then remains but to ascertain from the record, as certified, whether the bank is the real plaintiff, for, if they are not, then, as *Irvine* is admitted to be a citizen of Pennsylvania, and *Lowry*, of New York, the jurisdiction is undoubted. The paper upon which the suit is brought is not negotiable by the usage or custom of merchants. * * * The bank, therefore, cannot sue in their own name, in virtue of the indorsement of *Irvine* in blank, nor could they so sue it if it were specially indorsed to them, because the legal right of action would still remain in *Irvine*, though the equitable interest in the thing promised may have passed to the bank. * * * Standing as such to the bank, their rights are derivative through him, and as the indorsement passes only an equity the legal interest is in him. He is the real plaintiff in a court of law, in which the legal rights alone can be recognized."

The court then proceeds to draw the distinction between this and the case of *Brown v. Strode*, where the jurisdiction of the circuit court was sustained on the ground that, though the plaintiffs and defendants were citizens of the same state, the former were merely nominal parties, without any interest or responsibility, and made by the law of Virginia the mere instruments or conduits through whom the legal right of the real plaintiff could be asserted.

The case of *Coal Co. v. Blatchford*, 11 Wall. 172, relied upon by the defendant, is no authority for the dismissal of this bill. This was a bill brought by trustees to foreclose a mortgage upon the property of a railroad and coal company. The defendant demurred to the bill on the ground that one of the plaintiffs and the defendant corporation being citizens of the same state, the court had not jurisdiction of the case. The demurrer was sustained upon the authority of *Chappelaine v. Dechnaux*, 4 Cranch, 307; *Childress v. Emory*, 8 Wheat. 669, and *Osborn v. Bank*, 9 Wheat. 738. To the same effect is the case of *Knapp v. Railroad Co.*, 20 Wall. 117. As the cause of action was vested in the plaintiff in this case as trustee under the mortgages, the court looked upon their citizenship in determining the question of jurisdiction, and not to the residence of those persons who were beneficiaries in the subject-matter of the litigation.

It does not, however, follow that, where the cestui que trust is himself the complainant, the jurisdiction of the court will be ousted by the citizenship of his trustee. In the case under consideration, the suit is brought by a single bondholder in his own right. It is prosecuted, not under the trustees, but in hostility to them, and the trustees are made parties defendant. The plaintiff does not claim under them, in any sense, except that they hold the legal title, but he does as he may rightly do if a trustee has died, or has betrayed or refused to execute his trust,—prosecute the suit in his own name. *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Alexander v. Railroad Co.*, 3 Dill. 487.

Although a deceased party may have been a citizen of the same state with the defendant, his executor is regarded as the party to the record, and except in a case where the party is a merely nominal plaintiff for the use of the real plaintiff, and, perhaps we may add, a plaintiff made such by statute, we know of no case where the court will look behind the parties to the record. It follows that this point is not well taken.

2. The second and more serious defense is that this court has no jurisdiction on account of the pendency of a suit in the court of common pleas of Summit county for the foreclosure of a subsequent mortgage, to which suit the trustees of this mortgage were made parties under the practice in this state, and in which certain dissenting bondholders have petitioned to be heard. In this suit a receiver has been appointed, and is in possession of the road, and it is claimed that this court has no jurisdiction to interfere in any way with that receiver, or to enjoin him from contracting debts which that court has held he might contract; that the state court has full and complete jurisdiction and control over the entire sub-

ject-matter, and over the issues before it. In order to appreciate fully this claim, it will be necessary to rehearse to some extent the facts connected with the original mortgage now sought to be foreclosed. It was made in October, 1855, a few days after the organization of the company, to Flagg and Stedman, trustees, who have been since superseded by Schuchardt and Meyer, of whom Schuchardt has resigned his trust, leaving Meyer sole trustee. About the same time, another mortgage was executed to one Penn for some \$18,000,000. Default having been made by the railroad company upon the coupons annexed to the Penn mortgage, a bill was filed in the court of common pleas of Summit county for the foreclosure of this mortgage, to which the trustee under the present mortgage was made a party, as was required by the practice in this state. He was then not only a proper, but a necessary, party to this suit. He filed his answer, and also a cross-bill setting up the prior rights of bondholders under the Ohio mortgage. On the institution of this foreclosure, however, a large body of the bondholders who are residents of Holland, for the purpose of protecting their interests, and in order to realize the money due upon their bonds, which they then supposed was due, associated themselves together, and constituted a firm of Amsterdam bankers their agents for the purpose of representing them in such suit, and of collecting the amount due upon their bonds. A copy of this agreement, known as the "Amsterdam Contract," is made a part of the bill, and reference will be had to it hereafter. The plaintiff was a party to that agreement,—became such by depositing his bonds with those bankers,—and the agreement is so far binding upon him that he is estopped from taking any action inconsistent with the authority he had given them. The road was reorganized after having been sold on the Penn decree, October 3, 1871, subject to the Ohio mortgage, and a new mortgage was given, for \$56,000,000, to Taylor and Dunphy, as trustees. Much comment has been made by counsel upon the enormous difference between the mortgages of eighteen and fifty-six million dollars. It should be remembered, however, that the road was reorganized, and consolidated with other roads; that large expenses were incurred; and it is but natural that the mortgage should have been increased. It seems to us a matter we have no right to look into, in any view of this case. The charge of fraud is fully denied by the answer, as we understand it; and, being so denied, the answer, for the purposes of this motion, must be taken as true. Suit was brought to foreclose the Taylor and Dunphy mortgage in 1874 for nonpayment of the coupons, to which Meyer, surviving trustee of the Ohio first mortgage, was made a party. He filed his cross bill, as had been done by the trustees under this mortgage in the previous suit, and again set up his priority of lien. An agreement was thereupon entered into between the Amsterdam bankers, on the one part, representing the bonds under the Ohio first mortgage, and a committee of English bondholders under the second Penn mortgage, bearing date September 30, 1876, by which it was agreed the Dutch bondholders should be postponed in the payment of their mortgage for three years. At least the purpose

and result of it would be to extend the time of payment on their part for three years.

No question is made here of the power of the English committee to make that contract on behalf of the bondholders under the second mortgage. The Dutch bankers assumed, undoubtedly, to sign it upon the faith of the power given to them by what is known as the "Amsterdam Agreement" between themselves and bondholders representing about nine-tenths of the entire amount of the bonds under the Ohio first mortgage. Whether the Amsterdam agreement did give this authority or not, is a question open to doubt. It was strenuously insisted upon the argument that it did not. The substance of the agreement is as follows: After reciting "that, for a long time past, the coupons of these bonds are in default; that a number of holders of such defaulted coupons have handed the same to the deponent, Oewel, to enforce against the said company the rights that appertain to the holders of such coupons and bonds; that, consequent upon advices received from America, it becomes necessary, in order to enforce such rights, to have the bonds there for submission to the court, or to produce and use them in the legal proceedings that may arise,"—it provides:

"Art. 5. The deponent, Oewel, is authorized, by the surrender of the bonds, to enforce, in his name, or in the name of the party he appoints in America, all the rights and claims which the ownership of the surrendered bonds imply, and to institute all suits and measures which he may deem necessary. He is likewise authorized to compromise about these rights, claims, or the payment thereof. He is to intrust the proceedings, and the framing and the execution of all necessary measures, to such persons in New York, and wherever else it may be necessary, as he may consider most fit."

"Art. 7. The holder of a certificate cannot reclaim the bonds against which it was issued until the proceedings which Mr. Oewel shall have instituted on the strength of its delivery shall have been concluded.

"Art. 8. The moment the proceedings referred to in the preceding article shall be brought to an end, the holder of a certificate will, on delivery of same, receive from Messrs. Wertheim and Gompertz and Oewel, jointly, (after deduction of his proportionate share of the expenses,) all that they may have on hand, as corresponding to the bond against which the certificate was issued."

It is not unusual, in cases of railway mortgages, where the bondholders are very numerous, to employ a committee to act for them. Indeed, it is obviously impossible that so large a number of bondholders, residing so far distant from the subject-matter of litigation, should be able, personally, to superintend the collection of the coupons, or the legal proceedings that may arise in connection with them. The prime object of this agreement was evidently to secure co-operation among the bondholders; to appoint an agent, who should see to the collection and enforcement of these bonds, and the foreclosure of this mortgage. It is claimed that, while this agreement did give the Amsterdam bankers authority to transact their business connected with the suit then pending, after the termination of that suit the agreement became *functus officio*; that these parties ceased to be the agents of the bondholders in any further litigation; that they had no right, in the suit of 1874, brought some five years after the first one, to com-

promise in any way the rights of the bondholders; that their action in signing the Dutch-English agreement for the extension was ultra vires; that it gave no right to the trustees or the court to approve it; and that the decree of the court was itself ultra vires and void. Though it does not become necessary to decide that question, we are inclined to the opinion that considering the general scope and purpose of this contract, and the object for which these bonds were placed in the hands of these bankers, their authority continued until the bonds were collected; at least, in the absence of any redelivery of the bonds to the bondholders, or of any attempt on their part to reclaim or to put an end to their contract. As a matter of fact, the bonds were intrusted to them, and were sent to America, and placed in the hands of American counsel. They were, after the termination of the suit, returned to the Amsterdam bankers, but have never been returned to the bondholders themselves. The bankers continued to collect the coupons, and to see that the interests of the bondholders were protected. They acquired, as it is claimed, by large expenditures made by them, an interest themselves in the execution of this trust; and, if they did not continue to hold the bonds under this contract, it is not easy to see under what contract they did hold them. Clearly, they held them for the benefit of the bondholders. They were continuing to collect the coupons, and pay the interest over to the owners, and, so far as it appears, no dissent had been expressed to their continuing to hold them; and, the main object of the contract being to appoint an agent for the collection of the bonds, it would seem as though the authority of these parties continued until the bonds were actually collected. If the mortgage securing these bonds was foreclosed by the decree pronounced in the Penn suit in 1869, then there is no mortgage to foreclose here. It is already merged in the Penn decree. If that mortgage was not, however, merged in that decree, then, at least, it is an open question whether the second suit and the cross bill of Schuchardt and Meyer is not a continuance of the original proceedings, although filed in the suit for the foreclosure of another, namely, the Taylor and Dunphy mortgage. While it may not be, perhaps, the same suit, or a continuance of the same suit, still it is a continuation of the proceedings originally instituted to enforce payment of this mortgage. And, if it were our duty to determine what construction we should give to this contract, we should hesitate very long before saying that the Dutch bankers were not authorized by it to execute this Dutch-English contract, extending the time for payment. They undoubtedly assumed to make this contract upon the faith of the Amsterdam agreement, which was called to the attention of the court. The contract itself was laid before the trustees, the legal holders of the mortgage, who approved it. It was also made subject to the approval of the court, which did in fact confirm it.

We have very serious doubts as to the power of these trustees, as against dissenting bondholders, to waive their right to an in-

mediate foreclosure, and to grant an extension of three years, and we consider it at least open to question whether the supreme court, upon writ of error, would not hold that such action impaired the obligation of the original mortgage. We do not deem it necessary, however, to pass upon this question. There is no dissenting bondholder before this court. The only party here is one who claims to hold certificates from Wertheim & Gompertz, and is bound by their agreement, if they had power to bind any one. Whether this Amsterdam contract gave to them the power claimed,—to sign the Dutch-English contract,—and the trustees the right to approve it, and the court to carry it out by authorizing the receiver to contract debts for the current expenses of the road, and to issue certificates therefor, which should take precedence of the Ohio mortgage, was a matter before the state court. It had full jurisdiction of the subject-matter, namely, the property in controversy. All parties to the case—not only those to the original bill, but the trustees under the first mortgage, who filed their cross bill—were before that court, which had full and complete jurisdiction of the case; and, having such jurisdiction, we hold that its action is binding.

The court having decided these questions, and having inferentially, if not directly, held that the Amsterdam agreement did authorize the Dutch bankers to sign the Dutch-English contract, and the trustees to approve it, we feel quite clear that we are concluded, so far as this case is concerned, by that decree. Mr. Von Langen, who represented the dissenting bondholders, appeared in the state court, and asked to be made a party to the proceeding. The court refused it. We have no right to criticise this refusal. His remedy is by invoking the action of a superior court. It was certainly not a matter of discretion to refuse him an appearance, and it must, in some way, be reviewable by the supreme court of this state, by writ of error, appeal, or mandamus. If Mr. Reinach, the plaintiff in this suit, had applied to that court, and been refused a hearing, we should have felt concluded by its decree. We cannot review the action of the state court in that particular. Notwithstanding the Summit county court may not, as it is claimed by counsel for the plaintiff, have had jurisdiction to enforce this contract, still the court itself determined that it had jurisdiction, and we understand the rule to be that, where there is jurisdiction of the parties and of the subject-matter, the court may then pass upon its own jurisdiction, and its judgment upon that point is final and absolute.

There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter and those quasi jurisdictional facts without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. The judgment of a court having no jurisdiction of the subject-matter or the parties is null and void, and may be impeached in collateral proceedings, and the record of the court showing such jurisdiction may be contradicted by parol evidence.

Galpin v. Page, 18 Wall. 350; Starbuck v. Murray, 5 Wend. 148; Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight & Coke Co., 19 Wall. 58.

But there are certain facts termed "quasi jurisdictional" which must be alleged and proved, but, when so proved, are *res adjudicata* and binding in collateral proceedings. Such, for example, as that, in a petition for letters of administration, the decedent left no will; in informations in rem under the revenue laws, that the property has been seized by the collector; and, in proceedings to sell real estate for the payment of debts, that the deceased left no sufficient personalty. Examples of these litigations, and of the conclusive character of the judgments rendered under them, are found in the following cases: *Hudson v. Guestier*, 6 Cranch. 281; *Thompson v. Tolmie*, 2 Pet. 157; *Ex parte Watkins*, 3 Pet. 193; *Grignon's Lessee v. Astor*, 2 How. 319; *U. S. v. Arredondo*, 6 Pet. 709; *Griffith v. Bogert*, 18 How. 158; *Beauregard v. New Orleans*, Id. 497; *Florentine v. Barton*, 2 Wall. 210; *Comstock v. Crawford*, 3 Wall. 396; *Segee v. Thomas*, 3 Blatchf. 11; *Sheldon v. Wright*, 5 N. Y. 497; *Dyckman v. Mayor*, Id. 434; *Jackson v. Crawfords*, 12 Wend. 533; *Jackson v. Robinson*, 4 Wend. 436; *Wright v. Douglass*, 10 Barb. 97; *Fisher v. Bassett*, 9 Leigh, 119, 131.

So, in proceedings in involuntary bankruptcy, the allegation with regard to the debt of the petitioning creditor is treated as jurisdictional, and the judgment of the district court is binding, in an action by the assignee. *Michaels v. Post*, 21 Wall. 398; *Betts v. Bagley*, 12 Pick. 572.

Even if the determination of the court with regard to the power given to the Amsterdam bankers to sign the Dutch-English contract involved a jurisdictional question, which we are by no means disposed to concede, it was clearly of that character which cannot be reviewed here in a collateral proceeding. Its error in that regard could not be made the foundation of a suit here.

We are asked, in this case, not only to foreclose a mortgage which is in process of foreclosure in the state court, but to appoint a receiver of the property covered by the mortgage, without power to deliver him possession, possession having been already obtained by a receiver of the state court. The decree of the state court, postponing a sale, may at any time be reversed and a sale of the property ordered under the first mortgage. Of what avail, then, would it be for us to decree a sale of the same property? Ought this court to go through the idle form of a sale, without the power to deliver possession to the purchaser?

We are also asked to restrain the receiver of the state court from issuing certificates in obedience to the power given by that court; to prohibit the execution of an agreement made by a party defendant in a state court, which has already been executed and carried into effect by that court; and to set aside such agreement, if already made, as illegal and void.

By the Revised Statutes, (section 720,) we are prohibited from granting injunctions to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any

law relating to proceedings in bankruptcy. We see no reason why this section is not fully applicable here. It is held to extend, not only to the officers of the state court, but to the parties litigant there. So far as we know, the decisions have been uniform that the federal and state courts are so far independent of each other that injunctions will not be granted by either against the officers or the parties litigant in the other, staying proceedings in such courts. *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 612. In this case it is said, (pages 624, 625:)

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Riggs v. Johnson Co., 6 Wall. 166:

"Circuit courts and state courts act separately, and independently of each other; and, in their respective spheres of action, the process issued by the one is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye."

U. S. v. Council of Keokuk, 6 Wall. 514; *Duncan v. Darst*, 1 How. 301; *McKim v. Voorhies*, 7 Cranch, 279; *Watson v. Jones*, 13 Wall. 719; *City Bank v. Skelton*, 2 Blatchf. 14, 28; *Memphis City v. Dean*, 8 Wall. 64; *Mallett v. Dexter*, 1 Curt. 178; *Parsons v. Lyman*, 5 Blatchf. 170; *Peale v. Phipps*, 14 How. 368; *Bell v. Trust Co.*, 1 Biss. 260, and cases page 274; *Union Trust Co. v. Rockford, etc., R. Co.*, 6 Biss. 197.

It is also a doctrine too familiar for extended comment that property in the possession of a court acting under one jurisdiction cannot be wrested from it by an officer acting under another jurisdiction. *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334; *Keating v. Spink*, 3 Ohio St. 105.

The rights of the parties in this suit are protected in a state court. Whether fully protected or not is not for us to determine. We cannot say here that the action of the state court in confirming an agreement for the extension of the first mortgage has been injudicious. There are many reasons for saying it has been a judicious action. Great difficulties are suggested in the way of an immediate foreclosure under the first mortgage, which covers, it seems, only a part of the road, and a fraction of 347-388 of the lease of a branch line represented to be the most valuable feature of the organization. To say that the rights of this complainant are not fully protected in the state court; to pronounce that there is collusion and fraud there; and to demand of us, virtually, to stop the progress of this suit, and to sweep the subject-matter of the litigation and the contentions of these parties within the jurisdiction of this court,—is requiring of us more, we believe, than has ever been granted in any court of the United States.

We cannot better conclude this opinion than by the following quotation from the decision of Mr. Justice Bradley in *Haines v. Carpenter*, 91 U. S. 254:

"A mere statement of the bill is sufficient to show it cannot be sustained. * * * In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. * * * This objection, alone, is sufficient ground for sustaining the demurrer to the bill. * * * The state courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interfering with their proceedings."

See, also, *Wilmer v. Railroad Co.*, 2 Woods, 409.
The motion for an injunction must be denied.

RISK v. KANSAS TRUST & BANKING CO.

(Circuit Court, D. Kansas. June 29, 1893.)

RECEIVERS—RIGHTS OF SECURED CREDITORS.

The appointment of a receiver of an insolvent corporation on the bill of an unsecured creditor does not deprive secured creditors or their trustees of the right to possess, control, and enforce their securities, and, if the receiver has come into possession thereof, the court will require him to deliver them up.

In Equity.

In the matter of the application of Mr. A. G. Otis, a debenture bond holder, for the delivery of the mortgages securing his bonds by the receiver to a trustee for his benefit. Application granted.

H. M. Jackson, for petitioner.

David Martin, for receiver.

SANBORN, Circuit Judge. On March 13, 1893, the complainant in this action obtained a judgment at law against the defendant in this court for about \$9,000. This judgment was based on an unsecured debt of the defendant, and the complainant had no beneficial interest in the debenture bonds hereafter mentioned that were issued by the defendant, or in the collaterals pledged for their payment. On the same day, upon motion of complainant, without notice to the secured creditors, and with the consent of the defendant, a receiver of the property of the defendant was appointed. Prior to the commencement of these proceedings the defendant had issued a series of debenture bonds called "Series A," in the following form:

"The Kansas Trust and Banking Company of Atchison, Kansas, for value received, is indebted unto the registered holder hereof if registered, otherwise to —, in the sum of — dollars, which shall be due on the — day of —, 18—. This bond draws interest at the rate of — per cent. per annum, payable semiannually, according to the interest coupons hereto attached. * * * This bond is secured by mortgages on real estate deposited with the First National Bank of Atchison, Kansas, in trust, in ac-

cordance with the certificate of said bank hereto attached, and without which certificate this bond is not valid.

[Signed]

"The Kansas Trust and Banking Company."

The certificate indorsed on the said debenture bonds was in the following form:

"I, —, president or cashier of the First National Bank of Atchison, Kansas, hereby certify that as security for the due payment of the debenture bond of the Kansas Trust and Banking Company of Atchison, Kansas, hereto attached, there are deposited in this bank mortgages on real estate equal in amount to the amount of said bond. Said mortgages are not to be removed from the custody of the bank until the said bond is paid, and evidence of such payment is furnished to said bank, except on the condition that the said the Kansas Trust and Banking Company shall deposit in place thereof other mortgages equal in amount to those, or cash, at the option of the Kansas Trust and Banking Company."

This certificate was signed by the president or cashier of the bank. The face value of these outstanding bonds is \$18,000, and they are all owned by Mr. A. G. Otis. They were secured by real-estate mortgages and their accompanying bonds or notes, which had been made by third parties, and deposited with the bank as security for these bonds, under the contracts above set forth. Under an order of this court, these collaterals, which amount upon their face to about \$18,000, but which are insufficient in value to pay these debenture bonds, were delivered to the receiver of the defendant's property pending an application of Mr. Otis for an order for their delivery to him, or to a trustee or receiver for his benefit. That application is now to be disposed of.

The application must be granted. The receiver in this case represents the insolvent debtor and its unsecured creditors. He has no higher right to these collaterals than the debtor had. He is the receiver of the property of the insolvent debtor. He is not the receiver of the property of the secured creditors of that debtor. The contract of the debtor was that these mortgages should not be removed from the custody of the bank until the bonds were paid, except as other mortgages, equal in amount, were deposited in their place. The debtor has not paid, and cannot pay, the bonds. The collaterals are of less value than the amount of the debt they are pledged to secure. Mr. Otis owns that entire debt, and is in reality the only person beneficially interested in the notes and mortgages pledged to secure it. The only right the defendant or its receiver has here is the right to redeem these collaterals by paying the bonds, and that is a right without value.

The appointment of a receiver of an insolvent corporation on the bill of an unsecured creditor does not avoid its contracts with secured creditors, or deprive them or their trustees of the right to possess, control, and enforce their securities. High, Rec. § 359; In re Dissolution of Home Provident Safety Fund Ass'n, (N. Y. App.) 29 N. E. Rep. 323. When the receiver pays the bonds he will be entitled to the possession of the collaterals, but until that time the creditor to whom they belong, or a trustee for his benefit, is entitled to their possession, and is entitled to enforce their collection in the interest of the creditor for whose benefit they were pledged.

I will appoint a trustee, to whom the receiver may deliver these bonds, and who may proceed to collect them, to pay the debenture bonds from their proceeds, to report his acts to this court, and to pay over any surplus remaining after paying the bonds, if any there should be, to the receiver of the defendant's property.

STREET v. MARYLAND CENT. RY. CO. et al.

(Circuit Court, D. Maryland. September 25, 1893.)

RECEIVERS—APPOINTMENT AND REMOVAL.

While the suggestions and recommendations of persons who substantially own property about to be intrusted to a receiver are of great weight with the court in making an appointment, yet the court will not remove a railroad receiver, whose management has been able, efficient, and impartial, at the request of the controlling stockholder and his associates, when the litigation is not for the purpose of foreclosing a mortgage, but is instituted by a minority stockholder on the ground that the bonded indebtedness and the issues of stock are being vastly increased without any corresponding increase of assets, and mainly for the benefit of the controlling stockholder.

In Equity. Suit brought by Joseph M. Street against the Maryland Central Railway Company, the Baltimore & Lehigh Railroad Company, the Baltimore Forwarding & Railroad Company, the Mercantile Trust Company of Baltimore, trustee, and John H. Miller, Moses H. Houseman, and William Gilmore. Heard on motion to remove a receiver. Denied.

Stephenson A. Williams, for complainant.

John P. Poe, R. R. Boardman, N. P. Bond, D. G. McIntosh, and R. M. Venable, for respondents.

Before BOND, Circuit Judge, and MORRIS, District Judge.

BOND, Circuit Judge. The motion before us is the application of the Baltimore & Lehigh Railroad Company and John Henry Miller and Moses H. Houseman for the removal of William H. Bosley from the receivership of the Baltimore & Lehigh Railroad Company and the Baltimore Forwarding & Railroad Company, to which position he was appointed in this case by the circuit court for Hartford county on 17th May, 1893. The grounds for removal of this receiver stated in the petition of Miller, Gilmore, and Houseman are (1) that Bosley was improperly appointed; (2) that his appointment was the result of an unlawful conspiracy between the complainant, Street, Crumpton, and Kennefick; (3) that he has appointed Crumpton general manager of the railroad, although aware that Crumpton is incompetent; (4 and 5) that he desires to promote certain railroad schemes not in the interest of the Baltimore & Lehigh Railroad Company, and has unfairly reported the condition of its property; (6) that he has not sufficient experience to enable him to conduct and manage the property.

The petition of the Baltimore & Lehigh Railroad Company states substantially the same reasons, and also asks for Bosley's removal

upon the additional ground that as the court of common pleas for York county, Pa., has appointed a different person, Mr. Taylor, as receiver to operate that portion of the railroad which is in Pennsylvania, the evils of a divided management and the want of co-operation is disastrous in its results.

Petitions have also been filed by holders of the first and of the general mortgage bonds of the Maryland Central Railway, by holders of the bonds of the York & Peach Bottom Railroad Company, all uniting in asking that the whole railroad may be brought under the control of one receiver.

In considering the matters brought before us by these petitions, it is but right to say that, however the appointment of Mr. Bosley may have been brought about, there is no testimony which leads us to believe that he was a party to any combination of persons in any alleged scheme to force the railroad into liquidation for ulterior ends. He does not appear to have done more than agree to accept the receivership, if appointed. He does not appear to have had any previous connection with the property or with the parties. As to his performance of the duties of the receivership during the four months since his appointment, he appears to have acted with energy, ability, and good judgment. He has had previous experience in like positions, and has the confidence which experience gives in meeting the difficulties in running a railroad insufficiently equipped, in need of repairs, embarrassed by litigation, and pressed by creditors. Nothing has been made to appear against him showing partiality or favoritism, or a disposition to lend himself to any sinister proceedings of any litigant. His appointment of Crumpton has been criticised, Crumpton being one of those who assisted in getting up the case in which the receiver was appointed, but Crumpton had been general manager of the railroad from July, 1891, to April, 1893, and was second vice president of the forwarding and railroad company at the time of Bosley's appointment, so that up to that time he had the confidence of those who now object to him, and was kept in office by them. Mr. Bosley's business qualifications, his freedom from connection with any previous transactions of the defendants, the knowledge of the affairs of the defendant corporations which he has acquired in the four months since his appointment, make it, in our opinion, desirable that he should be retained.

It is true that the suggestions and recommendations of those who substantially own the property intrusted to a receiver should weigh with the court in selecting one. In this connection, however, it is proper to consider the nature of this proceeding and the charges of the bill of complaint. This is not the case of the appointment of a receiver merely to preserve and keep going a railroad pending the obtaining of a decree for sale. It is the complaint of a stockholder who charges that the value of his shares of the corporate property have been diminished by the improper appropriations of the funds of the corporation by those who have had control of it. It is charged that large amounts of its bonds issued by the defendants have been unlawfully diverted to private uses, and, although issued, are not in the hands of innocent holders, and that the corporate

stock has been enormously increased solely for the profit of these same persons or one of them.

The facts charged are in substance these: That the Maryland Central Railway Company was organized in 1888 with 4,000 shares of stock, of the par value of \$400,000, and subject to a mortgage of \$850,000; that it has no property now which it did not have then, except the stock which it holds of the York & Peach Bottom Railroad, which is a narrow-gauge railroad, 40 miles in length, subject to a mortgage of \$250,000; that since 1888 the Maryland Central Railway Company has been organized as the Baltimore & Lehigh Railroad Company, with a capital stock of 30,000 shares, of the par value of \$3,000,000, of which the defendant Miller holds over 23,000 shares; that the original mortgage of \$850,000 has not been reduced, and there has been put upon the property an additional mortgage under which \$3,500,000 of bonds may be issued, of which \$900,000 have been actually issued, nearly all of which have been given to the defendant Miller; that these bonds were voted to Miller for certain purposes, not one of which he has accomplished, except that he has obtained the stock of the York & Peach Bottom Railroad at a cost in money of about \$150,000; that for this great increase in bond indebtedness there is no increase of assets, but there is a considerable floating debt and great financial embarrassment, and that the railroad and equipment have deteriorated; that during all this time Miller has held a large majority of the stock, which has enabled him to appoint and control the directors; and that he holds nearly all the stock of the forwarding company, to which the road has been leased.

The facts alleged can hardly be said to have been denied by the answers of the defendants, although they deny all imputation of fraud, and they deny the right of complainants to demand an investigation. Under such circumstances, as it is the legality and bona fides of the transactions by which \$900,000 of the general mortgage bonds have been issued to Miller, and as it is his management of the corporate finances and property, which is to be inquired into, it is obvious that it may be no objection to a receiver, otherwise unobjectionable and competent, that he is not acceptable to the defendant Miller, and those who have been with him in his management, and it is apparent that the holders of general mortgage bonds obtained through Miller may not be unbiased in their attitude towards the investigation. But the holders of the \$850,000 first mortgage bonds issued by the Maryland Central Railroad Company, which are conceded to be a first lien, have an undisputed and vital interest in the property not affected by any charges in the bill, and their recommendations are entitled to weight. From representations on their behalf, it appears that they do not object to Mr. Bosley, except so far as the hostility of others to him may prevent the whole road from being brought under one receivership and operated under one management. If the whole road were within our exclusive jurisdiction, we should appoint Bosley as sole receiver for the whole road, but under the present circumstances the petitions for his removal now presented must be dismissed.

SOUTHERN PAC. R. CO. v. CITY OF OAKLAND et al.

(Circuit Court, N. D. California. August 21, 1893.)

1. PRELIMINARY INJUNCTION—ENJOINING TRESPASSES.

A preliminary injunction will be granted to restrain city authorities, in opening a street, from the removal of a fence, building, and tracks of a railroad from wharf property necessarily connected with the railroad system in its state and interstate business, since such removal constitutes a trespass which goes to the destruction of the property in the character in which it is enjoyed by the railroad company.

2. SAME—EXTENT OF PRELIMINARY INJUNCTION.

A preliminary injunction merely preserves matters in statu quo, and cannot direct the restoration of property to its condition before being disturbed.

In Equity. Bill by the Southern Pacific Railroad Company against the city of Oakland and others. Heard on motion for a preliminary injunction. Granted.

W. F. Herrin, H. S. Brown, A. A. Moore, and J. E. Foulds, for complainant.

Jas. A. Johnson, E. B. Pomeroy, W. L. Hill, W. R. Davis, E. J. Pringle, and H. A. Powell, for respondent.

McKENNA, Circuit Judge. A precise and detailed definition of the issues as to title is not necessary. Generally it may be said that the plaintiff alleges title, and the confirmation of this title by a judgment for the premises, obtained by C. P. Huntington against the city of Oakland in this court, and alleges certain acts of encroachment done, and others threatened. The defendants deny the title of the plaintiff and the judgment, and assert title in the city of Oakland, and the dedication, besides, of the premises as a public highway, and justify the acts of encroachment by their authority and duty as public officers.

These titles and rights of the parties, respectively, remain to be established; but the plaintiff alleges that it entered into possession of the whole of said premises on the 1st day of January, 1890, and ever since has been, and still is, in the possession thereof as a common carrier by railroad, and engaged in the transportation of state and interstate commerce; that in connection with its lines of railroad, and as an adjunct and necessary appurtenance thereto, and for the purpose of maintaining communication between portions of its road situated in San Francisco and the county of Alameda, it operates lines of steamers, one of them running into the estuary of San Antonio, and landing at a wharf or slip upon the said premises; that upon the premises there are also railroad tracks, warehouses, etc., all of which, with the personal property contained in them, were and are used in, and are necessary in the prosecution of, its business, and from the date last aforesaid until the 6th day of July, 1893, it was quietly in the possession of all of said premises, and the improvements and fixtures appurtenant thereto, and used and operated the same for the purpose aforesaid; and that all of it had

been continuously by plaintiff, and its predecessors in interest, used for like purpose for a period aggregating 23 years prior to January, 1890.

The answer admits that plaintiff went into possession on the 1st day of January, 1890, and is a common carrier, as it alleges, and has on the premises the structures alleged, but denies that the tracks, offices, or structures were or are necessary to the prosecution of its business. The defendants also admit that the plaintiff was quietly in possession, but "deny [I quote literally] that all the property and premises aforesaid have been continuously by the complainant, or its predecessors in interest, used for a period aggregating twenty-three years." By a well-known rule of the construction of pleadings this denial puts in issue the exact period of possession only, and it is consistent with a possession for a period aggregating 22 years. A long time, and pending an inquiry as to its rightfulness or wrongfulness, entitled the plaintiff to protection, if the acts of the defendants may be restrained by a court of equity. *Northern Pac. R. Co. v. City of Spokane*, 52 Fed. Rep. 428. That as to these acts the bill alleges that the defendants are the mayor and council of Oakland and its superintendent of streets, respectively. That the defendants, accompanied by a large body of men, with great violence, and in a riotous manner, entered into and upon the premises, and tore up certain of the railroad tracks thereon, pulled down certain of the fences and structures thereon. And plaintiff also alleges that the defendants will continue to disturb the possession of the plaintiff, and tear up and remove the remaining tracks and structures, and interfere with the replacement of those removed, and prevent plaintiff from exercising its franchises. There is also an allegation of a threat of defendants as mayor and council to pass orders to enable the *Davie Ferry & Transportation Company* to take possession of the property, and of threats of arrest of plaintiff's servants.

The answer of defendants is that the possession of plaintiff was that of an intruder and trespasser, and that its possession was maintained in part by means of a high and strong fence erected and maintained across the entire width of said wharf, and prevented the use thereof as a public street and wharf by the public, or by any common carrier except the plaintiff. That the defendant *Harrison*, as superintendent of streets, and in the performance of his duties, and in pursuance of the direction of the mayor and council of the city, on the 6th day of July, 1893, in a peaceable and quiet manner, and with only such assistance and workmen as were necessary, removed with all possible care, to avoid injury thereto, the said fence and a small frame building or cabin and its contents from the roadway of said Broadway wharf. The defendants deny that they tore up railroad tracks, except a small portion, and this only because it was necessary to prevent the plaintiff from blockading the street with a train of cars brought there for the purpose. The defendants also deny that they intend to interfere with or disturb the plaintiff's use or possession of the premises, consistent with the use by the public, and allege an intention, by lawful means and agen-

cies, to keep the same free and open as a public highway, and deny the intention to enable the Davie Transportation Company to take possession of the premises.

It is claimed by the defendants that their acts were and will be but trespasses, and cannot be enjoined. It is well settled that trespasses, as such, which are susceptible of pecuniary compensation, will not be enjoined, but it is as well settled that, if they are not so susceptible, they will be enjoined. The immediate premises are a wharf,—a necessary connection, it is said, with the plaintiff's railroad system, and an adjunct of its business, state and interstate. If this is true, it would be hard to assign it a money value. The money worth of a part of a great system would be very difficult to estimate, and it would not be easier if the boat line is independent of the railroad system, as alleged by defendants. In such case, who could fix, or by what test could be fixed, a money measure of damages to the plaintiff if the city of Oakland should assume control of the wharf pending the litigation, as it claims the right and asserts the purpose to do, and deny its use to the plaintiff, or give it only a partial use with other boat lines. Besides, even if the acts of defendants are "trespasses" in the ordinary sense, (and so to call them is to underrate them and their purpose,) they go to the destruction of the property in the character in which it is enjoyed, and may be properly enjoined. This is clearly decided by the case of *Jerome v. Ross*, 7 Johns. Ch. 315, cited by defendants. See, also, *Dying Establishment v. Fitch*, 1 Paige, 97, and *Livingston v. Livingston*, 6 Johns. Ch. 497; 2 Story, Eq. Jur. § 928. But the acts of the defendants are not trespasses in the ordinary sense; that is, mere fugitive and temporary intrusions on another's right. They are acts of ownership, and, if executed, will amount to a permanent appropriation of the property. This right may or may not be ultimately established in the city of Oakland. It may not now be assumed.

But what should be the extent of the preliminary injunction? The defendants contend that it cannot be made to undo that which has been done. The plaintiff contends, contra, that it should have such restraint as to permit the restoration of the property to the condition it was in before it was disturbed. In 1 High, Inj. § 4, the rule is laid down as follows:

"The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any questions of right, merely to prevent the further perpetration of wrong, or the doing of an act whereby the right in controversy may be materially injured or endangered. * * * The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction, courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of, and preserve matters *in statu quo*."

The text is supported and illustrated by several cases. In *Murdock's Case*, 2 Bland, 461, the action was to restrain the erection of a fence, and to remove the fence already erected, which included part of plaintiff's land. The injunction was denied as to the fence, which was erected, the court saying "that plaintiff asked

the court now and at once to put forth in his behalf its remedial, as well as its conservative, powers," and added: "The principal object of an injunction in cases of this kind is to prevent irreparable injury by preserving things in their present state, but, if an injunction were to order anything pulled down or undone, it is obvious that it might be itself used as a means for producing that very kind of irreparable injury to the defendant which the bill charged him with being about to perpetrate against the plaintiff."

The court said, however, that there were cases which went to the verge of ordering things undone, and cited *Lane v. Newdigate*, 10 Ves. 193, decided by Lord Eldon. The case, however, was not followed as authority, and the comments on it in subsequent cases are instructive. Its facts were that the plaintiff, Lane, was the assignee of a lease of a mill property granted by the defendant, with covenants for the supply of water from canals and reservoirs on the defendant's premises. The allegation was that he had allowed the reservoirs to be out of repair, and had removed a certain stop gate. Lord Eldon expresses a difficulty whether it was according to the practice of the court to decree or order repairs to be done, but afterwards said:

"So, as to restoring the stop gate, the same difficulty occurs. The question is whether the court can specifically order that to be restored. I think I can direct it in terms which will have the effect. The injunction I shall order will create the necessity of restoring the stop gate, and attention will be had to the manner in which he is to use the lock, and he will find it difficult, I apprehend, to avoid completely repairing these works."

This case, as I have said, was never regarded as authority in England, and was rejected as a precedent in *Blakemore v. Canal Navigation*, 1 Mylne & K. 185, and the principle laid down "that only such restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay further injury, to keep things as they are at present."

In *Farmer's R. Co. v. Reno, etc., Ry. Co.*, 53 Pa. St. 224, Mr. Justice Strong said:

"The sole object of such an order [an interlocutory injunction] is to preserve the subject of controversy in the condition in which it is when the order is made."

In *Audenried v. Railroad Co.*, 68 Pa. St. 370, Justice Sharswood, a very able jurist, reviews a number of cases, and quotes with approval the language of Justice Strong, *supra*. The facts were that the defendants were the owners of railroads from the Schuylkill coal regions for transporting coal to the river Delaware for shipment for places outside of the state of Pennsylvania, affording the only access from some of the collieries to the market. The coal was loaded on vessels at wharves owned by the defendants, who allotted space to shippers. The space allotted to plaintiff was taken away from him and allotted to others. This action was charged as illegal, and as practically a refusal to allow plaintiff to carry on his business. The plaintiff prayed, among other things, that the defendants be restrained from refusing facil-

ities to plaintiff, and that they be restrained from allowing others as long as they refused plaintiff,—practically, a prayer against discrimination. The injunction was denied. In rendering the opinion of the court, the learned justice compares preliminary and final injunctions, confining the purpose and office of the former to restraint,—prevention simply; and this limitation is observed, he said, “by all the cases both in England and America.” Final injunctions may be made mandatory, commanding acts to be done, the reason of the distinction being that preliminary injunctions are granted when the rights of the parties are in controversy. A final injunction is granted when the rights of the parties are determined. In commenting on *Lane v. Newdigate*, *supra*, which the court said in *Murdock’s Case* went to the verge of ordering things undone, Justice Sharswood condemned both the manner and extent of the injunction granted. He said that it was “not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing ought never to attempt to accomplish it by indirection. Injunction, as a measure of mere temporary restraint, is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go further.”

The principle of these cases is announced also in the case of *Northern Pac. R. Co. v. City of Spokane*, already quoted, found in 52 Fed. Rep. 428, and cited by the plaintiff. This was an action in which the railroad company had erected a warehouse on what was claimed to be a public street. The city threatened to remove it. There was also a controversy as to whether the premises were within the fire limits or not, and hence subject to the order of the city as to the kind of erection. The court granted an injunction against the city as to the removal of the warehouse which was on the premises, but so modified the order as not to preclude the city from requiring an inspection of the plans for the erection of any new building, and used the following language:

“The purpose of a restraining order *pendente lite*, in all cases of this nature, is to preserve property which is the subject of controversy in its existing condition until a final hearing and determination of the cause; and the order should be limited so as to simply preserve the status quo, and should not give either party an advantage by proceeding in the acquisition or alteration of property the right to which is disputed, while the hands of the other party are tied.”

Of course, it is contended by the plaintiff in this case that the “status quo” means the condition of the property before the disturbance. As we have seen by the authorities, this contention cannot be supported. It may be said, however, that in all these cases the injunction commanded something affirmative of the defendant; while in the case at bar the relief prayed for can be obtained by the simple repressive power of an order restraining the defendants from interfering with the plaintiff’s property. This is true, but it could be made true in any other case. It is not the form, but the effect, of the order which must be regarded. If it take or permit the taking from a defendant anything he has,

it would anticipate and forejudge the merits of the controversy, and transcend, as we have seen, the purpose of a preliminary injunction. As was said in *Murdock's Case*, supra, it would exert before final hearing the remedial, as well as conservative, powers of the court. The acts of the defendants were means of taking possession of what is alleged to be a highway,—a possession which could be only taken by removing obstructions, and can only be retained by preventing their restoration. To enable plaintiff to restore them by restraints on defendants would enable it to take a possession it did not have at the commencement of the suit, and which, in the case of *Farmer's R. Co. v. Reno, etc., Ry. Co.*, supra, and other cases, Justice Strong said could not be done by a preliminary injunction. The other points made and cases cited by counsel are more properly applicable at the final hearing than now. The restraining order, therefore, will be continued, but modified, so as not to permit the undoing of what has been done.

SKINNER v. FT. WAYNE, T. H. & S. W. R. CO.

(Circuit Court, D. Indiana. October 12, 1893.)

No. 8,766.

1. CORPORATIONS—STOCK—TRANSFER—IRREVOCABLE POWER OF ATTORNEY.

A financially embarrassed railroad contractor entered into a written agreement with a creditor, assigned to him a railroad construction contract and certificates of its stock issued in part payment for construction, and executed a power of attorney to transfer the stock; and the several instruments, when construed together, showed that the contractor intended, not only to pledge the stock as collateral security, but to invest the creditor with the legal title and with unlimited power of disposition. *Held*, that the power of attorney to the creditor was irrevocable, as it was a power coupled with an interest, and that the railroad company could not refuse to transfer the stock on its books, as directed by the creditor, on the ground that the contractor requested that such a transfer should not be permitted.

2. SAME—BILL TO COMPEL TRANSFER OF STOCK—PARTIES.

The bill by the creditor to compel the corporation to transfer the stock on its books was not defective in that the contractor was not joined as a party defendant.

In Equity. Bill by Porter Skinner against the Fort Wayne, Terre Haute & Southwestern Railroad Company to compel a transfer of corporate stock. Decree for complainant.

Osborn & Lynde, for complainant.

J. M. Dawson, for defendant.

BAKER, District Judge. The exceptions of the defendant raise the single question whether the plaintiff is entitled to a decree, as recommended in the master's report, requiring the defendant and its officers to make or permit the transfer to the plaintiff of the stock mentioned in the bill of complaint on the proper registry or stock books of the corporation. This question must be determined by a consideration of the true construction and effect of

the several written instruments entered into between the plaintiff and E. P. Reynolds & Co. A large amount of testimony was taken and reported by the master minutely detailing the oral negotiations between the parties, and explaining what is claimed to be their true intent and meaning, from which the master has found that it was the intention of the parties by their written agreement to clothe the plaintiff with the absolute power to control the stock, and to deal with the same as he saw fit.

In the absence of fraud, accident, or mistake, properly averred and satisfactorily proved, all antecedent oral negotiations between the parties are merged in the written agreement, which becomes the sole medium of proof and the sole measure of the contractual rights and obligations of the parties. Oral testimony is competent to explain the situation of the parties to the subject-matter to enable the court, as nearly as it can, to read and construe the written agreement in view of all the attendant facts and circumstances under which it was entered into. Still, it is the written agreement, fairly interpreted to effectuate their intent, which admeasures the rights and liabilities of the parties to it.

In ruling upon the exceptions, the court will therefore exclude from its consideration all the testimony relating to the antecedent oral negotiations of the parties, and all which is explanatory of their intent and meaning; and, keeping in view the facts and circumstances leading up to the written instruments, it will endeavor to ascertain from them the rights and obligations of the parties. The facts, dehors the written instruments, material to the present inquiry, may be briefly stated. Reynolds & Co. were railroad contractors and builders, who had a contract with the defendant for the construction of about 30 miles of railroad extending from Bainbridge to Carbon, in this state. When a little more than 10 miles of the railroad had been substantially completed, the contractors became financially embarrassed, and were unable to proceed with the further performance of the contract. The plaintiff, either by loans of his own money to Reynolds & Co. or by assisting them as guarantor or surety to raise money, had advanced to and become liable for them to the amount of \$190,000. Reynolds & Co. were unable to repay to the plaintiff the money borrowed from him, or to assist him in paying the note on which he had become liable for them as guarantor or surety. They manifested a willingness to save the plaintiff from ultimate loss so far as they could. They had the contract for building the 30 miles of railroad, and had received on account of its part performance from the defendant certificates entitling them to \$245,000 of its first mortgage bonds, and \$207,900 of its paid-up capital stock, consisting of 2,079 shares, of the par value of \$100 each, and a small amount of railroad material.

The several writings consist of the written agreement in part copied into the master's report, the assignment indorsed on the contract for building the 30 miles of railroad, the assignments indorsed on the two certificates of stock, one being for 486 shares,

and the other for 1,513 shares, and the power of attorney executed by Reynolds & Co. to the plaintiff. These several instruments relating to the same settlement, and executed at substantially the same time must be construed together. The purpose to be subserved by the execution of these various writings, and by the delivery to the plaintiff of the contract, and of the certificates entitling the holder to first-mortgage bonds, and of the two certificates for 1,999 shares of stock, was to secure the plaintiff for the amount due to him from Reynolds & Co., and to invest him with the legal title to the same, with absolute power of disposition. The only right retained by Reynolds & Co. was by paying to the plaintiff the entire amount for which they were liable to him before the plaintiff had sold these securities, to require their reassignment to them, with the further right after their sale to participate in any surplus remaining after full payment of the indebtedness due plaintiff, with interest and costs. Construing these instruments together, it is apparent that Reynolds & Co. intended, not only to pledge the stock as collateral security, but also to invest the plaintiff with the legal title to the stock, with unlimited power of disposition, to more certainly effectuate the purpose of the pledge. The assignment indorsed on each certificate of stock was in these words: "For value received, we hereby sell, assign, and transfer to Porter Skinner the shares of stock within mentioned, and hereby authorize him to make the necessary transfer on the books of the corporation." The power of attorney authorizes the plaintiff to make all sales and transfers of the stock as fully and completely as Reynolds & Co. could make them if personally present and making the same. This power was coupled with an interest, and was irrevocable.

Counsel for defendant insist that the plaintiff, holding the stock as security for a debt, is not entitled to vote upon it. It is not now necessary to decide that question. Whether he is entitled to vote upon the stock at corporate elections or not, it is clear that he is entitled to be invested with the legal title to the stock, with the absolute power of disposition. As between the parties to the assignment, it is enough that the certificates of stock were delivered with authority to the assignee, or any one he might name, to transfer them on the books of the corporation. If a subsequent transfer of the certificate were refused by the corporation, it can be compelled at the instance of either of the parties to the assignment. *Johnston v. Laffin*, 103 U. S. 800; *National Bank v. Watson*, 105 U. S. 217. There is nothing in the statutes of this state forbidding the transfer of stock on the books of the corporation to a pledgee.

The defendant excuses its refusal to make or permit the proper transfer on the ground that it has been requested by Reynolds & Co. not to permit such transfer. The master finds, and the testimony clearly shows, the execution by Reynolds & Co. of the assignment and power of attorney, and that the president and the secretary and treasurer of the defendant were personally cognizant of their due execution. Reynolds & Co. have never drawn

the validity of the assignment and power of attorney in question. So long as the validity of these instruments remains unchallenged, the defendant has no discretion in respect to the transfer of the stock, and has no concern with the equities, if any, existing between the plaintiff and Reynolds & Co. The rule is that where there are opposing claimants to the stock, each claiming to be the owner, and to have the right to registry, the corporation may, by filing a proper bill, compel the claimants to interplead, and have their respective rights determined; but, to warrant the refusal of a registry, there must be a clear doubt as to the proper claimant. No such doubt is shown in this case.

The bill is not defective because brought against the defendant alone. The wrong complained of is that of the defendant. It has no rightful power to refuse to make or permit the required transfer, nor has it control over such transfer. *Bank v. Lanier*, 11 Wall. 369; *Webster v. Upton*, 91 U. S. 65; *Black v. Zacharie*, 3 How. 483.

The exceptions ought to be overruled, and it is so ordered. Let a decree be entered conformably to the recommendation of the master.

UNITED STATES v. TRANS-MISSOURI FREIGHT ASSOCIATION et al.
(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 236.

1. STATUTES—CONSTRUCTION.

Every statute must be read in the light of the general laws upon the same subject in force at the time of its enactment.

2. SAME—CRIMINAL LAWS—COMMON-LAW OFFENSE ADOPTED BY CONGRESS.

Where congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other definition in the act.

3. MONOPOLIES—RESTRAINT OF INTERSTATE COMMERCE.

The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) are the contracts, combinations, and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of that act.

4. SAME.

The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interest of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. *Shiras*, District Judge, dissenting, on the ground that this rule is not applicable to corporations charged with public duties.

5. SAME—COMMON-LAW RULE.

The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy.

6. PUBLIC POLICY—HOW DETERMINED.

The public policy of the nation must be determined from its constitution, laws, and judicial decisions.

7. SAME—INTERSTATE COMMERCE.

The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences.

8. EQUITY—HEARING ON BILL AND ANSWER—EVIDENCE.

When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted.

9. SAME.

Where the contract is admitted, but the allegations tending to show its sinister purpose, tendency, and effect contained in the bill are denied by the answer, and averments tending to show a just and honest purpose, tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed.

10. CONTRACTS—PUBLIC POLICY.

Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy.

11. SAME—RESTRAINT OF TRADE—ANTI-TRUST ACT.

A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the interstate commerce act. Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the anti-trust act when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been to diminish, rather than to enhance, rates, and there is no other evidence of its consequences or effect. Shiras, District Judge, dissenting. 53 Fed. Rep. 440, affirmed.

12. SAME.

No monopoly of trade or attempt to monopolize trade within the meaning of the anti-trust act is proved by such a contract.

13. SAME.

The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties.

Appeal from the Circuit Court of the United States for the District of Kansas. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and 18 railroad companies, under the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red river; thence via that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line'; thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to

the Gulf of Mexico, and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"Exceptions.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver and Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver and Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"Article II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and reg-

ulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said com-

pany that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Article III.

"The duties and powers of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3 of article 3 of the agreement.

"Article IV.

"Any willful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Article V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at

its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"Article VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"Article VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Article VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and changed by the association thus formed, and that they have complied

with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the act of congress of February 4, 1887, entitled, "An act to regulate commerce," and the acts amendatory thereof. They aver that under that act they were required to make all charges reasonable and just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the interstate commerce commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the interstate commerce commission under the act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the interstate commerce act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440.

J. W. Ady, for appellant.

George R. Peck and Joel F. Vaile, (A. L. Williams, N. H. Loomis, R. W. Blair, John M. Thurston, O. M. Spencer, C. A. Mosman, J. D. Strong, and W. F. Guthrie, on the briefs,) for appellees.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their

main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 congress recognized and adopted this rule of public policy, and by section 5 of "An act to regulate commerce," commonly called the "Interstate Commerce Act," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) prohibited such contracts between common carriers engaged in interstate or international commerce. That act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

The government bases this suit on these provisions of the latter act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and, third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the interstate commerce act; but it insists that the anti-trust act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the anti-trust act prohibits any contract between competing railroad companies that restricts com-

petition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the anti-trust act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that act? and, if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the anti-trust act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this act, but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the supreme court of the United States. *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658. Two years before its passage congress had enacted the interstate commerce law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well-settled rules of construction must be applied to ascertain the meaning and scope of the act:

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act.

(2) Where words have acquired a well-understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198; *In re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 1 Black, 459, 469; *McDonald v. Hovey*, 110 U. S. 619, 628, 4 Sup. Ct. Rep. 142.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the act, viz. "An act to protect trade and commerce against unlawful restraints and monopolies," that it was

such contracts, and such contracts only, that congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice Burrough in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whitaker v. Howe*, 3 Beav. 383. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallan v. May*, 11 Mees. & W. 652, 667. In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Cloth Co. v. Lorsont*, L. R. 9 Eq. 345. In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for 10 years. *Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Com-

pany the exclusive right to furnish all drawing room and sleeping cars required by that road during a period of 15 years was not an illegal restraint of trade, and sustained it. Chicago, etc., R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 11 Sup. Ct. Rep. 490. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal v. Girard's Ex'rs*, 2 How. 127, 197; *Swann v. Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, (Com. Pl. N. Y.) 14 N. Y. Supp. 277.

"It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart v. Transportation Co.*, 17 Minn. 372, (Gil. 348.) "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9. "Whatever destroys, or even restricts, competition in trade is injurious, if not fatal, to it." *Hooker v. Vandewater*, 4 Denio, 349, 353. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. Rep. 391; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, (Com. Pl. N. Y.) 14 N. Y. Supp. 277; *Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Anderson v. Jett*, (Ky.) 12 S. W. Rep. 670; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Morrill v. Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled non-members to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, and *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were ultra vires the corporations, and their purpose and effect was to monopolize trade, like *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; or cases of questionable authority, like *Com. v. Carlisle*, *Brightly*, N. P. 36, 39. See, contra, *Snow v. Wheeler*, 113 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Rutherford*, 106 Mass. 1, 14. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well-settled rules, and come within the well-defined classes, to which we have above referred.

A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competition from illegal contracts in restraint of trade. The decision in the leading case upon this subject, (*Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Amer. Ed.] pt. 2, p. 708,) the case which Chief Justice Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade, (*Gibbs v. Gas Co.*, 130 U. S. 409, 9 Sup. Ct. Rep. 553,) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews, Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. Chief Justice Parker, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis v. Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general post office, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea-carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the associa-

tion was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal, (23 Q. B. Div. 598,) and finally affirmed by the house of lords, (App. Cas. 1892, p. 25.) In *Perkins v. Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Navigation Co. v. Winsor*, 20 Wall. 64, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the supreme court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for 10 years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by noncompeting companies. *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 20 Atl. Rep. 383. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *In re Greene*, 52 Fed. Rep. 104, 118; *Horner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 363; *Cloth Co. v. Lorsont*, L. R. 9 Eq. 345, 354; *Wickens v. Evans*, 3 Younge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant, Ch. 540; *Mallan v. May*, 11 Mees. & W. 652, 657; *Whittaker v. Howe*, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pin. 123, 150; *Beal v. Chase*, 31 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 94, 27 N. E. Rep. 1005; *Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861; *Association v. Walsh*, 2 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244; 17 N. E. Rep. 335; *Brown v. Rounsavell*, 78 Ill. 589; *Jones v. Clifford's Ex'r*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress

competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 625; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*W. U. Tel. Co. v. American Union Tel. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2,000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was

held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a * * * contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Navigation Co. v. Winsor*, 20 Wall. 64; *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544; *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 20 Atl. Rep. 383; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389. But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the interstate commerce law, and the action that has been taken thereunder by the government commission which was created to enforce its provisions. The interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the interstate commerce act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation, (Interstate Commerce Act, § 1;) merchants may sell articles of like character and value for as many different prices

as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services, (Id. § 2;) merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place, (Id. § 3;) merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul, (Id. § 4;) merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules, (Id. § 6;) merchants may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after 10 days' public notice or from decreasing them except after three days' public notice, (Id. § 6;) merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions, (Id. § 12.) These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an act of congress three years before the anti-trust act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the interstate commerce commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the interstate commerce act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose.

In the fourth annual report of the commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose

of agreeing upon classifications and rates, and upon a great variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces."

And on page 21 of the same report the following:

"In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the second annual report on page 25, when speaking of the unity of railroad interests, the commission uses this language:

"But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 23, we find the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the first annual report, on page 33, the commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced

the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the interstate commerce commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester, etc., R. Co. v. Concord R. Co.*, *supra*. But, without entering into that discussion, it is sufficient to say that, in our judgment, there was no hard and fast rule in force when the anti-trust act was enacted which made every contract between railroad companies void on grounds of public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the interstate commerce act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to examine the contract which is alleged to be in violation of the anti-trust act, but before doing so a preliminary observation will not be out of place. The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the interstate commerce act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials

of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 21 Wall. 430, 437; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 577, 11 Sup. Ct. Rep. 656.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchel v. Reynolds*, *supra*, the unfortunate remark "that wherever such contract stat indifferenter, and for aught appears, may be either good or bad, the law presumes it prima facie to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 365; *Stewart v. Transportation Co.*, 17 Minn. 372, 391, (Gil. 348.) *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Metc. (Mass.) 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulation, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association, in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at

the next monthly meeting, and all members shall be bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two-thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employes and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight

and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the interstate commerce commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the traffic embraced by the agreement, are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the interstate commerce act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than 10 days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the interstate commerce act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the anti-trust act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employees. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such a competitor at its peril; but these provisions were necessary for the protection of members of the association against the attacks of nonmembers. Without such provisions unreasonably low rates established by the latter would draw away the busi-

ness of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the 15 days' notice in case of a warfare upon it by a nonmember.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. In *re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. Rep. 309, 317-321, 2 C. C. A. 174, 230-235; and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for 40 days unchanged. Practically the 15 representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not per-

ceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a 30-days notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after 15 days' notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the government that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances, the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the anti-trust act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the anti-trust act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the interstate commerce act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the anti-trust act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

THAYER, District Judge, concurs.

SHIRAS, District Judge, (dissenting.) I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

Assuming that the anti-trust act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessities of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and enforced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus in *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, the supreme court, speaking by Mr. Chief Justice Fuller, declared that—

“The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual

effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, (*Registering Co. v. Sampson*, L. R. 19 Eq. 462,) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, it is said:

"If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169, it is declared that—

"The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private, corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises

carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market. The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practically the business of the community, whether

in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs v. Gas Co.*, supra, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that—

“We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void.”

Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime neces-

sity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which of necessity affects the cost to the consumer, as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the supreme court in *Gibbs v. Gas Co.*, *supra*, are of such a public character that presumably they cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public

interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the interests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this particular the public has relied upon the effect of competition in keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract

establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation affording other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained competition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of legislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus established, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great

cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a car load or two of live stock or of wheat or other like products. Is the citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him.

If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying on of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the interstate commerce act, it is therein argued that this act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always

loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The interstate commerce act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant, compensation for the services rendered by them. The purpose of the interstate commerce act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railway companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the interstate commerce act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the interstate commerce act was not enacted for their eradication.

The primary purpose of that act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the act was, in the language used by the supreme court in *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. Rep. 970, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." The uniformity and equality of rates sought to be secured by that act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the act.

I fail, therefore, to perceive the force of the argument that the

adoption of the interstate commerce act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that act the community was certainly entitled to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that act which deprives the public of this safeguard. That act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of business.

In the opinion of the court are found citations from the reports of the interstate commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public busi-

ness they are engaged in, does not show that it was the intent of congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment, (whereby either fixed rates or a maximum or minimum limit are enacted by the statute or by provisions for the adoption of rates by a commission,) or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment, has congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least, were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the interstate commerce act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common-law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the interstate commerce act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that act in the light of the causes leading to its enact-

ment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the interstate commerce act imposes important restrictions, (not upon the right, however,) but upon the practice of railway companies to do as they please in the matter of making and altering rates. But how does that fact tend to show that the act places restrictions upon the rights of the public? The congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the interstate commerce act, and the action of the commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce, so long as the same are reasonable,—which is the position of the court,—then would it not follow that the right thus created by the interstate commerce act is abrogated by the later enactment found in the anti-trust act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the interstate commerce act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality. I cannot believe that such is the meaning of the interstate commerce and the anti-trust acts. When the latter act was adopted, it had been declared by the supreme court of the United States to be the law that, with regard to the classes of business that are of a public nature, and are carried on to meet a public necessity, contracts im-

posing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such a public character as of necessity places it in the class declared by the supreme court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the anti-trust act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the supreme court? The interstate commerce and anti-trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific Railway Companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great

majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no competing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate noncompetitive points are reasonable or not, and the provisions of the interstate commerce act forbidding a greater charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and noncompetitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizen residing at the noncompetitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence

of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one upon the subject of the charges to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus is found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood, and, moreover, it directly affects and controls the cost to the public of all the necessities of life.

The declaration found in article I of the contract shows upon its face the main purpose of the combination, it being therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential ele-

ment in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed intent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case, then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890.

WARREN v. BURT et al.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 177.

PRINCIPAL AND AGENT — INTEREST OF AGENT IN PURCHASE FROM PRINCIPAL—ACCOUNTING TO PRINCIPAL FOR PROFITS.

In a suit to compel a real-estate agent employed by plaintiffs, former owners of a farm in Illinois, to pay plaintiffs certain profits derived by them from an exchange negotiated by the agent, and to cancel a contract made in payment of his commissions, it appeared that the agent showed plaintiffs a tract of land in Missouri which had been for sale for years at \$9,000, stated it to be worth at least \$32,000, and persuaded them to contract for an exchange of properties with one of the defendants, having no interest in the tract, falsely stated by him to be the owner's agent. Another defendant obtained an option on the tract for \$9,500, and thereafter conveyed it to plaintiffs in fulfillment of the contract, and received a conveyance of the farm. To facilitate the exchange, still another defendant loaned plaintiffs the cash requisite to carry out the contract, and took back a trust deed therefor, and the agent waived his commission in cash, and took in lieu thereof a contract for one-half the profits to be derived from a future sale of the property. Subsequently, the agent traded the Illinois farm at a profit of about \$8,000, which was divided among all the defendants, the agent receiving \$1,050. Defendants had previously operated together in other "real-estate deals," and divided the profits. *Held*, that the agent's ignorance or concealment of the ownership or price of the Missouri tract, his waiver of cash commission, and his receipt of a share of the profits of the farm largely in excess of the usual commission were sufficient proof that he was interested in forwarding the schemes of his codefendants for a share in the profit, and entitled plaintiffs to the relief sought against him.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Bill by Robert F. Burt and Charles Scudder, public administrator in charge of the estate of Robert H. Gardner, against Thomas H. Warren, Frank G. Flanagan, Benjamin F. Hammett, Charles Hewitt, and Benjamin F. Webster, for an accounting of profits realized by the trade of a farm formerly belonging to Burt and Gardner, and to cancel a contract between them and defendant Warren. The bill was dismissed as to the defendants other than Warren, and he appeals from a decree against him in favor of plaintiffs. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree against Thomas H. Warren, a real-estate agent, directing him to pay back to his principals certain profits he derived from the purchase of property of theirs he was selling as their agent, and canceling a certain contract he took from them in payment of his commission. Robert F. Burt, one of the appellees, brought the bill for this relief against Warren, and Frank G. Flanagan, Benjamin F. Hammett, Charles Hewitt, and Benjamin F. Webster, who were alleged to be associates of Warren in the purchase, and he joined as a defendant Charles Scudder, the public administrator of the estate of Robert H. Gardner, the other principal, who had died. The suit arose from these facts:

On October 13, 1882, Burt and Gardner owned a farm of 285 acres situated in Madison county, Ill., a few miles from the city of St. Louis, Mo. They resided in Columbus, Ohio, and had employed the appellant, Warren, who resided in St. Louis, Mo., to negotiate a sale or exchange of their farm, and had agreed to pay him a commission of 5 per cent. on the price at which such sale or

exchange should be effected. A few days before October 13, 1882, they came to St. Louis. Warren took them to see a tract of land 32 acres in extent, situated in the city of St. Louis, which was then owned by Mrs. Fanny Deaver, told them that it was worth at least \$32,000, and persuaded and assisted them to negotiate and make a contract with one William J. Haynes, a straw man who was furnished by the defendant Flanagan, and who had no title or interest in the land, whereby they agreed to convey to him their farm, which they estimated in the trade at the value of \$18,000, and to pay him \$3,500 in cash for the Deaver tract, subject to a trust deed for \$5,000; that is to say, he persuaded them to agree to give their farm and \$8,500 for the Deaver tract. Before this contract was made, the defendant Flanagan, accompanied by the defendant Hewitt, had obtained an option from the agent of Mrs. Deaver to purchase this land for \$9,500 dollars, and, immediately after it was made, Flanagan bought it for that sum, and then conveyed it to Burt and Gardner in pretended fulfillment of the Haynes contract, and received from them a conveyance of their farm to himself. In August, 1883, the defendant Warren traded off this farm for Flanagan and his associates on such terms that they made a profit of about \$8,000 on their trades in it. When the latter trade was consummated, Warren received \$1,050, which was found by the court to be his share of the profits, and was alleged by him to be his commission on the latter sale. The contract of Burt and Gardner with Haynes was made October 13, 1882. On the same day, to facilitate the negotiations, Warren waived his right to his commission of 5 per cent. in cash, and took from Burt and Gardner, in lieu thereof, a written contract whereby they agreed that he should have one-half of the remaining proceeds arising from the sale of the Deaver tract after the expenses of selling it should be paid, and they should have received \$28,500, and interest at 6 per cent. from the date of the contract. He placed this contract on record, and at the commencement of this suit claimed an interest in this land under it. The complainant brought his bill for a cancellation of this contract, and an accounting of the profits which Warren and his associates made out of their trades in the Madison county farm, on the ground that, while Warren was pretending to act as agent of the complainant and Gardner, he was in fact a partner with the defendants Flanagan, Hammett, Hewitt, and Webster in the purchase of the Deaver tract for \$9,500 and its transfer to Burt and Gardner for their farm, and that he assisted to make and shared in the profits of the disposition of the farm made by Flanagan and his associates in August, 1883. The defendant Warren denied any knowledge of, or participation in, the purchase of the 32 acres, denied that he ever had any interest in the farm or the profits of the trades in it, and insisted that he had discharged his duty to his clients faithfully. The court below found that after Warren had learned on what terms his clients would exchange their farm for the Deaver tract he had entered into an arrangement with the defendants Hammett, Flanagan, Webster, and Hewitt to the effect that Flanagan should buy the 32 acres at the lowest possible price, that it should then be exchanged for the farm on the terms Burt and Gardner had assented to, and that whatever profits were made should be so divided that Flanagan, Webster, and Hewitt should have one-half, to be divided among them as they chose, and Hammett and Warren should have the other half, to be divided between them as they might agree, and that this arrangement was carried out. The case was then referred to a master to take an account of the profits Warren had received. He reported the amount to be \$1,050, the report was confirmed, and a final decree rendered, canceling the contract of October 13, 1882, between Warren and Burt and Gardner, and adjudging that the complainant Burt and the administrator of the estate of Gardner recover of the defendant Warren the \$1,050 profits he received, with interest and costs. From this decree, Warren appeals. The bill was dismissed against the other defendants because it was not alleged and proved that they were the agents of, or occupied any fiduciary relation to, Burt and Gardner.

John R. Christian, (Frederick A. Wind, on the brief,) for appellant.
William B. Thompson, (P. R. Flitcraft, Willi Brown, and Henry E. Mills, on the brief,) for appellees.

Before BREWER, Circuit Justice, and SANBORN, Circuit Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The law guards the fiduciary relations with jealous care. It aims to prohibit the possibility of a conflict between the duty of a trustee and his personal interest. It demands that he look solely to the interest of his *cestui que trust*; that the agent work with an eye single to the welfare of his principal. It prohibits the agent from all speculation or profit in the subject-matter of his agency, and visits such a breach of duty, not only with loss of the profits gained, but with loss of the compensation which a faithful discharge of duty would have earned. The interests of vendor and purchaser are diametrically opposed. To the vendor the highest price, to the purchaser the lowest price, is the greatest good. For the agent of a seller to permit himself to become interested in a purchase from his principal is to inaugurate so dangerous a conflict between duty and self-interest that this has long been wisely and strictly forbidden. No man, whether he be principal or agent, can be a vendor and a purchaser at the same time, and an agent of a vendor who intentionally becomes interested as a purchaser in the subject-matter of his agency violates his contract of agency, betrays his trust, forfeits his commission as agent, and is liable to his principal for all the profits he makes by his purchase. *Michoud v. Girod*, 4 How. 503, 554, 555; *Crump v. Ingersoll*, 44 Minn. 84, 46 N. W. Rep. 141; *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. Rep. 785; *Jacobus v. Munn*, 37 N. J. Eq. 48, 53; *Moore v. Zabriskie*, 18 N. J. Eq. 51; *Perry, Trusts*, § 919; *Bank v. Tyrrell*, 27 Beav. 273, 10 H. L. Cas. 26; *Panama, etc., Tel. Co. v. India Rubber, etc., Co.*, 10 Ch. App. 515, 526; *Bent v. Priest*, 86 Mo. 475, 482.

There is no contention concerning these propositions of law. It is conceded that if Warren, while he was the agent of the vendors, entered into an arrangement with any of the purchasers whereby he was to have an interest in the purchase, or the profits of the purchase, of the Deaver tract, or of the farm for which it was exchanged, the decree should be affirmed. It is conceded that he was the agent of these vendors to effect an exchange of their farm for other property, and that, as such, he advised and persuaded them to effect the exchange in question; but it is strenuously insisted that he was not interested in Flanagan's purchase of the Deaver tract, or in the profits of the exchange of this tract for the farm. The court below found that he was so interested, and the only question presented by the assignment of errors in this case is whether the evidence warrants that conclusion. The result below casts so serious an aspersion upon the character of the agent for honor and integrity that this case demands, and has received, the most careful and patient consideration. The profits of the transaction were finally realized in 1883 by an exchange of the farm for some houses on Caroline street, in St. Louis, and the disposition of these houses through trust deeds and a conveyance of the fee. The witnesses, in speaking of this transaction, from its inception in the

purchase of the Deaver tract, through the exchange of the farm for that 32 acres, the trade of the farm for the Caroline street houses, and the disposal of those houses for money, call it a "real-estate deal." The following facts respecting this deal are either admitted or conclusively proved by the record: The defendants Frank G. Flanagan, Benjamin F. Hammett, Charles Hewitt, and Benjamin F. Webster were dealers in real estate in St. Louis, and were all interested in and shared in the profits of this "deal." The defendant Warren was a dealer in real estate, and well acquainted with all of these defendants. Hammett and Warren had been partners in the purchase and sale of many pieces of real estate where the latter furnished the information and the former the money. Webster and Flanagan were general partners, and Hewitt had been a partner with them in the purchase and sale of many pieces of real estate where he furnished the information and they supplied the money. These five men had before been interested together in the purchase and sale of some real estate, and in every such case Hammett and Warren had received one-half the profits, and Flanagan, Webster, and Hewitt the other half. The Deaver tract of land had been for sale for many years for about \$9,000. Before it was shown to Burt and Gardner, Flanagan, in the presence of Hewitt, obtained an option to purchase it for \$9,500 from the agent of the owner, Mrs. Deaver. Before this tract was shown to Burt and Gardner, Hewitt had informed Warren that it was the cheapest piece of property in the city at the price it could be bought for, but he was unable to remember whether he told him the price at which it could be bought. After Warren had received this information, and Flanagan had obtained this option, Warren, in company with either Hewitt or Hammett, took his principals, Burt and Gardner, to see this land; told them that it was worth from one thousand to fifteen hundred dollars an acre; that Flanagan was Mrs. Deaver's agent and controlled it; and advised and persuaded them to make the contract with Haynes to give their farm and \$3,500 in cash for this tract, subject to an incumbrance of \$5,000. Burt and Gardner objected to paying Warren's commission and the \$3,500 in cash, and thereupon, in order to effect the trade, Hammett agreed to loan them the \$3,500 on their trust deed upon the Deaver tract second to the \$5,000 incumbrance, and Warren took the contract in suit in lieu of his commissions. Flanagan produced the man Haynes, who signed the contract of exchange with Burt and Gardner, and then they returned to their residence in Columbus, Ohio. This contract was made October 13, 1882. On October 18, 1882, Mrs. Deaver made the deed of her tract to Flanagan. On the same day, Flanagan made the deed of this tract to Burt and Gardner. On October 19, 1882, Burt and Gardner made a trust deed of the Deaver tract to Hammett's trustee to secure their notes to Hammett for the \$3,500, and on the same day they made a deed of their farm to Flanagan. These deeds were all placed in trust with one Obear, in the city of St. Louis, where they remained pending the perfection of the titles until November 27, 1882, when they were delivered. On the next day the defendant

Hewitt sold the notes of Burt and Gardner that were payable to Hammett, which the latter had indorsed without recourse, for \$3,200. The amount of money paid for the Deaver tract was only \$4,500, as the \$5,000 incumbrance was deducted from the price, so that the dealers obtained the farm for about \$1,300. In August, 1883, the defendant Warren negotiated an exchange of this farm, and 80 acres adjoining it that Hammett owned, for the houses on Caroline street, which were immediately disposed of, so that a net profit of a little over \$8,000 was realized from the deal. Immediately after the trade of the farm for the Caroline street houses, Hammett paid Warren the \$1,050, which they testify was his commission for making this exchange, but which the court has found was a part of the profits of the transaction. Hammett then paid half of these profits to Flanagan and Webster, who divided with Hewitt, and this "real-estate deal" was closed.

It was the duty of this agent, Warren, to use reasonable diligence to learn the lowest price at which the Deaver tract could be bought, and to buy it for his principals, or give them an opportunity to buy it, at that price. If they did not wish to buy, and desired only to make an exchange of their farm for other property, then it was his duty to use diligence to get information of the price, and communicate it to them, to the end that they might make the best trade possible. This 32 acres of land had been for sale for \$9,000 for years. A single honest effort by Warren would have disclosed its price. His friends Flanagan and Hewitt had no difficulty in learning it, and obtaining an option to purchase it for \$9,500, before Warren took his clients to see it. It is perfectly obvious that they never intended to accept the offer, or to buy the land, unless Warren succeeded in persuading his clients into some trade very advantageous to them; indeed, Flanagan testifies that he did not have the money to pay for it. The contract with Haynes, who had no money or property or interest in this land, was but a device to conceal the real parties in interest. This Haynes contract was made October 13, 1882, and the deeds were not exchanged until November 27, 1882, although Flanagan closed his option for the purchase October 18, 1882. During all this time, Warren was corresponding with his clients about consummating this trade, and at one time arranged an extension of time to complete it. Instead of a cash commission of \$900 he took an agreement for one-half the surplus proceeds above \$28,500 and interest, to be realized at some indefinite future time from the sale of a piece of land that had just been bought for \$9,500. It is incredible that this agent, if he was expecting no other compensation, should have waived his commission for such a contract. It is incredible, if he was working solely in the interest of his principals, that he could not, or did not, learn and know who owned this land, and what its price was, before the Haynes contract was made; that he could be told that it was the cheapest piece of property in St. Louis, and not learn that its price was \$9,500 and not \$26,500; that his friend Flanagan could have

bought it at this price, and have held it from October 18th to November 27th, without his learning the price paid for it; and, if he did learn it, it is incredible, if he was working solely in their interest, that he would permit his clients to trade away a farm they valued at \$18,000, and that was worth at least \$5,000, for a bare thousand dollars, for that amount of money would have bought the Deaver tract, subject to the two trust deeds under which Burt and Gardner took it. There is but one rational explanation of such ignorance or concealment of facts, such carelessness of his client's interest. It is that he was interested with the purchasers, and forwarding their scheme in consideration of a share in its profits. In the light of that conclusion, his ignorance or concealment of Mrs. Deaver's ownership of the land and her price for it, his waiver of his cash commission due from his principals, his receipt of the \$1,050 from Hammett in August, 1883, on the exchange of the farm, that realized only about \$11,000,—an amount far in excess of the usual commission of 5 per cent. on such trades,—his entire course of action becomes consistent and reasonable. The portions of the evidence to which we have adverted are amply sufficient to warrant this conclusion, and there are other indications in this record, many of them slight in themselves, but which together urge us with compelling force to the same result.

Moreover, the circuit court investigated this question, carefully examined this evidence, and came to this conclusion. The case was then referred to a master to take an account of the profits appellant had derived from the transaction. His report was received, excepted to, and confirmed by the court.

Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. Rep. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. Rep. 355; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. Rep. 885; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. Rep. 821.

The decree below is affirmed, with costs.

BOOK et al. v. JUSTICE MIN. CO.

(Circuit Court, D. Nevada. September 18, 1893.)

No. 568.

1. MINING CLAIMS—LOCATIONS.

The location of a vein or lode, under the mining laws of the United States, is made by taking up a piece of land in the form of a parallelogram, not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location must be distinctly marked on the ground, so that its boundaries can be readily traced.

2. SAME—MARKING OF BOUNDARIES—SUFFICIENCY OF.

The question as to the sufficiency of the marking of the boundaries depends to some extent upon the character and condition of the ground located. Where the location is made upon a comparatively barren hillside, the posting of stakes at each of the four corners of the location, either by driving the stakes into the ground, or building of stone monuments so as to keep the stakes in place, is a sufficient compliance with the provisions of the law.

3. SAME—WHEN RIGHT OF POSSESSION BECOMES VESTED—REMOVAL OF STAKES.

When the location is marked so that its boundaries can be readily traced, the locator's right of possession becomes fully vested, and cannot be divested by the removal or obliteration of the stakes, monuments, or notice, without the act or fault of the locator, if he performs the other acts required by law.

4. SAME—NOTICE OF LOCATION.

The mining laws of the United States do not require any written notice to be posted upon the location when made, and, in the absence of any local rule or regulation or state law requiring a notice to be posted, the location, the boundaries of which are properly marked upon the ground, is valid without the posting of any notice.

5. SAME—LOCATION NOTICE LIBERALLY CONSTRUED.

Where the statutes of the state, or local rules and regulations of miners, require notices to be posted upon the ground at the time the location is made, the construction given to the notices should be liberal, not technical.

6. SAME—COURSE OF LINES CONTROLLED BY STAKES.

A mistake in the notice as to the direction and course, being "northerly" instead of "northeasterly," does not invalidate the location. Positive exactness as to the course is not required. The stakes and monuments referred to in the notice, and posted upon the ground, will control the direction stated in the notice.

7. SAME—RECORD OF LOCATION—REFERENCE TO ANOTHER MINING CLAIM.

When a notice of location is recorded, it must contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. A reference to a known mining claim is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument.

8. SAME—ANNUAL WORK—LABOR AND IMPROVEMENTS—WORK OUTSIDE OF THE LIMITS OF THE CLAIM.

The mining laws of the United States require that not less than \$100 worth of labor shall be performed or improvements made during each year upon every unpatented location. Labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location. Work done outside of the limits of a mining claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the location of the claim.

9. SAME—WORK ON DIFFERENT CLAIMS OWNED BY SAME PERSONS—RUNNING TUNNELS—WHEN SURFACE WORK NOT REQUIRED.

The running of a tunnel for the purpose of prospecting, developing, and working of two separate and distinct mining claims owned by the same person is to be credited to both of said claims, and, if the necessary amount of work is done, it is deemed a sufficient compliance with the law; and the owner is not, in such a case, required to also perform work on the surface of the locations, in order to hold the same.

10. SAME—ST. NEV. 1887, P. 136, § 2, CONSTRUED—PRIMA FACIE EVIDENCE—FAILURE TO HAVE WORK RECORDED DOES NOT AMOUNT TO FORFEITURE OF CLAIM.

In construing the act requiring owners of mining claims to make affidavits as to the amount of work done, and to have the same recorded,

(St. Nev. 1887, p. 136.) *held*, that the object of the act was to prescribe a definite way in which the proof of the performance of the work might be obtained, that the act was not intended to prevent the owner from making the proof in any other way, that it simply makes the record *prima facie* evidence of the facts therein stated, that a failure to comply with the terms of the act does not work a forfeiture, and that a forfeiture of a mining claim can only be established by clear and convincing proof of the failure of the owner to comply with the provisions of the law as to the amount of work required to be done.

11. LOCATIONS OF MINING CLAIM IN NAMES OF INDIVIDUALS FOR BENEFIT OF CORPORATION—VALIDITY OF—WORK DONE BY CORPORATION BEFORE OBTAINING LEGAL TITLE INURES TO THE BENEFIT OF THE LOCATIONS.

Defendant is a California corporation engaged in mining in the state of Nevada, and on the 2d day of January, 1888, was the owner of the Justice claim,—a patented location. The locators of the West Justice and James G. Blaine locations, on that day, while in the employ of the corporation, made the locations in their own names at the expense of, and for the benefit of, the corporation. The Justice, West Justice, and James G. Blaine are contiguous to each other. The corporation annually performed work by running tunnels from the Justice claim for the purpose of prospecting and developing the mining ground embraced within the locations of the West Justice and James G. Blaine. (See opinion as to the facts.) The locators of these claims did not convey the title to the corporation until the 29th day of November, 1892. *Held*, that the locations made for the benefit of the corporation were valid; that the work performed by the corporation in running the tunnels should be credited as work done upon the West Justice and James G. Blaine; and that the work so done and performed, being sufficient in value, constituted a compliance with the mining laws.

12. SAME—LEGAL EFFECT OF SUCH LOCATIONS—RIGHT OF POSSESSION.

When a mining location is made by one person in his own name, at the request and expense of, and for the benefit of, another person, such other person is legally entitled to the possession of the mining ground so located. The locator, in such a case, holds the legal title in trust for the benefit of the person at whose expense the location was made.

13. STATUTE OF FRAUDS NOT APPLICABLE.

Held, that the statute of frauds had no application to the facts of this case; that, the locators of the ground having voluntarily conveyed the title to the corporation, no objection could be urged by strangers to the transaction on the ground that the original agreement as to the location of the claims was not in writing.

14. DISCOVERY OF VEIN OR LODGE—WHAT CONSTITUTES—SECTION 2320, REV. ST. U. S., CONSTRUED.

Any discovery of quartz or other rock in place, bearing gold, silver, or any of the precious metals or valuable deposits specified in the first clause of section 2320, Rev. St. U. S., constitutes a "discovery of a vein or lode," within the meaning of those words as used in the last clause of said section, which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

15. SAME—DISCOVERY OF ROCK IN PLACE—VALUE OF MINERAL FOUND.

The statute was intended to apply to any kind of a vein or lode of quartz or other rock in place, bearing mineral, in whatever kind, character, or formation the mineral might be found. The statutes should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein in sufficient quantity to induce them to expend their time and money in prospecting and developing the ground located. When the locator finds the rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral, in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants a location of a mining claim to be made.

16. SAME—EXPERT TESTIMONY—VALUE OF.

The value of the testimony of experts as to what constitutes a vein or lode depends to a great extent upon the strength or weakness of the reasons given in support of the conclusions reached. An expert witness testified that he would not call any discovery of rock bearing mineral a vein or lode, unless gold or silver was found in sufficient quantities to pay all the expenses of extracting, removing, and milling the ore therefrom, and leave a profit to the owner. *Held*, that the statute is not susceptible of any such construction.

17. "VEIN OR LODE" DEFINED—AUTHORITIES REVIEWED—APPLICATION OF.

The words "vein or lode," as used in the United States statutes, and as understood by miners, are applicable to any body or belt of mineralized rock lying within clearly-defined boundaries, separating it from the country, or nonmineral, rock. Authorities as to the definition of "lodes or veins" reviewed at length, and the consideration, weight, and application thereof stated. (See opinion.)

18. SAME—QUESTIONS OF FACT.

It is always a question of fact, to be determined by a jury, or by the court, if the case is tried without a jury, whether a vein or lode has been discovered or exists within the limits of the location in controversy, and also as to the continuity of ore and mineral matter constituting the length, width, and extent of any particular vein or lode.

19. REVIEW OF FACTS—CONCLUSIONS.

The facts of this case as to the character of the yellow porphyry rock wherein the vein matter is found, and the purple porphyry rock by which it is bounded, reviewed at length. *Held*, that the preponderance of the evidence shows that within this belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed rock and matter are found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter,—metal-bearing rock."

20. PREVIOUS DISCOVERY OF A LODE—VALIDITY OF SUBSEQUENT LOCATION.

It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location.

21. PRIORITY OF RIGHTS—NO QUESTION AS TO CROSS VEINS.

The West Justice and Blaine locations being prior in point of time, and the locators and owner thereof having complied with the mining laws, it necessarily follows that the location of the Peerless within the limits of said locations is entirely null and void, and no question as to its being a cross vein can be considered.

22. MINING CLAIMS—WHEN RELOCATION OF, CANNOT BE MADE.

Mining claims are not open to relocation until the rights of the former locator have come to an end. No relocater of a mining claim can avail himself of the mineral in the public land which another has discovered until the prior locator has in fact abandoned the ground, or, under the provisions of the mining law, has forfeited his right thereto.

23. SAME—RIGHTS OF LOCATORS TO OTHER VEINS THAN THOSE DISCOVERED.

Where a valid discovery and location of a vein is made, and the laws in relation thereto are fully complied with, the locator thereof is not only entitled to the vein or lode discovered by him, but every other vein or lode throughout its entire depth, the top or apex of which lies within the surface lines of his claim extended downward vertically, to which no right had attached in favor of other parties at the time his location was made.

(Syllabus by the Court.)

In Equity. Bill by W. H. Book and W. H. Blowey against the Justice Mining Company to quiet title to certain mining locations. Decree for defendant.

[illegible]

HAWLEY, District Judge. This is a suit in equity to quiet the title to certain mining ground situate on Justice hill, in the Gold Hill mining district, Storey county, Nev. Complainants are citizens of the United States, and claim title to the ground in controversy under the Peerless mining location made by them on September 22, 1892. Defendant is a corporation organized and existing under and by virtue of the laws of the state of California, and engaged in the business of mining in Storey county, Nev. It claims title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine." These claims were located

on the 2d day of January, 1888,—the West Justice, by Charles Lyons; and the James G. Blaine, by Dennis Harrington and Roger Sheehan. At the time these locations were made, Lyons, Harrington, and Sheehan were citizens of the United States, and were in the employ of the defendant at the Justice mining claim,—a patented location owned by defendant, adjoining the West Justice on the northeast side. These witnesses testify that the locations of the West Justice and James G. Blaine claims were made by them in their own names, for the sole use and benefit of the defendant, at its request and expense. On the 29th of November, 1892, they executed and delivered deeds conveying the ground to defendant. This suit was commenced December 5, 1892. The land in controversy is a part of the public domain, and is known and claimed as mineral land. The Peerless location is valid, if the ground was subject to location at the time it was made. The West Justice and James G. Blaine locations were made long prior in point of time to the Peerless, and, if the locators or owners thereof fully complied with all the essential requirements of the law, the defendant will, of course, be entitled to a decree in its favor.

Complainants contend that both of said locations were and are invalid, and that the defendant never acquired any title thereto. This contention is sought to be maintained upon several separate and distinct grounds, each of which is earnestly contested. The record presents a mass of conflicting testimony upon nearly every vital point in regard to the facts. This seems to be inevitable upon the trial of mining cases. Every judge and "every lawyer at all familiar with the trial of mining cases, where the question of the existence or nonexistence of a lode or vein is raised, understands the difficulty that is often—we might say always—encountered in the attempt to ascertain the facts. Practical miners, experts, and men of science are often examined as witnesses, and they frequently differ as much in their statement of facts as in their conclusions of judgment." *Mining Co. v. Corcoran*, 15 Nev. 153. The task of ascertaining the truth from such conflicting evidence is by no means an easy one. But, difficult as it is, there are judicial methods of investigation that lead with almost unerring certainty to a satisfactory solution of the disputed questions. Intermingled with the controversies as to the facts, the whole case bristles upon every side with sharp-pointed legal questions, involving the construction that has been, or ought to be, given to the various provisions of the mining laws of the United States; and, upon these questions, counsel, in their zeal on behalf of their clients, seem to differ as much as to what the law is as the witnesses do as to the facts.

Under the mining laws of the United States, no valid location of a mining claim can be made until the discovery of a vein or lode within the limits of the claim located. The location of a mining lode or vein is made by taking up a quantity of land in the form of a parallelogram, not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location of this piece of land must be distinctly marked on the ground, so that its boundaries can be readily traced. When the

record of the location of a mining claim is required to be made, it should contain the names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will, with reasonable certainty, identify the claim. Not less than \$100 worth of labor must be performed, or improvements made, on the claim during each year.

Did the locators and owner of the West Justice and James G. Blaine locations comply with these provisions of the United States statutes?

1. Were the locations marked upon the ground in such a manner that their boundaries could be readily traced?

It appears from testimony that is undisputed that the ground embraced in these locations had been long previous to January, 1888, located as mining ground by other parties. This fact was publicly known at the time these locations were made. The time for doing the necessary work on the previous locations expired on the morning of the 1st day of January, 1888, which was Sunday. About 1:30 o'clock on Monday morning, January 2, 1888, the ground being covered with snow two feet deep, Lyons, Harrington, and Sheehan went upon Justice hill with a bundle of stakes, 2x4 and 4 feet long, previously prepared, and posted one stake at each of the four corners of the claims, upon which stakes were letters or numbers designating the corner of the claim where the stakes were posted. At places where the stakes could not be driven into the ground through the snow, they built monuments of rock around the stakes to hold them in place. In March or April, 1888, the stakes were renewed at places where they were then missing. The locators at this time also placed a stake near the middle of the southerly or southeasterly end line of the West Justice claim, so as not to encroach upon the Hartford patented claim. Lyons and Harrington testify positively to these facts, and explain with tedious minuteness almost each and every step taken and act done by them,—the preparing of the stakes, driving them into the ground, building of stone monuments, measuring the ground with a tape line, placing of written notices on the ground, etc. Upon cross-examination, one of these witnesses testified that the locators of the claims were engaged in this work about 2½ hours. The testimony of these witnesses as to the work done in posting the stakes is not disputed, except upon the imaginable theory that it is incredible that they could have performed the acts testified to by them within the time and in the manner testified to, owing to the fact that the night was dark and cold, the snow deep, and the hillside precipitous and rough. This argument is purely technical and critical, and is not based upon any merit whatever. It would, at most, only tend to establish—if it tends to establish anything—that the witness was mistaken as to the length of time it took to do the work. This may be admitted. But the fact remains that the work of posting the stakes was actually done. The testimony of defendant's witnesses upon this point is clear, positive, direct, and undisputed. Moreover, the stakes at the southeast corner of the West Justice, and at the end line

near the Hartford mine, were found standing, at the time the testimony was taken in this case, where they had been placed by the locators. The stake at the northeast corner of the West Justice was found lying upon the ground near the place where it had been posted. The stone monuments at the northeast corner of the Blaine and the northwest corner of the West Justice were still in place. It is not to be expected that all of the stakes and monuments would have remained in place, exposed as they were to the winds and rough weather, and liabilities of being torn down and destroyed by either innocent or evil-disposed people, for a period of four years. The fact is that, when the testimony in this case was taken, one of the stakes posted by complainants on the Peerless could not be found. It had disappeared within a few months after the location was made. Could it be claimed that the Peerless location is invalid on that account? Certainly not. Yet the contention of the complainants' counsel, if logically carried out, would apply with as much force to the Peerless as to the West Justice or Blaine locations. The only conclusion that is justified by the evidence is that the stakes and monuments were actually placed upon the corners of each of the locations made on January 2, 1888, and the conclusion is equally inevitable that the locations were so marked that the boundaries thereof could be readily traced. All the authorities agree that any marking on the ground, by stakes, monuments, mounds, and written notices, whereby the boundaries of the location can be readily traced, is sufficient. *Gleeson v. Mining Co.*, 13 Nev. 442; *Southern Cross Gold & Silver Min. Co. v. Europa Min. Co.*, 15 Nev. 383; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 523; *Jupiter Min. Co. v. Bodie C. Min. Co.*, 11 Fed. Rep. 667; *Hauswirth v. Butcher*, 4 Mont. 308, 1 Pac. Rep. 714; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. Rep. 728; *Pollard v. Shively*, 5 Colo. 309; *Eilers v. Boatman*, 3 Utah, 159, 2 Pac. Rep. 66; *Du Prat v. James*, 65 Cal. 555, 4 Pac. Rep. 562; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. Rep. 594.

The question as to the sufficiency of the stakes and monuments to enable the location to be traced always depends, to a great extent, upon the confirmation and condition of the ground located. A location on a hill covered by a dense forest might require more definite marking than a location on a bald mountain, where the stakes, wherever placed, could be readily seen. Justice hill slopes off in all directions. Purple and yellow porphyry rock is exposed upon the surface in many places, and can readily be seen without making excavations. On other portions of the hill, this rock is covered with loose soil from one inch to a foot or more deep. The whole surface of the hill is dotted over by small bunches of stunted sagebrush, and at and along the summit of the hill, as well as on the sides thereof, any stakes or monuments designating corners or lines of mining locations can readily be seen. No case has been called to my attention where the posting of stakes or building of monuments of the kind, character, and description testified to by the witnesses in this case, at the four corners of the location on the surface, upon a com-

paratively barren hillside, has not been deemed a sufficient compliance with the law. The supreme court of this state has been extremely liberal in its views as to the manner in which mining locations might be marked upon the ground, and be sufficient to comply with the law. *Gleeson v. Mining Co.*, supra. The law is certainly complied with whenever stakes and monuments are so placed upon the ground that the boundaries of the location can be traced with reasonable certainty, and without any practical difficulty. "The object of the law in requiring the location to be marked on the ground," as was said in the case last cited, "is to fix the claim,—to prevent floating or swinging,—so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not, in express terms, require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced;" but they are sufficient for that purpose. When the location is one sufficiently marked upon the surface, so that its boundaries can be readily traced, and all the other acts of location are performed as required by law, the right of possession becomes fully vested in the locator, and cannot be divested by the removal or obliteration of the stakes, monuments, marks, or notices, without the act or fault of the locator, during the time he continues to perform the necessary work upon the claim, and to comply with the law in all other essential respects. *Jupiter Min. Co. v. Bodie C. Min. Co.*, 11 Fed. Rep. 667; *McEvoy v. Hyman*, 25 Fed. Rep. 598.

2. Were the notices and record of the West Justice and James G. Blaine defective, uncertain, or insufficient?

The notice of location of the West Justice reads as follows:

"Notice is hereby given that the undersigned has this 2d day of January, 1888, taken up and located fifteen hundred linear feet on this vein of gold and silver quartz, and three hundred feet on each side from the center thereof. This claim begins at this notice and monument, which is the southwest boundary of the Justice Mining Company's claim, and extends fifteen hundred feet in a northerly course, thence six hundred feet in a westerly course, thence fifteen hundred feet in a southerly course, thence six hundred feet to the place of beginning. This claim lies north of the Hartford mine, Gold Hill mining district, Storey county, Nevada. This claim shall be known as the 'West Justice Mine.' Located this 2d day of January, A. D. 1888.

"Charles Lyons, Locator.

"Witness:

"Dennis Harrington.

"Roger Sheehan.

"Filed for record this 4th day of January, 1888, at 30 min. past 9 A. M., at request of locators.

"John Ross, County Recorder.

"Recorded Book D of Mining Locations, p. 81."

The language of the Blaine notice is similar, as to extent of ground claimed, etc. This claim is described as beginning at the southwest boundary of the West Justice, and it is stated that "this claim lies north of the Ennis mine," and that it shall be known as the "James G. Blaine Mine."

In determining the effect and sufficiency of these notices, it should be borne in mind that the mining laws of the United States do not require any notice to be posted upon the location of a mining claim, when it is made, and there is no provision, anywhere, requiring the notice to be posted in any particular place upon the ground. The locations were valid without any notice of location being placed on the ground. But it is argued that the locations are invalid because notices were posted that did not correctly describe the lode, and because the notices were not posted on the lode. In construing notices of this character, where, under the mining rules and local regulations, or state laws, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence, the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located. Apply these principles to the notices in question. The Justice mining claim was a patented location, with well defined and marked boundaries, when the West Justice and Blaine were located. Now, the notice of location of the West Justice described it as commencing at the "southwest boundary of the Justice Mining Company's claim." If we were to be governed by the notice, there would be no difficulty in finding the commencement point, but it is said in the notice that the claim extends 1,500 feet in a northerly direction. This is a mistake, so far as the direction is concerned. True north would carry the line over and across the Justice mine, instead of along the southwesterly line of said patented claim, where the stake at the northeast corner of the West Justice was posted. The word "northerly," under such circumstances, conditions, and surroundings should not be interpreted as meaning due north. It includes and may mean any meridian line or course between a due north and northwest, and is defined and made certain by the posting of the stakes or the building of the monuments at the corners of the locations, or along the lines thereof. Such stakes and monuments would control the courses specified in the notice. *Pollard v. Shively*, 5 Colo. 309; *Cullacott v. Mining Co.*, 8 Colo. 179, 6 Pac. Rep. 211;

McEvoy v. Hyman, 25 Fed. Rep. 596. The mistakes made in the notices as to the courses of the lines are not, in the light of the other facts, sufficient to invalidate the locations. Moreover, the West Justice is described in the notice as being north of the Hartford, which was a patented mining claim, well known and clearly defined. This is held to be a sufficient compliance with the laws of the United States, which require that the record should contain such a description as will identify the claim by reference to some natural object or permanent monument. **Hammer v. Milling Co.**, 130 U. S. 292, 9 Sup. Ct. Rep. 548; **Upton v. Larkin**, 7 Mont. 449, 17 Pac. Rep. 728; **Gamer v. Glenn**, 8 Mont. 371, 20 Pac. Rep. 654.

The West Justice, notwithstanding the mistake in the notice as to the direction of its lines, was described and staked off in such a manner that it could easily be identified by any prospector or other persons who were desirous of ascertaining the boundaries of the particular ground that had been located. In **Metcalf v. Prescott**, 10 Mont. 283, 25 Pac. Rep. 1037, the court held that an error in the notice, stating the location to be in a certain county, when in fact it was in another county, did not vitiate the description, otherwise good.

Further criticism is made as to the wording of the notices claiming 1,500 feet "on this vein," and to the fact that no vein was exposed where the notices were placed. In some states there are laws requiring parties, when making a mining location, to sink a discovery shaft on the lode ten feet or more in depth, and to post a notice thereon, but there is no such law in this state. While the lode within the limits of the boundaries of the location is the principal thing that the locator desires to claim, the law does not demand a marking of the lode. It is the surface land which is to be marked and described, and the notices must be read and interpreted with reference to this law. What is here said disposes of the further objection specifically urged by counsel, that the notices were not placed within reasonable proximity to the lode.

All that has been said about the West Justice is equally applicable to the Blaine notice. The various objections urged to the notices do not affect the validity of either location.

3. Was the annual assessment work done upon the West Justice and James G. Blaine locations?

The testimony shows that the defendant, in May, 1888, commenced work, running a tunnel from the Woodville shaft, at a point about 280 feet west of south from the Justice shaft, for the purpose of developing the vein or lodes contained in the West Justice and Blaine locations. This tunnel was run over 200 feet in the year 1888, at an average expense of about \$12 per foot. It was extended in 1889 about 200 feet further, and in 1890, 1891, and 1892, about 100 feet each year. It is 980 feet in length, and, according to the testimony of some of the witnesses, it cost the defendant over \$20 per foot to run it. It extends into the West

Justice ground over 200 feet beyond the line of the Justice claim. The sole object of running this tunnel, as testified to by defendant's witnesses, was to prospect the West Justice and Blaine locations. It also appears that another tunnel was run in the West Justice ground a distance of about 35 feet in 1889, at a cost of not less than \$250, for the purpose of prospecting both the West Justice and Blaine locations. In 1890, another tunnel, commencing at the southwesterly line of the Justice, was run into the West Justice claim by the defendant, for a like purpose, at an expense that year of over \$200. Work upon this tunnel was continued in the year 1891 at an expense of over \$200, and in 1892 a like amount was expended in extending it. The testimony clearly shows that the running of these tunnels was a practical way to work and prospect the West Justice and Blaine locations. Labor and improvements, within the meaning of the statute, are deemed to be done on a mining claim or lode, whether it consists of one location or several locations, owned by the same party and contiguous to each other, when the labor is performed or improvements made for the purpose of working, prospecting, and developing the ground embraced in the location or locations. The running of a tunnel is often the best means of developing a lode or vein, and extracting the ore and mineral therefrom, and it is not of infrequent occurrence that such tunnels commence at the slope of a hill on the surface ground outside the surface location of a mining claim. When such work is done for the avowed and express purpose of prospecting two or more claims held in common, as was the case here, the courts have always held that such work was to be credited to such claims. This is always deemed to be a sufficient compliance with the provisions of the mining laws of the United States. *Smelting Co. v. Kemp*, 104 U. S. 636; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428. Work done outside of the limits of a claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the claim itself. *Mining Co. v. Callison*, 5 Sawy. 440; *Harrington v. Chambers*, 3 Utah, 109, 1 Pac. Rep. 362; *U. S. v. Mining Co.*, 24 Fed. Rep. 568. Section 2324 of the Revised Statutes is conclusive of this question. This section was amended February 11, 1875, "so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act." In the light of this statute, and of the evidence in this case, the contention of complainants, that the Blaine location was invalid because no assessment work was done within the limits of the location, is shown to be absolutely untenable.

The next objection urged by complainants, upon this branch of the case, is that both the West Justice and Blaine locations are

invalid because the assessment work was not recorded as required by the laws of this state. The section of the law relied upon reads as follows:

"Sec. 2. Within thirty days after the performance of labor or making of improvements, required by law to be annually performed or made, upon any lode or mining claim, the person in whose behalf such labor was performed or improvements made, or some one in his behalf, shall make before, and record with, the mining recorder of the district wherein such claim is situated, an affidavit setting forth the amount of money expended, or value of labor performed or improvements made, or both, the character of expenditures, labor or improvements, a description of the claim or part of claim, affected by such expenditures, or labor or improvements, for what year, and the names of the owners or claimants of said claim, at whose expense the same was made or performed. Such affidavit, or a copy thereof, duly certified by the recorder, shall be prima facie evidence of the performance of such labor, or the making of such improvements, or both." St. Nev. 1887, p. 136.

The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be, in many cases, more accessible. In all mining communities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements, and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. The act was passed, as expressed in the title, "for the better preservation of titles to mining claims." Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience, and expense, by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owner of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit. It simply makes the record prima facie evidence of the facts therein stated. In *Coleman v. Curtis*, (Mont.) 30 Pac. Rep. 266, the supreme court, referring to a statute of that state similar to the one here quoted, said that the statute "relates, not to the effect of doing the work or making the improvements, as required by law, but to the method of preserving prima facie evidence of the fact that such requirement has been fulfilled." See, also, *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652. There is no provision in the statute to the effect that a failure to comply with its terms will work a forfeiture, and the statute is not susceptible of any such construction. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law. *Hammer v. Milling Co.*, 130 U. S. 292, 9 Sup. Ct. Rep. 548.

Objection is further made to the work done in this case upon the ground that the defendant is not in a position to avail itself of the proofs, because it is not shown that the locators did the work, and, further, because it affirmatively appears that the defendant did not have the legal title to the claims when the work was done, and was not a resident of this state. When a location is made by one person, in his own name, at the expense of, for

the benefit and on behalf of, another person, such other person is certainly entitled to the ground so located. There is no law which prohibits a citizen of the United States, who is a resident of another state, from taking up and locating mining claims in this state in his own name, or from employing citizens and residents of this state to locate claims in their own names for the benefit of such nonresidents. The defendant, it is true, is a foreign corporation. In the eye of the law, it is a resident of the state of California. Under the laws of this state, any nonresident person or corporation "may take, hold and enjoy any real property, or any interest in lands, tenements, or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions as any resident, citizen, person, or domestic corporation." Gen. St. § 2655. Another statute of this state provides that all corporations formed under the laws of Nevada for the purpose of mining "shall have power to purchase and hold such mining property as they may deem meet." Gen. St. § 279.

The statute of frauds, (Gen. St. Nev. § 2624,) relied upon by complainants, has no application whatever to the facts of this case. An oral agreement to locate a mining claim for the benefit of another need not be in writing. If a party, in pursuance of such an understanding, at the expense of another, locates the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made; and such party could, upon making the necessary proofs, compel the locator of the mining claim to convey the title thereof to him, although the agreement so to do was not in writing. This familiar principle has been often applied in cases where a party has entered into an oral agreement to locate mining ground for the joint benefit of himself and others, and makes a location in his own name. It has always been held that such oral agreements are not within the statute of frauds. *Gore v. McBrayer*, 18 Cal. 582; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. Rep. 803; *Hirbour v. Reeding*, 3 Mont. 13; *Welland v. Huber*, 8 Nev. 203.

But in any event this question only affects the parties to the agreement, and it is difficult to see how strangers to the transaction could urge the statute of frauds, when the parties in interest had fully and voluntarily complied with their agreement by conveying the title to the party for whose benefit the locations were made. The statement is made in complainants' brief that:

"The truth is, defendant hunted up and purchased the pretended title of Harrington and Sheehan after the Peerless lode was discovered, and, by means of this title, is attempting to deprive complainants of their mine by means of the false pretenses that the location was made for the Justice Company, and that work done by the Justice Company in its workings was intended for the Blaine location."

The record does not bear out this assertion. It shows the truth to be, as before stated, that the locations were made for the benefit of defendant, that the work in running the tunnels was done at the expense of defendant, that the sole object and only purpose of running the tunnels was to develop the mining lodes and

veins within the limits of the West Justice and Blaine locations, and that such object and purpose were publicly made known at the time the work was done.

4. Did the locators of the West Justice and James G. Blaine discover any vein or lode of quartz or other rock in place, bearing gold or silver, within the limits of their locations, prior to the location of the Peerless claim? This is the most important question in this case. It is one upon which fair-minded men might honestly differ. Credible witnesses, of equal knowledge, character, experience, and judgment, have honestly expressed a difference of opinion in regard to it. It now devolves upon the court, without the aid of a jury, or the presence of the witnesses, to determine where, and upon which side, the weight of the evidence is found.

What constitutes a discovery of a vein or lode, within the meaning of the statute? Section 2320, Rev. St., provides that—

"Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, 1,500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The words "vein or lode," in the last clause of this statute, were evidently intended to apply to such "veins or lodes" as were described in the first section, and to have the same meaning, viz. a vein or lode "of quartz or other rock in place bearing gold, silver," etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that

constitutes the discovery, and warrants the prospector in making a location of a mining claim.

Numerous references have been made by the respective counsel to the works of scientists as to the origin of ore deposits, the character of mineral formations, and the causes thereof. Le Conte's *Elements of Geology*, 205, 207, 220, 225, 228, 235, 236; Phillips on *Ore Deposits*, 18, 19, 32, 35, 74, 76 et seq.; Von Cotta's *Treatise on Ore Deposits*, 26, 27, 34, 35, 69, 70,—which have been examined. Various courts have at different times given a definition of what constitutes a vein or lode, within the meaning of the act of congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits or vein matter, and of the country rock, in the particular district where the claims are located. There is no conflict in the decisions; but the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state. The following cases are instructive upon the point, and are here cited. Some of them will be more particularly noticed after the facts of this case are reviewed. *Mining Co. v. Corcoran*, 15 Nev. 147; *Eureka Consolidated Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302; *Mining Co. v. Callison*, 5 Sawy. 439; *Jupiter Min. Co. v. Bodie C. Min. Co.*, 7 Sawy. 97, 11 Fed. Rep. 666; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522; *Hyman v. Wheeler*, 29 Fed. Rep. 347; *Doe v. Mining Co.*, 54 Fed. Rep. 935; *Mining Co. v. Cheesman*, 116 U. S. 536, 6 Sup. Ct. Rep. 481; *Burke v. McDonald*, (Idaho) 29 Pac. Rep. 98; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. Rep. 728; *Mining Co. v. Mahler*, 4 Mor. Min. R. 390; *Duggan v. Davey* (Dak.) 26 N. W. Rep. 899; *Harrington v. Chambers*, 3 Utah, 115, 1 Pac. Rep. 362; *Armstrong v. Lower*, 6 Colo. 393, 581.

What are the facts of this case? The testimony on the part of the complainants is to the effect that the Peerless is a fissure having a regular course in an easterly and westerly direction, from a foot to three feet in width; a crevice in the earth and porphyry rock filled with decomposed quartz and clay; a quartz vein containing gold and silver in valuable quantities; a blind lode having a foot and hanging wall of porphyry rock, well defined. Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; that he knew that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners, who at that time were working upon and claimed the same as mining ground; that prior to making the West Justice location he knew that there was a lode within the boundaries of that location containing gold and silver bearing rock and ore. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about \$800 in

gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground, and examined it closely; that he discovered and found quartz rock in place, bearing mineral, within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep and three or four feet in width in the ground, in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony.

After the commencement of this suit, numerous holes were dug at the instance and expense of defendant, commencing at the northwesterly end of the West Justice, and extending in places to the southwesterly line of the Blaine location, and at other places, over the hill, within the lines of the respective claims. The witnesses who performed this work testify that they traced the yellow porphyry rock all the way from the northerly end of the West Justice to the southwest corner of the Blaine claim; that, whenever they dug holes in the yellow porphyry rock formation, they obtained quartz rock and decomposed matter containing gold and silver, as shown by assays that were made. The testimony of other witnesses is to the effect that the purple porphyry rock constitutes the foot wall of the Blaine lode; that it forms the separation designated on defendant's Map E as the "Great Blaine Horse;" that it also forms the hanging wall of the Blaine lode; that there is a lode formation all the way between the foot and hanging walls, broken only by the Blaine horse. Several practical miners, having no interest in this controversy, testified that from an examination of the old cuts, the Peerless shaft, and the several holes that were sunk by defendant to determine the formation and character of the ground, with knowledge of the fact that samples of the rock and decomposed matter taken therefrom assayed from \$1 to \$3 and \$4, and at one place as high as \$20, a ton, and in the old cuts over \$100 a ton, they would say that the whole formation of yellow porphyry, as marked on Map E, from the foot wall to the hanging wall of the Blaine lode, is one single, mineralized formation, containing gold and silver bearing quartz rock in place, and constitutes what is known by miners as a "lode;" that there is no difference in the formation where the Peerless shaft is sunk from any other part of the lode where the same decomposed yellow rock with quartz is found; that the ore and vein matter, wherever found upon the hill within the limits of the West Justice and Blaine locations, is of the same kind and character; and that the Peerless is a mere seam or fissure in this formation, the boundaries of which are marked by the purple rock as the hanging wall and foot wall of the Blaine lode.

The conditions which defendant's witnesses testify to in relation to the yellow porphyry rock constituting a lode are denied by the complainants' witnesses in rebuttal. It is also denied by them that the yellow porphyry occurs upon the hill as represented on defend-

ant's Map E. They testify that the purple and yellow porphyry rock is found indiscriminately, in patches and spots, all over the hill, except at the Peerless fissure. The principal expert witness on the part of complainants testified that the rock, yellow and blue, constituting the mass on Justice hill, and particularly of the ground embraced in the locations in controversy, is what is known to geologists and mineralogists as "quartz porphyry;" that the difference in the appearance of the rock is a difference in color, and not of texture; that "the parts which outcrop above the surface, with very few exceptions, are purple in color, with quite a pronounced purple tinge, and the parts which are below the surface, or just at the surface, change gradually from the purple color of the outcropping rock to a bluish color just at the surface; and within a foot or two of the surface, below it, it changes into a reddish or yellowish color. These changes have no dividing line, or anything like that, but are imperceptible, and blending one with the other, the purple color decreasing gradually. The first is bluish, and then bluish and gray yellow, and then yellow." Great reliance is placed upon the testimony of this witness. His testimony is given from information obtained by reading elementary works on mineralogy and geology, and is to the effect that the yellow porphyry is not a lode, and that all the land on Justice hill, except that part embraced in the Peerless location, should be classed as agricultural, not mineral, land. This witness testifies to theories of his own, and states the facts which he claims substantiates his theories. The value of testimony of this character, in controversies of this kind, depends to a great extent upon the strength or weakness of the reasons given in support of the conclusions reached. Just what this witness meant will perhaps be best understood by quoting a few of the many questions and answers upon his cross-examination, as to what he considered was a lode or vein:

"Question. Excluding all the excavations that you have testified about within the boundary lines of the West Justice, Blaine, and Peerless claims, which are laid down upon the maps of the plaintiffs and defendant, what difference, if any, is there presented to the eye between any of the claims? Answer. Over the surface of the West Justice and Blaine claims there is but little difference in the surface appearance, excluding the excavations. I think the surface of the hill is very much the same, outside of the croppings of the rocks. Q. And you have included in that answer all the land embraced within the West Justice, James G. Blaine, and Peerless locations, and including the Peerless location inside of the Blaine? A. Yes, sir. Q. If, as a matter of fact, you had, upon taking samples, and having assays made, and making them yourself,—you had ascertained that that formation contained gold and silver, would you say that that formation constituted a lode? A. I would not, unless it contained gold and silver in sufficient quantities to make it valuable for mining purposes. Q. In ascertaining that fact, would you deduct from the value the actual cost of mining, the actual cost of labor, the actual cost of milling, and the actual cost of all the material used in mining the ore up to the time that the result of the working of your ore had been obtained, leaving a profit for yourself? A. I might. Probably, that would be the proper course to pursue. Q. In your judgment, before you would call that country about which you have testified a lode, would it be necessary for you to find the precious metals of gold and silver in sufficient quantities to pay all the expenses incident to mining, hauling, reduction, etc., and leave a profit besides? A. I would expect it to pay through-

out the extent of the rock, over and above expenses. Q. And, until that result was obtained, you would not call it a lode? A. I would not say it was a lode unless I found the metals in it to pay the cost of mining. * * * I would not call it a lode unless it was sufficiently mineralized to make it pay to work, or else it would be subject to location as agricultural land. * * * Q. Suppose you found a homogeneous formation between defined boundaries, and upon investigation you ascertained the precious metals did not exist in sufficient quantities to pay for mining. Would you say it was a lode? A. I would reject it as a lode. The water of the ocean contains more gold and silver, in proportion, than the rocks of that hill; and yet I don't claim that the ocean is a lode, simply for the reason that it contains more gold and silver than that hill. But it is a fact that the water of the ocean contains more gold and silver, in proportion, than the rocks of the hill in question. * * * Q. Assuming as a fact that the cost of reduction is \$5 or \$6 a ton, and that the cost of labor is \$4 a day, would you not say that the ground embraced in the locations named was not a lode unless gold and silver existed in sufficient quantities to cover at least those expenses? A. I would not say it was a lode unless it produced it in much greater quantity than that. * * * Q. Is it your understanding that, before a man can locate and acquire title to mineral land, he must actually develop a property that will pay the expenses I have named? A. Yes, sir; he has no right to make a location until he traces or develops such a lode by means of a tunnel, shaft, or other workings."

It must be remembered that this is not a controversy between miners, upon one side, and agricultural claimants, on the other, to determine whether the land on Justice hill is more valuable for one purpose than the other; but it is a controversy between miners, to determine which has the title to certain land claimed by both parties as mineral land, and to have the title thereto quieted by a decree of this court. The answers of the witness to the questions asked constitute the keynote to the theory relied upon by complainants to prove that no discovery of a vein or lode had been made within the limits of the West Justice and Blaine locations prior to the location of the Peerless lode. Other witnesses upon the part of the complainants defined what they understood to be a lode substantially to the same effect. If this theory were adopted by the courts, it would invalidate many mining locations. Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would lead to absurd, injurious, and unjust results, destructive of the rights of prospectors and miners, in their honest, patient, and industrious efforts to explore, discover, and develop the veins and lodes that exist in the public mineral lands of the United States. A vein or lode of quartz or other rock in place, bearing gold and silver, is found upon the side of a hill or mountain. It is within well-defined walls, and the rock assays from \$1 to \$15 per ton. The cost of extracting, removing, and milling the ore is \$20 per ton. The miner making the discovery is aware of this fact, but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to

be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, in such a case, can it be reasonably claimed, under the provisions of the mining laws, that the person making the discovery—a discovery which, in good faith, induces him to locate the vein or lode, and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same—can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill 500 or 1,000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over \$40 per ton,—enough to insure a profit to the owners,—and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for, according to the testimony of some of complainants' witnesses, the latter location would be valid, and the prior location invalid. The act of congress is not susceptible of any such construction. It does not impose any conditions as to the value or extent of the ore. It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

Judge Sawyer, in construing this provision of the statute, correctly instructed the jury in *Jupiter Min. Co. v. Bodie C. Min. Co.*, 11 Fed. Rep. 675, that:

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be very thin, and it may be many feet thick, or thin in places,—almost or quite "pinched out," in miners' phrase,—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * within the lines of the claim located, to make a valid location including the vein or lode. It may, and often does, require much time and labor, and great expense, to develop a vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

In *Eureka Consolidated Min. Co. v. Richmond Min. Co.*, supra, Mr. Justice Field, in delivering the opinion of the court, discussed this question as to what constituted a lode at great length, and came to the conclusion—

"That the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes * * * all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition, where applicable to the facts, has been approved and followed, and is recognized and declared to be correct by the supreme court of the United States in *Mining Co. v. Cheesman*, *supra*, where the court said:

"A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may be regarded as a lode, whatever the boundaries may be. * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

Hyman v. Wheeler, *supra*, is to the same effect.

In *Burke v. McDonald*, *supra*, the court held that:

"A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only."

In some mining districts the country rock is found in broken blocks scattered throughout the vein or mineralized rock constituting what is known and called the "lode." Where the lode or vein is wide, the country rock is occasionally found in large, solid bodies, extending for hundreds of feet in length, and several feet in width, forming what is technically known among miners as a "horse," and in other portions of the lode loose blocks or fragmentary bodies of the country rock will be found commingled, more or less, with the ore bodies of the vein or lode. Even in narrow veins there is liable to be an intrusion of the country rock into the vein, occupying almost its entire width, and sometimes leaving nothing but a narrow seam of clay leading the way for the miner to follow his vein until the country rock disappears, and the ore bodies are found continuing as before. Such conditions in the formation of the country rock, fissures, and ore bodies are often deceptive and misleading. The owners of such veins or lodes are often confronted with different theories, the truth or falsity of which can only be solved by expensive explorations. A practical illustration of these conditions is found in *Phillips on Ore Deposits*, p. 35, fig. 11, where the author, in referring to the conditions of the metalliferous veins found in the mining districts of Cornwall, England, says:

"The same lodes, within short distances, often vary considerably in direction, width, and dip, and they frequently split or divide into branches, both in length and in depth. These branches may, or may not, again unite. If, as in Fig. 11, a lode, a, incloses a mass of the country rock, the included fragment, b, is called a 'horse' or 'rider.'"

The definitions of a vein or lode, as given in the authorities, are, as before stated, instructive, and worthy of consideration. Their application to any given case must be determined by reference to the special facts which existed in the particular mining district where the lodes under consideration were located, in connection with the facts of the case before the court. It is always, in every case, a question of fact, to be determined by a court or jury, whether a vein

or lode has been discovered or exists within the limits of the particular claim or location in controversy, and also a question of fact as to the continuity of ore and mineral matter constituting the width and extent of any particular lode. In the case of Eureka Consolidated Min. Co. v. Richmond Min. Co., the court found the facts to be that a zone of limestone was contained within clearly-defined limits; that it bore unmistakable marks of originating, in all its parts, under the influence of the same creative forces; that it was bounded on the south by a wall of quartzite, and on the north by a belt of clay or shale; that the limestone was found between these limits, and had been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, to a great extent, all traces of stratification; that throughout this zone of limestone the mineral was found in the numerous fissures of the rock; that the mineral was "sufficiently diffused to justify giving to the limestone the general designation of mineralized matter,—metal-bearing rock." Substituting the words "yellow porphyry" for "limestone," and the words "purple porphyry" for "quartzite" and "clay or shale," and giving the true course of the hanging and foot walls, and we have substantially the same physical facts concerning the formation of the country on Justice hill as were found in the Eureka Case.

Several of the witnesses upon the part of the complainants, who expressed their opinion, as miners, that there was no vein or lode, except the Peerless, that had been discovered in the ground in controversy, testified upon cross-examination that the entire country from the north boundary of the West Justice and Blaine locations down to the Independent mine,—a distance of more than one mile,—is all of the same character; that mining claims are now, and have been for many years, located and worked in the same kind and character of formation as is found in the West Justice and Blaine locations; that it is just the kind of a country and formation that a prospector would look for and work in; that it is all a mineral belt, where a person is as liable to find ore in one place as in another; that the whole formation of yellow porphyry is more or less mineralized; and that, if the ground was not taken up, they would be inclined to locate it, with the expectation of finding ore that would pay expenses, and return a profit to the owner. Although there are found large blocks of solid, yellow porphyry rock containing no mineral, as is the case with the limestone, in limestone formations, yet in many places the yellow porphyry is broken, crushed, and decomposed, with seams and fissures found in all directions, showing more or less continuity of ore, quartz rock, and mineralized vein matter throughout the entire width of the yellow porphyry belt, giving to it a specific, individual character, and by which it can be distinctly identified, and is separated from the blue or purple porphyry by which it is bounded. Within this belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed earth and rock is found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter,—metal-bearing rock."

Guided by the best lights at my command, the decisions of courts as to what constitutes a discovery, the definition of a "vein or lode," within the meaning of the act of congress, and the testimony contained in the record, I am of opinion that the weight of the evidence preponderates in favor of the defendant.

It is an undisputed fact that the locators of the West Justice and Blaine locations were not the original discoverers of the vein or lode, but it is not necessary that the locators should be the first discoverers of a lode, in order to make a valid location. It is sufficient if it is shown that the locators knew at the time of making their locations that there had been a discovery of a vein or lode within the limits of the locations made by them. *Jupiter Min. Co. v. Bodie C. Min. Co.*, supra.

5. The facts of this case do not present any questions as to the rights of the parties under section 2336, Rev. St., with reference to cross veins, as contended for by complainants' counsel. The Peerless is not a cross vein, but it is a part of the Blaine lode, discovered and located within the limits of the Blaine location. Complainants, in making the location, and working upon the Peerless,—notwithstanding the fact that they may have acted in perfect good faith, under the honest belief that the land taken up by them was subject to location,—were trespassers upon the mining ground owned by defendant. It affirmatively appearing that the West Justice and Blaine locations were prior in point of time, and that the locators, and the owner thereof, have in every respect fully complied with the mining laws applicable to said locations, it necessarily follows that the Peerless location, or so much thereof as is within the limits of the West Justice and Blaine locations, is absolutely null and void, and no right or title to the ground in controversy was obtained thereunder. Mining claims are not open to relocation until the rights of the former locator have come to an end. No relocater can avail himself of the mineral in the public land, which another has discovered, until the former discoverer has in fact abandoned the claim, or, under the law, has forfeited his right thereto. As was said in *Belk v. Meagher*, 104 U. S. 284:

"The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

It is expressly provided in the act of congress that, where the locators of a mining claim have fully complied with all the provisions of the law, they—

"Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically." Rev. St. U. S. § 2322; *Doe v. Mining Co.*, supra; *Duggan v. Davey*, supra; *Mining Co. v. Fitzgerald*, 4 Mor. Min. R. 380; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 206, 6 Sup. Ct. Rep. 1177.

This is true in all cases, subject only to the other provisions of the statute, which have no application to this case, reserving to locators of other mining claims the right to follow under the surface of such locations for the purpose of extracting and removing the ore from any vein or lode, the top or apex of which lies within the surface lines of such other location.

It follows from the views herein expressed that the defendant is entitled to a decree in its favor. It is so ordered.

ST. LOUIS MINING & MILLING CO. OF MONTANA v. MONTANA MINING CO., Limited, et al.

(Circuit Court, D. Montana. October 2, 1893.)

No. 292.

1. INJUNCTION—WHEN ISSUED—MINING CLAIMS—ACTION AT LAW.

In the federal courts an interlocutory injunction may be granted, restraining the mining of valuable ores pending an action at law to determine the legal title, when such title is in dispute. *Erhardt v. Boaro*, 5 Sup. Ct. Rep. 565, 113 U. S. 537, followed.

2. SAME—EQUITABLE TITLES.

The legal title is not "in dispute," however, within the rule requiring the institution of an action at law, when complainant shows a conveyance from the government patentee, and defendants merely claim under a contract to convey, made by such patentee, which is merely an equitable title; and in such case the court may issue an interlocutory injunction pending the determination of the title by suit in equity.

3. SAME—ACTS TO BE ENJOINED—CERTAINTY OF DESCRIPTION.

An injunction will not issue to restrain the removal of ores from disputed ground between mining claims, when neither the bill nor any affidavit or other evidence fixes the point where defendant must stop. The court will not in terms enjoin defendants from working any vein having its apex in complainant's claim, for this would require defendants to ascertain from what acts they are enjoined.

4. SAME—EXPLORATION OF MINING GROUND.

The working of disputed mineral ground for purposes of exploration only, will not be enjoined.

5. ESTOPPEL—BY DEED.

The equitable title acquired by the vendee of lands under a contract to convey cannot work an estoppel to the assertion of the legal title by a third person to whom the vendor has conveyed it.

In Equity. Suit by the St. Louis Mining & Milling Company of Montana against the Montana Mining Company, Limited, Rawlinson T. Bayliss, Alexander Burrell, Joseph Harvey, Isaac Warren, Nicholas Francis, John Jewell, and Thomas Howkins, to enjoin the extraction of ores from ground claimed by complainant. Injunction denied, and restraining order dissolved.

McConnell, Clayberg & Gunn and Toole & Wallace, for complainant.

Cullen & Toole, for defendants.

KNOWLES, District Judge. Complainant brings this suit for the purpose of enjoining defendants from extracting certain valuable ore, containing gold and silver, from certain mining premises

claimed to belong to the St. Louis quartz lode mining claim. The jurisdiction of this court, sitting as a court in equity, is claimed on the ground that the same will prevent a multiplicity of suits. The application at this time is for an interlocutory injunction pending the action, for the purpose of preserving the ore in one certain vein of the lode claim mentioned in the bill, until the final determination of the action. The defendants urge that the court has no jurisdiction of the cause, because the title to the premises in dispute has not as yet been determined at law. Enough facts are stated in the bill to show that the action is of the character which would prevent a multiplicity of actions at law. It is alleged therein "that defendants have entered upon a vein or lode of quartz belonging to complainant, and in which it is in possession, and have extracted valuable ore therefrom; are now so doing, and are threatening to continue the extraction of such ore." This is what is termed a "continued trespass." A continued trespass is said to be of the class of wrongs which will necessitate the instituting of a multiplicity of actions at law. 1 Pom. Eq. Jur. p. 256, § 245.

It is contended, however, that the complainant's title to the vein or lode, which, it is alleged, defendants are trespassing upon, has not as yet been established by an action at law. It is said, generally, when the legal title is in dispute, an injunction will not be granted until the same is established by at least one action at law. 1 Pom. Eq. Jur. p. 264, § 252. This rule is said to be established because courts in equity will not, in general, try the legal title to land. It has been held by the supreme court, however, in the case of *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. Rep. 565, that the above doctrine "has been greatly modified in modern times, and it is now a common practice, in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though title to the premises be in litigation. The authority of the court is exercised in such cases through its preventive writ to preserve the property from destruction pending legal proceedings for the determination of the title." Perhaps the rule is still that no permanent injunction will be granted in such a case as a continued trespass until the legal title is established in a proceeding at law to determine the same. The above case, however, would settle the rule for this court that, pending an action at law for that purpose, in such cases an interlocutory injunction might issue.

The question arises, is the legal title disputed in this case? for, if it is not, the rule that requires an action at law to be instituted does not apply. "If the plaintiff's title to the subject-matter affected by the wrong is admitted, a court of equity will exercise its jurisdiction at once, and will grant full relief to the plaintiff without compelling him to resort to a prior action at law." 1 Pom. Eq. Jur. § 252.

It will be observed, in the decisions upon this point, it is generally stated that, when the legal title is disputed, an action at law

must first be maintained to determine the same before an injunction will be granted. In this case it is not disputed but that complainant claims under a patent from the United States, the source of title. The patent is in evidence in this proceeding, and a deed from Charles F. Mayger, the patentee, to complainant. There is a strip of ground containing about 12,844.50 square feet off of the St. Louis lode mining claim, bounded as follows, to wit:

"Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears S., 39° 32' E., said course being at right angles to the boundary line of the St. Louis lode, between corners 2 & 3, fifty feet distant; thence N., 50° 28' E., on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners 2 & 3, 226 feet, to a point on the boundary line of the St. Louis lode between corners 1 & 2; thence S., 20° 28' W., along said boundary, between corners 1 & 2, 60.5 feet, to corner No. 2 of St. Louis lode, 400.31 feet, to corner No. 3 of St. Louis lode; thence N., 46° 10' W., along the line of boundary of St. Louis lode, between corners 3 & 4, 30 feet, to a point; thence N., 50° 28' E., along a line parallel to the boundary of St. Louis lode, between corners 2 & 3, 230 feet, to point of beginning."

This ground is included in the patent of the said St. Louis lode claim to said Charles F. Mayger. This ground, on the 7th day of March, 1884, the said Mayger contracted to convey to William Robinson, James Huggins, and Frank P. Sterling. The defendant the Montana Mining Company, Limited, is the assignee of this contract, and claims a right to said premises thereunder. This does not raise any issue as to the legal title to these premises. If it shows any title to the premises, it is an equitable title, and can be made available in a court of equity. If a valid equitable title, in such a court it will constitute as good a defense as a legal one. It is claimed that, should the plaintiff be forced into a court of law to try its legal title, there might be presented the question of estoppel in regard to the assertion thereof. The facts presented up to this time would not be sufficient to present such a question. The authorities cited by defendants upon this point pertain to estoppel in pais. The acts or representations necessary to work such an estoppel are acts or representations clearly made with a knowledge of the facts. The person affected thereby must have been ignorant of the falsity of the same, and must have acted thereon upon the belief that they presented the true condition of the title of the property in controversy. No such a condition of things pertaining to the dispute in this case is presented. There is nothing to show any waiver of the legal title in this case. The equitable title conveyed by the contract cannot work an estoppel to the assertion of the legal title. It is no admission or declaration contrary to the claim of the legal title. Generally, when one enters upon land under an executory contract of purchase, he is estopped to deny the legal title of the one executing the contract. 7 Amer. & Eng. Enc. Law, p. 27. Generally, an equitable title cannot be interposed as a defense in an action at law. A law court takes no notice of an equitable title. For these reasons I think the legal title in this case is not in dispute, and that the suit was properly instituted in a court of equity. If an injunc-

tion will issue pending an action at law, and in aid thereof, when a continued trespass is complained of, I can see no reason for refusing an interlocutory injunction upon the same facts pending an action in equity. The same right to have the property preserved from destruction should exist in one case as well as in the other.

The next question presented is, can the court, under the facts in this case, grant the writ asked? The dispute in this case arises over a vein which crosses on some line from the St. Louis claim to the Nine Hour claim. The exact point where the apex of this vein crosses into the undisputed ground of the Nine Hour lode is not fixed by any affidavit or the bill of complaint. The court cannot, then, designate the exact line beyond which defendants, in working north upon said vein in their ground, must stop. Plaintiff asks the court to enjoin the defendants from working upon or extracting any ore from any vein having its top or apex in the St. Louis ground. This would call upon the defendants to ascertain what veins have their apex in plaintiff's ground, and the extent of such apex therein. "The writ, as a general rule, ought to contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject." *Whipple v. Hutchinson*, 4 Blatchf. 190. This rule was expressed in the above case by Justice Nelson. The rule is approved in *High, Inj.* (1st Ed.) p. 26, § 38. In reason, it ought not to be left to a defendant to ascertain from what acts he is enjoined. There is probably a dispute as to where the apex of the vein in controversy does cross that line between the St. Louis and Nine Hour claims. Defendant Bayliss, in his affidavit, asserts that he has not mined north of a point where a line drawn parallel to the south end line of the St. Louis claim would cut the point where the vein in dispute probably crosses the line of the Nine Hour lode, except for exploration, and the ore taken out in such exploration has been left in the drift. This is not disputed by any affidavits on the part of plaintiff. There are declarations that defendants have worked in the vein having its apex in the ground in dispute, but not that they have removed the ore therefrom. This is a matter worthy of consideration. A court, under such circumstances, ought not to enjoin a party from exploring his premises or the premises in dispute. That is not an irreparable injury. For the reason that the court cannot order a writ showing distinctly the ground from which defendants should be enjoined from taking out ore beneath the surface of the Nine Hour claim, and because it does not fully appear that defendants have been removing any ore to which plaintiff may establish, on the trial, its title to, the writ is denied, and the restraining order heretofore issued is hereby revoked and dissolved.

SAUNDERS v. BLUEFIELD WATERWORKS & IMP. CO. et al.

(Circuit Court, W. D. Virginia. October 20, 1893.)

1. EMINENT DOMAIN—BY WHOM EXERCISED—FOREIGN CORPORATIONS.

No corporation, municipal or otherwise, has power to take for public use private property situated in a different state than that of its incorporation.

2. RIPARIAN RIGHTS—WATER COMPANIES.

A water company having contracts to supply a city and a railroad company with water for its own profit has no greater power, as a riparian proprietor, to take water from an unnavigable stream, than a private individual has.

3. SAME—DIVERSION OF WATER—INJUNCTION.

The appropriation of the water of an unnavigable stream by a riparian owner, in such quantities as to unreasonably diminish the supply of other riparian owners, is a private nuisance, for which an injunction will lie.

In Equity. Bill by Walter M. Saunders against the Bluefield Waterworks & Improvement Company and others to enjoin the diversion or appropriation of the waters of a natural stream. Preliminary injunction made perpetual.

Statement by PAUL, District Judge:

On the 1st day of June, 1892, the complainant presented his bill to the judge of the circuit court of Tazewell county, Va., and a preliminary injunction against the defendants was awarded, in accordance with the prayer of the bill; and on the 17th day of August, following, the suit was removed into this court by the defendants. The complainant states in his bill that he is a citizen of the state of Virginia, and of the western district of Virginia, and that the defendant company is a corporation chartered under the laws of the state of West Virginia, and a citizen of that state; that he is the owner of a boundary of land containing about 3,000 acres, on which he resides, in the county of Tazewell, Va.; that most of this land is fertile, adapted to the growing of grain and other products common to that section, but that its chief value is for grazing, a large area of it being in meadow; that most of the arable land lies on a rather elevated plateau, but very little of it is watered by the main Bluestone river, and that his main dependence for water for his land is smaller streams, and that, in fact, his main dependence is one small stream known as "Beaver Pond Creek;" that the source of this stream is a bold-flowing spring of pure water, situate near the southeastern portion of his land; that a short distance from its source this stream enters upon his land, and flows for a mile, or more, through the most fertile and productive portion of it; that last year he purchased from one John Bailey 93 acres of land near said spring, and through which said creek runs, almost solely for the water it affords; that said creek runs through much of his meadow land, for draining which he has constructed more than 20 blind ditches which empty into it; that there are a few other small mountain streams on the large expanse of his land, but they cannot be depended upon, and frequently are dry for several months in the year. Complainant then alleges that the defendant company has purchased the right to divert the water of the aforesaid spring, together with some land about it; that it intends to convey the water to the city of Bluefield, in the state of West Virginia, by forcing it through 10-inch cast pipes with powerful engines to be stationed at the spring; that the water to be so taken from the spring is not intended to be returned to the channel of the stream, and cannot be; that, if the defendant company succeed in reaching the water with the pipes and machinery it intends to use, it will take the whole stream, or so deplete it that a running stream will not be left to flow through his land; and that, in consequence, there will be no estimating the damages that will be done to his land and to his business. He further alleges that the defendant company has its employees at work in Tazewell county, in the state

of Virginia, and in the western district of Virginia, in putting down a pipe line preparatory to the removal of the water.

The defendants, W. T. Louder, Alexander Tackett, Henry Tackett, and T. J. Crouch, in their answers, aver that at the time these suits were instituted they were employes of their codefendant, the Bluefield Water Works & Improvement Company, for daily wages, and working under the direction of said company, and that they have not, and never have had, any interest in the subject-matter of these suits.

The defendant company, in its answer, states that it is a corporation, a joint-stock internal improvement company, chartered and organized under the laws of West Virginia, and now, and ever since it was organized, doing business exclusively within the state of West Virginia. It admits that it has purchased of one Carmack Bailey and wife one acre of land, on which there is a large spring known as "Beaver Pond Spring," and asserts that in the conveyance of said land to it by Carmack Bailey and wife it is expressly stipulated that it shall have the right to remove the water from the spring to the city of Bluefield, where it proposes to use it for the purpose of furnishing it to residents of that city for drinking and all other domestic and other purposes, and to supply the Norfolk & Western Railroad Company with it for its trains and shops. It states that, for the purpose of transporting and using the water for the purposes aforesaid, it has at great expense laid a pipe line from its reservoir in the city of Bluefield to the spring, a distance of about three miles; that it has built an engine house near the spring on its land, and has purchased an engine and other valuable machinery, and placed the same in the engine house. It claims that its tract of land, with the spring thereon, lies wholly in Mercer county, in the state of West Virginia; and cites certain acts of the legislature of Virginia, and the report and plat of a survey made in pursuance of said acts, in support of its contention. It claims that under the laws of the state of West Virginia it is an internal improvement company, and that under the laws of that state it has the right to acquire real estate and water for its purposes, either by purchase, if it could agree upon terms with the owner thereof, or, if it could not agree upon terms with the owner, then that it has the right to acquire such private property by instituting condemnation proceedings in accordance with the laws of said state providing for the taking of private property for public purposes; and that, in acquiring private property for its purposes in either of the modes prescribed by the laws of the said state, it was, in so doing, the representative of the state,—standing, as it were, in the shoes of the state,—and protected in its possession of, and title to, the property thus acquired by and through the exercise of the right of eminent domain. It claims that it has thus acquired the said one acre of land and the right to divert the water of the spring; and that the purpose for which it proposes to divert the water is a public use, indispensable to the public welfare; and that the acquisition of this water is necessary for the use to which it proposes to apply it. In its answer the defendant company also admits that it does intend to take, if it lawfully can, about four-fifths of the water from the spring, and convey it to the city of Bluefield, but denies that this diversion of the water will in any way injure the plaintiff or lessen the value of his lands.

At the October term, 1892, of this court, a motion was made to dismiss this suit, by the defendant company, which motion was overruled. A demurrer to the bill was then filed, the grounds of demurrer being as follows: First, that the court has no jurisdiction of the parties nor of the subject-matter of the suit; second, for want of proper parties to the bill; and, third, that the complainant's remedy is at law, and not in equity. The demurrer was overruled. At the same term of the court an order of survey was made, and a surveyor appointed to ascertain and report to the court the true boundary line between the county of Mercer, in the state of West Virginia, and the county of Tazewell, in the state of Virginia, and to show the location of the spring with reference to said boundary line. The surveyor executed the order, and filed his report on the 9th day of January, 1893; but exceptions have been filed to his report, and the same have been considered by the court.

Henry & Graham, for complainant.

A. J. & S. D. May and A. W. Reynolds, for defendants.

PAUL, District Judge, (after stating the facts.) The first question to be determined is as to the location of the spring,—whether it is in the state of Virginia or the state of West Virginia. This depends upon the ascertainment of the boundary line between the county of Tazewell, in the state of Virginia, and the county of Mercer, in the state of West Virginia, and the exact location of the spring with reference to this boundary line.

The county of Mercer was formed out of portions of the counties Giles and Tazewell, in the state of Virginia, in 1837, and became a county in the state of West Virginia upon the formation of that state, in 1863. An act of the legislature of Virginia, passed March 13, 1847, provided for surveying and ascertaining the true boundary line between Mercer county and Tazewell county. In pursuance to the provisions of this act a survey was made, and a plat drawn, which plat, the act further provided, should be "conclusive evidence in all controversies which may arise touching said line." The surveyor appointed by the court has ascertained the true line as originally surveyed and located, and traced on the plat pursuant to the said act of the legislature of Virginia, and has reported the same to the court. This report appears to the court to be correct, and the exceptions to it which have been filed must be overruled, and the report confirmed. According to this report the spring is situate in the county of Tazewell, in the state of Virginia, and within the jurisdiction of the court. This determines the question as to the location of the spring.

The defendant company claims that it is an internal improvement company, and has the right to take private property for public uses. Whatever may be its powers conferred by its charter in the state of West Virginia, (and the court has no occasion here to express any opinion on that question,) it will not be contended that the defendant company, having no charter under the laws of the state of Virginia to do so, can exercise such powers within this state. The determination of the question as to the location of the spring—that it is in the state of Virginia, and not in the state of West Virginia—settles this contention, also, adversely to the claim of the defendant company. In the opinion of the court, the defendant company possesses, within this state, no greater or higher powers in relation to the taking of private property for public uses without the consent of the owner than a natural person possesses. It had the power to contract with the city of Bluefield and the Norfolk & Western Railroad Company to supply them with water, just as any natural person has; but such contract could not confer upon it any such power as that which the state may exercise in its sovereign right of eminent domain.

Neither the city of Bluefield nor the Norfolk & Western Railroad Company is a party to this suit. They are not here claiming that the water of this spring is indispensable to them for public uses. They have not constituted the defendant company their

agent in any respect to protect or advance their interests. The evidence shows that the only relation the defendant company sustains to the city of Bluefield or the Norfolk & Western Railroad Company is that of a party to certain contracts to furnish these two corporations with water according to the terms of the contracts; and it does not appear that the purpose for which it proposes to take the water and divert it from its channel is for public use, but to fulfill its contracts in the interest of its own private gain.

But, even if this were otherwise,—if the defendant company came as the accredited agent of the city of Bluefield and the Norfolk & Western Railroad Company; even if the city of Bluefield and the Norfolk & Western Railroad Company were themselves the defendants here,—it would make no difference in the condition of this suit touching this branch of the contention; for the city of Bluefield, being a corporation under the laws of the state of West Virginia, could not have the power to exercise the right of eminent domain within the state of Virginia, under its charter from the state of West Virginia, and the Norfolk & Western Railroad Company, although a corporation under the laws of the state of Virginia, could not, as a riparian owner, take water for its engines so as to affect injuriously the rights of other riparian owners; and even if it, as an internal improvement company, needed the water for public uses, the only mode by which it could acquire it without the consent of the lower riparian owners, if at all, would be by instituting condemnation proceedings as prescribed by the laws of the state of Virginia.

The court is therefore of opinion that this controversy must be decided upon the well-known principles of law applicable to the rights of riparian proprietors. These principles are so well settled and so familiar that we ought to have little difficulty in applying them to the questions involved.

Mr. Gould, in his treatise on the Law of Waters and Riparian Rights, (section 205,) says:

"Each riparian proprietor has a right to the ordinary use of the water flowing past his land for the purpose of supplying his natural wants, including the use of the water for his domestic purposes and for his stock. * * * The term 'domestic purposes' extends to culinary and household purposes, and to the cleansing and washing, feeding, and supplying the ordinary quantity of cattle. * * * But railway companies, as riparian owners, are not entitled to take water for their engines so as to affect injuriously * * * the right of other riparian owners, such use not being domestic; and the fact that they do not require the water for domestic use does not entitle them to it for other purposes of a different character."

Mr. Minor, in the third volume of his Institutes, (not yet published,) has exhaustively investigated the subject, collated the authorities, and states the law. He says:

"Prima facie the proprietor of each bank of a private (or unnavigable) stream is the proprietor of half the land covered by the stream; but there is no property in the water, but only a mere usufruct, while it passes along. Every proprietor has an equal right to use the water which flows in the stream, and to have the full benefit thereof, in the state in which it exists naturally, as it was wont to run, (currere solebat,) uncontaminated and sub-

stantially undiminished (save for the most necessary uses of life) by the acts of landowners above him, and without prejudice from the acts of the proprietors below him; and that, not in consequence of any presumed grant from any one, but *ex jure naturae*,—by the law of nature. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to the ordinary channel when it leaves his premises. Without the consent of the other proprietors who may be affected by his operations, no riparian owner can either divert or unreasonably diminish the quantity of water which would descend to the proprietors below, nor pollute it, nor throw the water back upon the proprietors above." 3 Minor, Inst. pp. 15, 16, and the long list of authorities there cited.

"By the general law applicable to running streams, every person through or past whose land a natural water course runs has a right to the reasonable use of the water, and no proprietor, above or below, has a right to divert or obstruct it. This right is not an easement, but is inseparably annexed to the soil, and passes with it." *Carpenter v. Gold*, 88 Va. 552, 14 S. E. Rep. 329.

Would the removal and diversion of the water of the spring, the source of the stream in question, in the manner and quantity proposed by the defendant company, unreasonably diminish the quantity of water which would descend to the complainant's land below? It appears from the evidence that the stream from this spring first enters upon the complainant's land a short distance below the spring, flows through it for several hundred feet, then leaves it, and flows through others' lands for a distance of between one-fourth and one-half mile, then re-enters upon complainant's land, and flows through it for a distance of a little more than a mile. Between the spring and the point at which the stream first enters upon the complainant's land, as the evidence shows, there are no tributaries of sufficient size to be considered. The complainant's right to the use of the water which flows in the stream, and to have the full benefit thereof, uncontaminated and substantially undiminished (save for the most necessary purposes of life) by the acts of the landowners above him, is fully established at the point where the stream first flows upon his land, and is as valid in respect to the several hundred feet of its course through his land which it first makes as it is in respect to the mile or more of the course it makes through his land lower down, after its second entrance on it; and the complainant claims that he purchased that portion of his land through which the stream first flows mainly for the benefit of the water which the stream affords, and that he would not have purchased it but for that consideration. The defendant company denies that the removal and diversion of the water, as proposed by it, would in any way injure the complainant, or lessen the value of his land, and contends that there would be an abundance of water left for all lawful and necessary purposes. From measurements made by the defendant company's engineer, the flow of the spring for each 24 hours, at different dates, is shown to be as follows: January 28, 1892, 1,100,968 gallons; February 9, 1892, 2,227,548 gallons; April 19, 1893, 1,222,793 gallons; April 29, 1893, 2,281,983 gallons. The engineer states that the measurement taken on January 28th is low on account of the ground and the small tributaries being frozen up; that taken on February 9th is high on account of heavy

rains two days before it was taken; that taken on April 19th is low on account of dry weather; and that taken on April 29th is high on account of heavy rains two or three days before. He also states that during heavy rains it is impossible to give an accurate measurement of the spring, on account of its overflowing its banks. No measurement has been made at any time during the summer or autumn season. Any calculation based upon the flow of the water during a rainy season would not be proper, because these are only occasional seasons, infrequently occurring, and of short duration. The calculation, to be correct, must have reference to the flow of the water during the regular seasons of the year, and provision should be made against the scarcity of water in the dry seasons, when it is most needed. The evidence shows that the defendant company has provided itself with a pump and machinery with which it can remove from the spring 1,271,600 gallons of water in each 24 hours. This would exceed the total flow of the spring on the 28th of January by 170,632 gallons, and of its flow on April 19th by 48,807 gallons. It would be more than half the total flow in the rainy seasons, and would, no doubt, equal or exceed it at any regular season of the year. The defendant company states in its answer that the Norfolk & Western Railroad Company's demand for water will be greatly increased in the near future. It is conceded that the city of Bluefield is a growing place, and necessarily the demand for water by its inhabitants must increase with its growth in population. What quantity of water will be required to supply such increased demands can only be conjectured, but must be very large. The defendant company concedes that its purpose is to take about four-fifths of the water, and in the opinion of the court this would unreasonably diminish the quantity of water which would descend to the complainant's land below; especially, as the defendant company does not claim that it wants the water for its own domestic purposes, but concedes that it intends to make of it a marketable commodity. But with the machinery provided to supply any demand, to the full extent of the flow of the spring, the quantity of water that would be taken by the defendant company would be limited only by the demand for it, and this demand, continually increasing, would ultimately take all the water of the spring.

But the complainant's riparian rights are equally valid in respect to the longer course, of a mile or more, which the stream makes through his land after its second entrance upon it, lower down, as in respect to the shorter course which it makes through his land at first. Between the point at which the stream leaves his land, after its short course through it, and the point at which it again enters upon it to make its longer course through it, a distance of something less than half a mile, the stream receives the water from John A. Bailey's spring branch and from Wilson creek. The defendant company's engineer's measurement of the flow of the stream after receiving these tributaries, taken at a point about 800 feet above the point at which it enters upon the complainant's land for the second time, showed the quantity of water

for 24 hours as follows: April 19, 1893, 2,342,085 gallons; April 29, 1893, 7,562,932 gallons. The engineer states that the low measurement on April 19th was on account of dry weather, and that the high measurement on April 29th was on account of heavy rains two or three days before. No measurement appears to have been taken at this point, or at any other point between where the stream leaves the complainant's land after its first short course through it and where it re-enters upon it, at any other time, either in the winter, summer, or autumn season. The date of April 19th may be taken as a fair average date among the seasons. From the measurements taken, the court can make no closer approximation. On that date, at the point stated, the flow of the water in the stream was 2,342,085 gallons. Taking from this the capacity of the pump and machinery of the defendant company to remove and divert the water, to wit, 1,271,600 gallons, and only 1,070,485 gallons, which would be less than one-half the water, would be left to flow upon the complainant's land at its entrance thereon for the second time to make a course of more than a mile through it. This, in the opinion of the court, would be an unreasonable diminution of the water which would descend to the complainant's land below, especially as it is not wanted by the defendant company for its own domestic uses, but to sell for its own profit to other parties, who have no riparian rights in the stream.

Upon a careful consideration of the evidence in this cause, and of the law applicable to the same, the court is of opinion that the removal and diversion of the water of the spring in question, in the manner and quantity which would be removed and diverted by the proposed operations of the defendant company, would be an unreasonable diminution of the quantity of water which would descend to the land of the complainant, who is a riparian proprietor below, and would deprive him of his equal right to use the water which flows in the stream, and to have the full benefit thereof in the state in which it exists naturally, as it was wont to run. "Accordingly, the diversion of a natural stream is a private nuisance, and therefore, from an early period, the courts of equity have granted relief by way of injunction, in such cases, at the suit of the injured party. The jurisdiction is founded upon the notion of restraining irreparable mischief, or of preventing vexatious litigation or a multiplicity of suits." *Carpenter v. Gold*, 88 Va. 553, 14 S. E. Rep. 329. "And it is to be specially observed that if the use be unreasonable, or otherwise illegal, the party whose rights are affected may maintain an action, although there may have been no actual, but only potential, damage,—that is, a possible future injury from the present invasion of the right." 3 Minor, Inst. p. 17, and authorities there cited.

The preliminary injunction must be made absolute and perpetuated.

JORDAN v. HARDIN.

(Circuit Court of Appeals, Seventh Circuit. July 15, 1892.)

No. 15.

NEW TRIAL—EJECTMENT—APPEAL—RES JUDICATA.

Under Rev. St. Ill. c. 45, § 35, which allows a defeated party in ejectment a new trial as matter of right upon payment of costs within one year after the rendition of the judgment, such defeated party is entitled to a new trial even though the judgment has been rendered pursuant to a mandate of the supreme court, and notwithstanding a new trial already had on stipulation of the parties.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

At Law. Ejectment by Gertrude H. Hardin against Conrad N. Jordan. On May 28, 1883, the case was tried for the first time, resulting in a judgment for plaintiff. This judgment was set aside, and a new trial ordered on stipulation of the parties. On January 18, 1886, the case was tried for the second time, and judgment rendered for plaintiff for part only of the land in controversy. On writ of error to the supreme court this judgment was reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff for all the land. Judgment was entered in obedience to this mandate, June 10, 1891. Defendant thereupon paid costs and moved for a new trial. The motion was denied, and he brings error. Reversed.

Rev. St. Ill. c. 45, § 35, declares that: "At any time within one year after a judgment either upon default or verdict in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause, * * * but no more than two new trials shall be granted to the same party under this section."

W. C. Goudy and John I. Bennett, for plaintiff in error.

Dent & Whitman, for defendant in error.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and JENKINS, District Judge.

PER CURIAM. The judgment of the circuit court is reversed, with costs, and remanded to the court below, with directions to award a new trial.

EXCHANGE NAT. BANK OF SPOKANE v. BANK OF LITTLE ROCK.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 268.

1. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—RAISED DRAFT—PROXIMATE CAUSE OF LOSS.

A bank clerk, whose duty it was to prepare exchange for the cashier's signature, so drew a draft for \$25 to his own order that the amount could be readily altered, and, after procuring the cashier's signature by

pretending that he wished to make a remittance of that amount, altered the draft so that it presented the appearance of a genuine draft for \$2,500, and thereafter indorsed it, and procured it to be discounted. *Held*, that the forgery by the clerk, and not the negligence of the bank, was the proximate cause of the loss, and the bank was not liable therefor.

2. SAME—LIABILITY OF BANK—FRAUD OF CLERK.

The bank was not liable on the ground that the forger was its confidential employe, because in this transaction he acted as a purchaser, and not as an employe, and because the purchase of the draft was complete, and he was the owner of it, when the forgery was committed.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

At Law. Action by the Exchange National Bank of Spokane, Wash., against the Bank of Little Rock, Ark., to recover the amount of a draft raised after its issue by defendant. Judgment for defendant. Plaintiff brings error. Affirmed.

Statement by SANBORN, Circuit Judge:

The Exchange National Bank of Spokane, Wash., plaintiff in error, brings this writ of error to reverse a judgment of dismissal of an action brought by it against the Bank of Little Rock, Ark., the defendant in error, to recover the amount of a draft for \$2,500 which had been raised from \$25 after the defendant issued it, and before the plaintiff bought it. One D. C. Jordan, an employe of the defendant, whose business it was to prepare the exchange for the cashier to sign, drew a draft of the defendant on a New York bank, payable to his own order, for \$25, for the cashier to sign, under the pretense that he wished to make a remittance to his brother. He so wrote the words "twenty-five" that there was room in the blank just after it to insert the word "hundred." He so punched the figures "\$25" that there was room just after them to insert with the punch two ciphers and a star in the usual manner, and he so wrote the figures "\$25" that there was room immediately after them to insert two ciphers. In this condition he presented the draft to the cashier, who examined it, saw the way in which it was written and punched, and then signed it, and delivered it to Jordan. The latter then made the insertions of the words and figures he had left room for, and the paper became a fair draft for \$2,500, without any erasure, interlineation, or other mark to excite suspicion of the alteration. This is a copy of the altered draft:

(Punched.) \$2500 †	BANK OF LITTLE ROCK.	\$2500.00
LITTLE ROCK, ARK., Mar. 8, 1890.		
Duplicate Unpaid.		
Pay to the order of D. C. JORDAN,		No. 3539.
Twenty-five Hundred.		Dollars.
Original.		
To CHEMICAL NATIONAL BANK, New York City.		C. T. WALKER, Cashier.

After making the alterations, he indorsed this draft to a fictitious person, indorsed the name of the fictitious person upon it, and delivered it to a third person, who was identified at the bank of the plaintiff, and at whose request the plaintiff discounted the draft in good faith, for value, and without notice

or suspicion of any alteration in it. The court below held that the draft was a forgery, and imposed no liability on the defendant, and this is the supposed error complained of.

S. R. Cockrill and George H. Sanders, for plaintiff in error.
Dan W. Jones and W. S. McCain, for defendant in error.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

There is a decided conflict of authorities over the question whether the maker of commercial paper or the innocent purchaser of it should bear the loss resulting from a fraudulent and unauthorized alteration in its terms or amount after its issuance and before its purchase, where the drawer or maker writes it so carelessly that the alteration may be made without exciting any suspicion of the forgery.

It is said that the drawer should suffer the loss, because his carelessness invites the forgery, on the principle that where one of two innocent parties must suffer from the fault of a third he shall sustain the loss who put it in the power of a third to occasion it. It is said that he should bear the loss, because when he issues the paper he represents to the commercial world that the draft or note is genuine, and because confidence in negotiable paper will be lessened if makers are allowed to repudiate alterations which they have invited. These are but some of the reasons assigned for charging the maker of the paper with the loss. They are good reasons for holding the maker of negotiable paper liable for any loss of which his carelessness is the proximate cause. If he carelessly intrusts checks or notes having blanks therein that were evidently intended to be filled, to a third party, who subsequently fills up and sells them, or if he intrusts to a confidential clerk the duty of filling the blanks in notes or drafts he has assigned or indorsed, and the clerk inserts excessive amounts, he cannot defend against such paper in the hands of an innocent purchaser, and the reasons referred to above fairly apply. In such cases the loss is the natural and probable consequence of his own negligence, a loss that he might have and ought to have foreseen, a loss the risk of which he fairly assumes by his own acts. But when the drawer has issued a draft or note complete in itself, but in such a form as to be easily altered without attracting attention, and it is afterwards fraudulently raised by a third person, without his knowledge or authority, and then bought by an innocent purchaser, it is not his negligence, but the crime of the forger, that is the proximate cause of the loss. Forgery and consequent loss cannot be said to be the natural or probable consequence of issuing a draft inartificially drawn. The presumption is that dealers in commercial paper are honest men, and not forgers, and that such paper will not be changed. It will not do to say that every one whose negligence invites another to commit a crime is liable to a third party for the loss the latter sustains thereby. One who, by carelessly leaving a pile of shavings

near his house, invites another to commit the crime of arson that results in the burning of his neighbor's buildings, is not liable to his neighbor for that loss. The farmer who negligently turns his horse into the highway, and thereby invites a thief to steal it, does not thereby lose title to his horse when an innocent purchaser has bought him of the thief. Nor is there, in our opinion, any sound reason why the liability of the maker of a promissory note or bill of exchange, complete in itself when issued, but subsequently fraudulently raised without his knowledge or authority, should be measured by the facility with which a third person has committed the crime of forgery upon it, or why he should be held liable for the loss resulting from such a forgery. The altered contract is not his contract. His representation was not that the forged contract was his, but that the original contract was his, and the rule caveat emptor makes it the duty of the purchaser when he buys it, and not of the maker, to then see that it is genuine. To cite and attempt to distinguish the decisions upon this question would be a work of supererogation. The authorities have all been carefully reviewed, and the conclusion to which we have arrived has been reached in *Holmes v. Trumper*, 22 Mich. 427, by Mr. Justice Christiancy, with whom Chief Justice Campbell and Justices Graves and Cooley concurred; in *Bank v. Stowell*, 123 Mass. 196, by Chief Justice Gray, without dissent from any member of the supreme judicial court of Massachusetts; in *Burrows v. Klunk*, 70 Md. 451, 17 Atl. Rep. 378; in *Bank v. Clark*, 51 Iowa, 264, 1 N. W. Rep. 491; in *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. Rep. 892; and in *Goodman v. Eastman*, 4 N. H. 455; while the decisions in *Simmons v. Atkinson & Lampton Co.*, 69 Miss. 862, 12 South. Rep. 263; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. Rep. 64; and *Angle v. Insurance Co.*, 92 U. S. 330, 340,—are to the same effect. This question has been much discussed, and the authorities differ, but we think the better reasons, the most forcible and convincing opinions, and the marked trend of the later decisions support the view of the court below.

But it is said that this case is an exception to the decisions and the reasoning to which we have referred because this draft was raised by the confidential clerk and employe of the bank. The answer is that this was a transaction between the bank on one side and Jordan, the clerk, as a purchaser of the draft, on the other. Whatever may have been their relations in other matters, in this they dealt at arm's length as vendor and purchaser. Moreover, it was not until after the draft had become a perfect instrument, had been signed by the cashier, and completely delivered to the purchaser, that it was raised. Certainly Jordan was not then acting for the bank, or in his capacity as its clerk. The bank did not employ or confide in him to remit or dispose of this draft after he had purchased it. He was then acting in his own behalf, and using his own property.

The judgment below is affirmed, with costs.

GERMAN INS. CO. OF FREEPORT, ILL., v. FREDERICK.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 267.

1. SERVICE OF PROCESS—MOTION TO QUASH—WAIVER.

Where, pending a motion, made on special appearance, to quash the summons, a new summons is served, and defendant enters a general appearance, answers, and goes to trial, without invoking the action of the court on the motion, he thereby waives his right to insist on the same; so that it is immaterial that the right of action became barred after service of the first summons, and before service of the second, although defendant supposed that plaintiff intended to rely on the latter.

2. DEMURRER TO EVIDENCE—WAIVER—APPEAL.

The introduction of evidence by defendant, after his demurrer to plaintiff's evidence is overruled, is a waiver of his right to rely on that ruling as error.

3. JUDGMENT NON OBSTANTE VEREDICTO.

A judgment non obstante veredicto can be had only by the plaintiff, and a motion for such a judgment cannot be made by defendant unless the common-law rule has been relaxed by statute or decisions.

4. FIRE INSURANCE—PROOFS OF LOSS—WAIVER OF CONDITION.

A denial of all liability by an insurance company before the expiration of the time for making proofs of loss is a waiver of the condition requiring such proofs.

5. EVIDENCE—RELEVANCY—OFFER OF PAPERS.

When a voluminous record or document is offered in evidence, which upon its face has no relation to the cause on trial, and its introduction is objected to upon the ground that it is irrelevant, and the party offering it does not state to the court the object of its introduction or point out its relevancy, the obligation is not imposed on the court of examining such record and a mass of previous evidence for the purpose of ascertaining whether it is not relevant to prove some direct or collateral issue in the case.

6. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to sustain the verdict is not reviewable in federal appellate courts unless defendant ask a peremptory instruction for a verdict in his favor at the close of the whole evidence.

7. SAME—HARMLESS ERROR.

The exclusion of evidence offered to prove a fact which is admitted is not reversible error.

In Error to the Circuit Court of the United States for the District of Kansas. Affirmed.

H. M. Jackson, for plaintiff in error.

A. F. Martin, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This action was brought by Lucy Frederick, the defendant in error, against the German Insurance Company of Freeport, Ill., and a corporation of that state, on the 18th of November, 1884, in the district court of Brown county, Kan., and afterwards removed by the defendant to the circuit court of the United States for the district of Kansas, to recover

\$1,147, and interest, upon a fire insurance policy issued by the defendant company to the plaintiff, insuring the plaintiff's dwelling house for \$1,000, and household furniture for \$200, against loss by fire.

In addition to a general denial, the answer set up the following defenses: (1) Failure to make proof of loss in the time and manner required by the policy; (2) the payment to the plaintiff of \$58, for which sum the plaintiff executed a receipt in full satisfaction of the loss, and surrendered the policy sued on to the defendant, the answer averring that the receipt was executed and the policy "delivered by plaintiff upon a full explanation and statement to her of the claims of the defendant that said policy was null and void by reason of prior insurance upon plaintiff's said property which had not been disclosed or made known to this defendant at the time said policy so sued upon was issued;" (3) prior insurance in the Continental Insurance Company, without the knowledge or consent of the defendant; (4) that the action was barred by a provision of the policy to the effect that no suit should be maintained thereon unless commenced within six months after the loss occurred. There was a trial before a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

There were two summonses issued in the case, and the defendant's contention is that the service of the first was defective, and that the second was not served until after the period of limitation prescribed by the policy had run. The only mode in which this question is saved and assigned for error is by an exception to the refusal of the court to give the following instruction to the jury:

"Such policy of defendant also contains the following clause: 'It is mutually agreed that no suit or action against this company upon this policy shall be sustainable in any court of law or equity unless commenced within six months after the loss or damage shall occur; and, if any suit or action shall be commenced after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.' And if the jury believe from the evidence that on July 19, 1884, the insured property was destroyed or injured by fire, and that on November 18, 1884, plaintiff, by her attorneys, filed her petition in the district court of Brown county, Kansas, and that on that day summons was issued by the clerk of said district court, directed to the sheriff of Shawnee county, Kansas, for service upon the state superintendent of insurance for the state of Kansas, and that said defendant appeared specially in said cause, and moved the court to quash and set aside the service of such summons, and said cause remained pending in said court, without any further or other appearance by said defendant, and without any order being made by said court upon such motion, until June 30, 1885, and that on said last-mentioned day the plaintiff caused another summons to be issued upon such petition against the defendant, and the defendant subsequently appeared therein, then said action must be deemed to have been commenced upon said June 30, 1885, and the verdict must be for the defendant."

The statute then in force in Kansas provided that an action should be deemed commenced at the date of the service of the summons on the defendant, with certain exceptions and qualifi-

cations not material to this case. The act relating to service of process on a foreign insurance company doing business in the state (1 Gen. St. Kan. 1889, p. 981, par. 3354) provided that such company "shall file in the insurance department its written consent * * * that actions may be commenced against such company * * * by the service of process on the superintendent of insurance;" and that "the summons shall be directed to the superintendent of insurance, and * * * be forthwith forwarded by the clerk of the court to the superintendent of insurance, who shall immediately forward a copy thereof to the secretary of the company sued, and another copy to the general agent of said company, if any such agent reside in this state; and thereupon said superintendent shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copies, and the name and address of each person to whom he forwarded such copy." The summons issued by the clerk was directed to the sheriff of Shawnee county, and was served by that officer on the superintendent of insurance, who made this return thereon:

"State of Kansas, Insurance Department.

"I, R. B. Morris, superintendent of insurance of the state of Kansas, do hereby certify that I received the annexed copy of a summons in case of Lucy Frederick vs. The German Insurance Co. of Freeport, Illinois, said to be issued by the clerk of district court of Brown county, Kansas, second judicial district, dated the 18th day of Nov., 1884, on the 25th day of November, A. D. 1884, at 9 o'clock A. M., and that on the 25th day of November, A. D. 1884, I forwarded a duly certified copy of the same, by depositing it in the United States mails, postage paid, addressed as follows: 'Fred Gund, Sec'y German Insurance Co., Freeport, Illinois.' Said company has no general agent residing in this state. In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of Topeka, this 25th day of Nov., A. D. 1884.

"R. B. Morris, Superintendent."

On the 19th day of January, 1885, the defendant appeared specially, and filed a motion "to quash and set aside the pretended service of summons," because the summons was directed to the sheriff, and not to the superintendent of insurance, and was served by the sheriff, when it should have been directed and forwarded to the superintendent of insurance by the clerk. The superintendent of insurance took no exceptions to the method of serving him with the summons, but made a return acknowledging service thereon, and showing that he forwarded, in due time and manner, a certified copy of the same to the defendant company, as required by law. The objection is not that the defendant did not receive the notice of the commencement of the suit, but that such notice did not bind it, because the summons was directed to the sheriff instead of to the superintendent of insurance. Another summons was issued and served June 30, 1885. On the 8th of September, 1885, the defendant appeared generally, and filed a "motion to make more definite and certain," and on the 17th of December, 1889, it filed its answer to the merits without reservation or qualification. At the time the motion for a more

specific statement was filed, and at the time the answer was filed, the motion to quash the service of the first summons had not been disposed of. There was a mistrial of the cause at the June term, 1889, and it was tried again in November, 1892, and it was during this last trial that the motion to quash the service of the summons was called up, and decided by the court adversely to the plaintiff in error. Seven years elapsed between the time the motion was filed and the judgment of the court invoked upon it, and during this time the defendant had answered to the merits, and the cause had been twice tried. Upon this state of the record we do not find it necessary to decide whether the motion to quash the summons was well founded or not. Assuming, but not deciding, that it was well founded, and conceding that the defendant had a right to make a special appearance to object to the jurisdiction of the court over its person without subjecting itself to such jurisdiction, it is apparent that upon the facts disclosed by the record the plaintiff in error cannot now avail itself of this objection. In some states the defendant may appear specially, and move to set aside the service of the summons upon him, without thereby subjecting himself to the jurisdiction of the court. "Nor," in the language of the supreme court, "is the objection waived when, being urged, it is overruled, and the defendant compelled to answer." *Harkness v. Hyde*, 98 U. S. 476. But the rule is uniform that a defendant desirous of challenging the sufficiency of the service upon him must do so at the threshold, and appear for that purpose alone, and that, if he appears to the case for any other purpose before such motion is disposed of, he thereby waives the benefit of it. *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36; *Meixell v. Kirkpatrick*, 29 Kan. 679, and note. Upon the facts of this case it is clear that the defendant's motion to quash the service was waived. It is no answer to say that the defendant supposed the plaintiff intended to rely upon the second summons, which, it is claimed by the defendant, was served more than six months after the loss occurred. If the defendant expected or desired to take any benefit from its motion to quash the service, it should have invoked the judgment of the court upon it in proper season. Not having done so, it has lost all benefit from it. The fifth request of the defendant was therefore rightly refused.

At the close of the plaintiff's evidence the defendant filed a demurrer thereto, which was overruled, and this ruling is assigned for error. After the demurrer was overruled, the defendant proceeded to introduce its evidence in defense. It is a well-settled rule that if, after a demurrer to the evidence is overruled, the party offers evidence in his own behalf, he thereby waives all objection to the decision of the court overruling his demurrer. *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. Rep. 569; *Elliott*, App. Proc. §§ 685, 686. The rule is the same where the defendant, instead of demurring to the evidence, moves for a peremptory instruction to the jury to render the verdict in his favor. If, after such request is denied, the defendant introduces his evidence, he

thereby waives any objection to the ruling of the court denying the request. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591; *Village of Alexandria v. Stabler*, 1 C. C. A. 616, 50 Fed. Rep. 689.

After the jury had rendered their verdict, the defendant filed a "motion for judgment in favor of the defendant notwithstanding the verdict," which motion was overruled, and this ruling is assigned for error. But a judgment non obstante veredicto is a judgment in favor of the plaintiff, notwithstanding the verdict for the defendant, and can only be given upon a motion made by the plaintiff. Steph. Pl. [98]; 2 Bouv. Law Dict. tit. "Judgment;" Freem. Judgm. § 7; Amer. & Eng. Enc. Law, tit. "Judgment;" 1 Black, Judgm. § 16. This well-settled common-law rule has been relaxed in some of the states; but we are cited to no statute or decision changing it in Kansas, and, if a defendant can make the motion in that state, there is nothing in the record in this case to found it upon.

A large part of the brief of counsel for plaintiff in error is taken up with quotations from the testimony, and an argument thereon, intended to show that the policy and the receipt acknowledging satisfaction thereof were obtained from the plaintiff fairly, and not by the fraud, deceit, falsehood, and threats of its agents, as claimed by the plaintiff. This was a question of fact which it was the province of the jury to decide. It was fairly submitted to them by the court, and we have no power on this record to inquire into the sufficiency of the evidence to support their finding. If the defendant below desired to test, on writ of error in this court, the sufficiency of the evidence to sustain the verdict, it should have asked, at the close of the whole evidence, a peremptory instruction for a verdict in its behalf. Not having done so, this court cannot consider the evidence with a view of determining whether it was sufficient to warrant a verdict for the plaintiff. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591; *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. Rep. 671; *Village of Alexandria v. Stabler*, 1 C. C. A. 616, 50 Fed. Rep. 689.

The 6th, 7th, 8th, and 9th requests of the defendant, in so far as they state the law applicable to the validity of the settlement, are covered by the charge in chief.

It is too well settled to require a citation of authorities, that if an insurance company refuses to pay a loss and denies its liability, upon the ground that the policy is not in force, before the expiration of the time in which proofs of loss are to be made according to the terms of the policy, such refusal and denial constitute a waiver of the condition of the policy requiring such proofs. Immediately after the fire the defendant denied its liability in toto, and the jury have found that it soon thereafter procured the possession and cancellation of the policy by fraudulent means, which decision and finding, as before shown, we are not at liberty to review. The exception, therefore, to the charge of the court, and the exception to the refusal of the court to give defendant's fourth request on this subject, are overruled.

The third specification of error reads as follows:

"The court erred in rejecting evidence offered by plaintiff in error, to wit, the proofs of loss made out, signed, and sworn to by defendant in error, being a claim made under oath against the Continental Insurance Company for insurance, commencing March 13, 1883, expiring March 13, 1888, upon the same property described in the petition in this case, and which proofs of loss were in the usual and common form, and containing, among other things, the following statement: 'In schedule of additional insurance, give the name of each company, date and expiration of policy, rate of premium, and the entire written portions of each policy, and all indorsements, assignments, or transfers thereon. (11) That, in addition to the amount covered by said policy, there was other insurance to the amount of none dollars, as follows:

\$ — in — Insurance Co. of —.

\$ —

\$ —

—The written portion of several policies issued by said companies being shown in Schedule A, hereunto annexed, besides which there was no policy or contract of insurance.'"

It is obvious from the contents of this specification of error that the only portion of the paper styled "proofs of loss" which the defendant desired to make use of as evidence was that portion copied into the exception, concerning which it is only necessary to say that it was irrelevant, and had no bearing on any issue in the case. When this paper, which comprises more than seven pages of the record, printed in very small type, was offered in evidence, the defendant did not, when its introduction was objected to, state to the court the object or purpose of its introduction, or point out its relevancy or materiality to any issue in the case. Under these circumstances it was not the duty of the court to explore this voluminous document to ascertain whether it might not be competent evidence for some purpose. A mere offer to introduce a voluminous record in evidence, which upon its face has no relation to the cause on trial, does not impose on the court the obligation of examining such record and a mass of previous evidence, for the purpose of ascertaining whether such record, or some part of it, is not relevant and competent to prove some direct or collateral issue in the case. Over v. Schiffing, 102 Ind. 191, 26 N. E. Rep. 91; Railroad Co. v. Smith, 21 Wall. 255. Good faith to the court and the opposing party requires, when the admission of the document is objected to and its competency is not apparent, that the party offering it shall state the purpose for which it is offered; and when its introduction is claimed in the lower court for a purpose for which it is incompetent, and it is for that reason rightly excluded by that court, the party will not be permitted to change his ground in the appellate court, and insist that the lower court erred in not admitting it for a purpose not disclosed to that court, and upon which its judgment was not invoked. If such a practice were permissible, it would be an easy matter for every party to lay the foundation for a reversal by stating to the lower court that the evidence was wanted for a purpose for which it was clearly incompetent, and afterwards showing in the appellate court that there was a purpose for which it was competent and material. A party cannot am-

bush the court and his adversary in any such way. It is impossible for this court to do more than conjecture the object for which this record was offered; but we think we are bound to conclude that the only part of the paper that the defendant proposed to make use of as evidence is that portion copied into the assignment of error, and which was clearly irrelevant to any issue in the case.

The bill of exceptions states that "counsel for defendant here offered in evidence certain papers, which he stated were a copy of the petition in the case of *Lucy Frederick v. The Continental Insurance Company*, with a copy of policy attached, for the purpose of showing the amount of insurance in the Continental Company." The court sustained an objection to the introduction of this evidence, and that ruling is assigned for error. The offer to introduce this record is free from the objection that we have just been considering, for it was accompanied by the statement of counsel that it was offered "for the purpose of showing the amount of insurance in the Continental Company." The benefit and necessity of the rule which requires that the offer to introduce evidence should, as a general rule, be accompanied by a statement of the purpose of such evidence, which will show its materiality and relevancy to some issue in the case, is shown by the exception we are now considering. We are not left to conjecture as to the purpose for which this record was offered. We have only to inquire whether the refusal to admit the record for the purpose for which it was offered was a harmful error; and plainly it was not. The answer set up the prior insurance in the Continental Insurance Company as a defense, and the plaintiff's reply admitted such prior insurance, but alleged the defendant had full notice of the same before it issued its policy to the plaintiff. The issue that was made by the pleadings, and that was tried, was not whether there was prior insurance, or the amount of it, but whether the defendant had notice of such prior insurance. The court called the attention of the jury to the defense based on this prior insurance, and correctly instructed them as to the law applicable thereto, and, moreover, directed them to credit the defendant with \$400 which the plaintiff admitted she received from the Continental Company in a compromise of the policy issued by that company. Furthermore, in the brief of counsel for the plaintiff in error, it is said: "Such prior insurance and settlement were admitted." It was not proposed to prove that such prior insurance had been paid, and therefore the amount of that policy beyond the \$400 admittedly paid thereon was immaterial. It is clear, therefore, that the defendant was not prejudiced by the refusal of the court to admit the record in evidence for the purpose stated, and that the only effect of its admission would have been to needlessly incumber the record. To render an exception to the admission or rejection of evidence available in this court it must affirmatively appear, not only that the ruling excepted to was erroneous, but that it affected, or might have affected, the decision of the case. A case will not

be reversed for the admission or rejection of evidence that could have no effect upon the judgment. *Railroad Co. v. Smith*, supra; *Bryant v. Stainbrook*, 40 Kan. 356, 19 Pac. Rep. 917.

Finding no error in the record, the judgment of the circuit court is affirmed.

EDDY et al. v. EVANS.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 235.

1. RAILROAD COMPANIES—KILLING STOCK—CONTRIBUTORY NEGLIGENCE.

Owners of stock in the Indian Territory have a right to let them run at large, and it is not contributory negligence to turn horses loose to graze in the vicinity of a railroad track, upon which they stray and are killed.

2. SAME—NEGLIGENCE OF ENGINEER—BLOWING WHISTLE.

The failure of a locomotive engineer to blow the whistle on discovering stock upon the track, about 80 yards ahead, is sufficient to warrant a jury in finding negligence, although it appears that the air brakes were immediately applied.

3. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

A request for an instruction to return a general verdict for defendant is properly refused, if the evidence justifies a verdict for plaintiff in respect to any part of his claim.

In Error to the United States Court in the Indian Territory. Affirmed.

Clifford L. Jackson, for plaintiffs in error.

O. S. Moore, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This action was brought by John R. Evans, in the United States court in the Indian Territory, against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas & Texas Railway Company, to recover \$150 damages for two horses killed by the alleged negligent operation of an engine on the defendants' road. There was a trial before a jury, and a verdict and judgment for the plaintiff, and the defendants sued out this writ of error.

The first assignment is that the court refused to direct a verdict for the defendants. Whether the horses were killed through the negligent operation of the defendants' engine was a question of fact for the jury, whose verdict this court cannot set aside, if there was any evidence fairly tending to support it. *Railroad Co. v. Stout*, 17 Wall. 657; *Insurance Co. v. Ward*, 140 U. S. 76, 81, 11 Sup. Ct. Rep. 720; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. Rep. 679; *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. Rep. 748; *Railway Co. v. Jarvi*, (8th Circuit,) 10 U. S. App. 439, 3 C. C. A. 433, 53 Fed. Rep. 65; *Railroad Co. v. Foley*, 53 Fed. Rep. 459; *Railroad Co. v. Ellis*, (8th Circuit,) 10 U. S. App. 640, 4 C. C. A. 454, 54 Fed. Rep. 481.

It was the duty of the engineer to keep a careful lookout for stock on the track, and, when it was discovered, to use all reasonable means to avoid injuring it. The engineer testifies that the horses were run into about midnight; that his engine was 50 feet from the first horse, when he saw it; and the testimony of other witnesses tends to show that the second horse was 65 yards further from the engine than the first,—that being the distance between their dead bodies, as they lay by the side of the track, where they were killed. The engineer testifies he applied the air brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse furthest from the engine could and would have got off the track. Whether the jury were justified in drawing the same inference as to the first horse, we need not inquire, for the reason that the instruction asked applied to both horses; and it was not error to refuse it, if the case, as to either horse, should not have been taken from the jury.

We have repeatedly decided that the owners of stock in the Indian Territory have a right to let them run at large, and that, when stock stray upon a railroad track, they are not trespassing. The court, therefore, did not err in refusing to instruct the jury that it was contributory negligence for the plaintiff to turn his horses loose to graze in the vicinity of the railroad track.

The judgment of the court below is affirmed.

HAZARD POWDER CO. v. VOLGER.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 219.

1. NEGLIGENCE — EXPLOSION OF POWDER MAGAZINE — ACTION FOR INJURY TO PROPERTY—WHEN MAINTAINABLE.

Proof of actual and peaceable possession of land is sufficient to enable the possessor to maintain an action against a powder company for damages sustained to the buildings thereon by the explosion of a magazine erected and maintained by the company in violation of a city ordinance, and the admission in evidence of imperfect deeds in his chain of title is not prejudicial error.

2. SAME—MATTERS OF DEFENSE SUBSEQUENT TO INJURY.

A deed to defendant of the land upon which its magazine and the house of plaintiff were situated, executed by the original owner four years after the explosion complained of, is inadmissible in such action as evidence for defendant.

3. SAME—IDENTIFICATION OF PLAT OF CITY.

A plat of the city of Cheyenne, which was laid out by the Union Pacific Railroad Company as a town site, is sufficiently authenticated as the official plat by the fact that it was made by the surveyor and chief engineer of the company, was mentioned in the act incorporating the city, (Laws Wyo. 1877, p. 37,) and has always been recognized as the official plat by the city and its officers, and by surveyors and conveyancers.

4. NUISANCE—POWDER MAGAZINE—CITY ORDINANCE.

The maintenance of a magazine containing a large quantity of powder within the city limits, in violation of a city ordinance, is a nuisance which will render the owner liable for any injury caused to strangers by an explosion, from whatever cause resulting.

5. SAME—KNOWLEDGE OF PERSON INJURED—CONTRIBUTORY NEGLIGENCE.

A person is not guilty of contributory negligence in living in his home near such magazine with knowledge of the danger to be apprehended therefrom

6. DAMAGES—NEGLIGENCE—PERSONAL INJURIES.

The damages to which a man is entitled for nursing his wife and doing her work while she is suffering from injuries caused by the negligence of another are the value of the service of a competent servant to perform the same duties, and not the amount of wages which he might have earned by working at his trade.

7. APPEAL—CORRECTING ERRONEOUS ASSESSMENT OF DAMAGES.

Where the trial court has erroneously instructed the jury as to the measure of damages in a certain particular, and it is apparent that the erroneous assessment under the instruction could not have exceeded a given sum, the appellate court may affirm the judgment on condition that plaintiff remit such excess.

In Error to the Circuit Court of the United States for the District of Wyoming.

At Law. Action by Schultz Volger against the Hazard Powder Company for damages resulting from the explosion of defendant's powder magazine. Judgment for plaintiff. Defendant brings error. Judgment affirmed on condition that plaintiff remit a portion of the amount of recovery.

John W. Lacey and Willis Van Devanter, for plaintiff in error.

A. C. Campbell and P. Gad Bryan, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This was an action brought by Schultz Volger, the defendant in error, against the Hazard Powder Company, the plaintiff in error. The pleadings in the case are extremely prolix and redundant. The substance of the complaint is that the plaintiff was in the lawful possession of a parcel of real estate, and a dwelling house situated thereon, in the city of Cheyenne, and that the defendant, in violation of an ordinance of the city, erected and maintained therein a powder magazine, situated near by the plaintiff's house, in which it stored and kept a large quantity of gunpowder, and that on the 2d day of July, 1885, the powder in the magazine exploded, destroying the plaintiff's house and its contents, and seriously injuring his wife and child. The defenses were a general denial, and that the powder company owned and was in possession of the premises where the plaintiff was living at the time of the explosion, and that the plaintiff was living thereon as a trespasser, with the knowledge of the location of the magazine and its dangers. There was a trial, and verdict and judgment for the plaintiff, and the powder company sued out this writ of error.

The plaintiff claimed he entered upon the premises and erected his house thereon under a license from James Talbot, the owner of

the land, and the first two errors assigned relate to the admission in evidence, over the defendant's objection, of a deed from John Talbot to James Talbot, and from the latter to the former, for land claimed to embrace the parcel on which the plaintiff's house stood. It is objected in this court that these deeds are void for uncertainty in the description of the premises, but this ground of objection was not interposed in the lower court. The objection there made was the very general and indefinite one that they were "incompetent and irrelevant." But, waiving this objection to the sufficiency of the exceptions, they are unavailing for another reason. All the evidence shows that the plaintiff was in the actual and peaceable possession of the premises, and that was sufficient evidence of his right to the premises to enable him to maintain this action. *Railway Co. v. Johnson*, 54 Fed. Rep. 474; *Railroad Co. v. Lewis*, (9th Circuit,) 7 U. S. App. 254, 2 C. C. A. 446, 51 Fed. Rep. 658. If, therefore, the admission of the deeds in evidence was an error, it was an error without prejudice.

It is assigned for error that the court excluded from the evidence a quitclaim deed from the Union Pacific Railroad Company to the powder company, dated March 8, 1889, for the premises upon which the magazine and the plaintiff's house were situated. This deed was made four years after the explosion, and was rightly excluded on that ground.

The fourth specification of error is that the court admitted in evidence the plat of the city of Cheyenne made by Gen. G. M. Dodge, as surveyor and chief engineer of the Union Pacific Railway Company. The following certificates were annexed to this plat:

"Dedication of the Town of Cheyenne.

"I, G. M. Dodge, do hereby certify that I am a surveyor and civil engineer; that I caused to be surveyed accurately the town of Cheyenne, in the county of Laramie, in the territory of Wyoming, a plat of which is hereto appended, and that the streets, alleys, lanes, avenues, squares, parks, commons, and such pieces of land as were set apart for public, village, town, city, or railroad use, or dedicated to charitable, religious, or educational purposes, were well and accurately staked off and marked.

G. M. Dodge,

"Surveyor and Chief Engineer U. P. R. R.

"I, G. M. Dodge, being trustee for the owners of the lots, lands, and premises described and shown on the foregoing plat, do hereby designate and name the same the 'Town of Cheyenne,' and dedicate the streets, alleys, and public grounds thereof, as shown on the said plat, to the public use.

"G. M. Dodge,

"Chief Engineer U. P. R. R. and Trustee.

"In presence of J. M. Eddy, Assistant Engineer."

An act to incorporate the city of Cheyenne, passed by the territorial legislature in 1877, (Sess. Laws Wyo. 1877, p. 37,) provided that "all that portion of the territory of Wyoming situated on Crow Creek, in the county of Laramie, where the Union Pacific Railroad crosses the same, laid out and platted as a town site by the Union Pacific Railroad Company under and by the name of 'Cheyenne,' is hereby declared to be a corporation by the name of the 'City of Cheyenne.'"

The evidence shows that this plat is now, and always has been recognized and accepted by the city and its officers, and by surveyors and

conveyancers, as the official plat of the city, and as the plat mentioned in the act of the legislature incorporating the city.

A sufficient answer to this assignment of error is found in the fact that the record does not show that the defendant objected to the introduction of the plat in the lower court. The objection to its competency is made for the first time in this court, upon the ground that it is not "shown that the instrument is the act of the Union Pacific Railroad Company." The objection is not well founded in fact. It sufficiently appears from the evidence that the plat was made by authority of the Union Pacific Railroad Company, and is the plat referred to in the act of the legislature incorporating the city. Confessedly, according to the plat, the plaintiff's house and the defendant's powder magazine were within the city limits.

In its charge the court below said to the jury:

"Some question was raised during the progress of the trial whether the magazine was, in fact, within the limits of the city. Upon that question, plaintiffs exhibited a map which, I believe, was made by General Dodge, and signed by himself as chief engineer of the Union Pacific Railroad Company,—a map of the city upon which the town site was divided into blocks, lots, streets, and alleys; and in that connection an act of the territorial legislature was introduced in evidence, which declares that the city of Cheyenne shall include so much as was embraced within this map. It is true, the reference to the map was not very clear, inasmuch as the act described the map as one made by the Union Pacific Railroad Company, and it did not appear that this map was made by the railroad company, except in so far as it might be inferred from the circumstances that it was made and signed by the chief engineer of that company; but, inasmuch as it does not appear that there was any other map to which the legislature referred, we must assume that in the act to which reference has been made it referred to this map, and that the city was established upon the territory indicated upon that map. And as to that the testimony, uncontradicted, is that the magazine was located upon block thirty-one within the plat made by Dodge. From that, upon these facts, we assume that the magazine was within the city, and was within the prohibition of the ordinance passed by the city council of the city of Cheyenne."

This charge, in view of the uncontradicted evidence, is not subject to any just exception, and the eleventh specification of error based thereon, as well as the fifth, sixth and eighth specifications of error, which relate to the admission of the plat and its probative force, must share the fate of the fourth assignment. The court below indicated to the jury with sufficient distinctness that the burden of proof was upon the plaintiff, and the ninth and tenth specifications of error, which assume the fact to be otherwise, are without merit.

The seventh specification of error complains of the refusal of the court to instruct the jury that if the title to the land where the plaintiff's house and the defendant's magazine were situated was in the defendant, and the defendant was in possession of the same, and the plaintiff was a trespasser thereon, then he could not recover. There is no evidence that would justify the court in submitting these issues to the jury. There was no evidence that the defendant owned the land, or that it had possession thereof, other than the parcel upon which the magazine stood, or that the plaintiff was a trespasser thereon.

In the course of its charge the court said to the jury:

"In this instance the character of this magazine as a public nuisance comes almost entirely from the circumstance that there was an ordinance of the city of Cheyenne forbidding the maintenance of such magazine within the city limits. There should be no question as to the authority of the city to pass that ordinance, so that we may consider the storage of powder in large quantities as forbidden by the terms of the ordinance; and upon that, the magazine being forbidden by law, we must say that if anything happened from an explosion occurring in the magazine, however it was brought about, whether by lightning or from any other cause, the defendant owning that magazine and maintaining it there should be liable to the persons so injured."

The defendant has no reason to complain of this instruction. It certainly stated the law as favorably to the defendant as the facts of the case would warrant. The maintenance by the defendant of a powder magazine, containing a large quantity of powder, within the city limits, in violation of the city ordinance, was a nuisance which rendered the defendant liable for the injury resulting to the plaintiff from its explosion. It is no defense to such an action that the magazine was properly constructed and the powder carefully stored therein, and that the explosion was due to no personal negligence of the defendant or its agents. It is liable for the injuries resulting from its explosion from any cause, because its location under the ordinance made it a nuisance. *Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. Rep. 389; *Cheatham v. Shearon*, 1 Swan, 213; 1 Dill. Mun. Corp. § 374, note, p. 449.

Nor is it any answer to such an action to say that the plaintiff knew the danger he incurred in living near the magazine, and was therefore guilty of contributory negligence. The plaintiff was not driven to the alternative of abandoning his home or releasing the defendant from all claim for damages for the injuries he might sustain by reason of the maintenance by the defendant of such a nuisance. *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 643, 652, 653; *Railroad Co. v. English*, 73 Ga. 366.

In *Pollock on Torts* (page 352) the learned author says:

"Neither does it make any difference that the very nuisance complained of existed before the plaintiff became owner or occupier. It was at one time held that if a man came to the nuisance, as was said, he had no remedy; but this has long ceased to be the law as regards both the remedy by damages and the remedy by injunction."

In its charge in chief the court said to the jury:

"I think, gentlemen, that to the extent that Mr. Volger was withdrawn from his ordinary business by the situation of his wife, necessarily,—by that I mean time which it was necessary for him to give to her care,—he may be allowed according to the rate of his ordinary wages; and so, also, if you believe that the infirmity which she says she has suffered from in all these years, to the extent to which he may have withdrawn from his ordinary affairs in order to give attention to her, I think he may have compensation. If he were a person in circumstances able to employ some one to manage his house, perhaps I would not be able to say that to you; but when a work-ing-man is compelled by the illness of his wife to withdraw himself from his ordinary occupation, to attend exclusively to caring for her, in so far as the illness may proceed from the wrong of another, he may have compensation for his time."

This paragraph of the charge was duly excepted to by the defendant. The court had previously told the jury that the plaintiff was entitled to recover his expenses incurred in doctoring, nursing, and caring for his wife, and for the loss of her services as a housewife, down to the trial, and for such longer period as the evidence showed the disabilities resulting from the explosion were likely to continue. The evidence shows that the wife's services were worth \$20 per month, and that the plaintiff was a carpenter, and earned, when working at his trade, \$3.50 per day. It was this latter sum the jury were told they might award the plaintiff for the time he was employed in nursing his wife and doing her work. The amount the plaintiff was entitled to recover for nursing his wife and doing her work was the value of his services in these capacities, or the value of the services of a competent servant to perform the service, and not the amount of wages he might have earned working at his trade as a carpenter. *Town of Salida v. McKinna*, 16 Colo. 523, 27 Pac. Rep. 810; *Barnes v. Keene*, (N. Y. App.; filed Feb. 12, 1892,) 29 N. E. Rep. 1090. The last case cited was an action by a father to recover expenses incurred in nursing his infant daughter, who was injured through the defendant's negligence. The father nursed the daughter, and was permitted by the lower court to prove that his occupation was that of theatrical manager, at which he earned \$50 a week, which he had to give up during the time he was nursing his daughter. The court said:

"The rule governing the assessment of damages in such a case as this is compensation for pecuniary loss, and the amount of that loss is not affected by the financial condition of the person sustaining it. The accidental circumstance that the loss may at the time bear more heavily upon a poor man than a rich man cannot swell the amount that the person causing that loss is legally responsible for. While the plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover, in addition thereto, what he might have made if he had not abandoned his business engagement. He could not recover for services rendered during a specified period, and for loss of time during the same period. He was entitled to have his pecuniary loss, necessarily caused by the accident, made good to him. This included the services of a nurse as long as a nurse was needed, and, if the plaintiff saw fit to act in that capacity, he was entitled to the value of his services in that capacity; but, if he abandoned a more lucrative occupation in order to act as nurse, the value of his services while engaged in that occupation could not properly be considered by the jury in estimating the value of his services while acting as a nurse. His services as a nurse were worth no more because he was able, in some other calling, to earn a large income."

Upon the evidence the utmost amount the jury could have allowed the plaintiff under this instruction was \$3.50 per day for six months, less \$20 per month, the value of the wife's services or the services of one to do her work. The erroneous assessment could not, therefore, have exceeded the sum of \$426. This is the only error in the case, and it may be removed by the defendant in error remitting that amount of the judgment. *Kavanaugh v. City of Janesville*, 24 Wis. 618; *Town of Salida v. McKinna*, 16 Colo. 523, 27 Pac. Rep. 810; *Elliott*, App. Proc. §§ 570, 573.

If within 60 days the defendant in error will file in this court a remittitur for the sum of \$426, thereupon the judgment below,

less the sum remitted, will be affirmed, without costs to either party in this court. If the defendant in error shall decline to remit said sum within the time mentioned, the judgment will be reversed, at the costs of the defendant in error, and the cause remanded with directions to grant a new trial.

HAZARD POWDER CO. v. VOLGER.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 218.

In Error to the Circuit Court of the United States for the District of Wyoming.

At Law. Action by Caroline Volger against the Hazard Powder Company for damages for personal injuries. Judgment entered on verdict directed for plaintiff. Defendant brings error. Affirmed.

John W. Lacey and Willis Van Devanter, for plaintiff in error.

A. C. Campbell and P. Gad Bryan, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. All the questions raised in this case were decided adversely to the plaintiff in error in the case of Powder Co. v. Volger, (No. 219,) 58 Fed. Rep. 152, and the judgment of the circuit court is affirmed on the authority of that case.

RUSH v. NEWMAN.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 269.

1. JURY TRIAL—WAIVER BY WRITTEN STIPULATION—RECORD ON APPEAL.

The recital in a record, "both parties in open court having waived a jury, and agreed to trial before the court," does not show that a stipulation in writing waiving a jury was filed, as required by Rev. St. § 649.

2. APPEAL—REVIEW—FINDINGS OF FACT BY COURT BELOW—SUFFICIENCY OF PLEADING.

Where a jury has not been waived, as required by Rev. St. § 649, the appellate court cannot notice findings of facts by the lower court for any purpose, but the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the appellate court can only consider the sufficiency of the declaration to support the judgment.

3. SAME—PRESUMPTIONS

In such a case, tried in the circuit court for the district of Kansas, where the petition set out a contract for the sale of corporate stock, alleged its breach, and prayed judgment for the full amount of damages recovered, defendant claimed that the petition was insufficient to support the judgment, in that the proper measure of damages was the difference between the market value of the stock and the contract price, and that the petition failed to allege either what the difference was, or that the stock was of no value. *Held*, that as it was competent for plaintiff to prove, under the petition, that the stock was of no value, it would be presumed that such proof was made.

4. FEDERAL COURTS—FOLLOWING STATE PRACTICE.

In actions at law in the federal courts the sufficiency of the pleadings to support the judgment must be determined by the laws regulating the practice and pleadings in the state courts, as determined by the state decisions.

5. PLEADING—WAIVER OF DEFECTS.

After answer filed, an objection to a petition that it does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege that which is essential to the relief sought.

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action by L. Newman against J. W. Rush for breach of contract. On trial by the court without a jury, judgment was rendered for plaintiff. Defendant brings error. Affirmed.

C. N. Sterry, E. D. Kenna, and F. M. Bentley, for plaintiff in error.

James R. Hallowell and Montgomery Hallowell, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. On the 12th day of May, 1891, L. Newman, the plaintiff, filed his petition in the court below against J. W. Rush, the defendant, alleging that on the 19th of June, 1888, the defendant executed and delivered to the plaintiff the following contract:

"In consideration of Mr. L. Newman taking 20 shares of the stock of the First National Bank of Dighton, and paying for same at the rate of \$104 per share, total \$2,080, I agree, at the end of one or two years, at the option of Mr. L. Newman, to take the said stock off his hands and pay him the amount he paid for it, \$2,080, and interest at the rate of twelve per cent. per annum on his investment if the bank should fail to make a cash dividend to the amount thereof. In that case I agree to give him the amount he gave for his stock, should he request me to take it off his hands.

"J. W. Rush."

The petition alleges that the plaintiff subscribed for the 20 shares of stock, and paid therefor at the rate of \$104 per share, and that the inducement to the purchase was the covenants of the defendant contained in the agreement; that at the end of two years from the date of the contract the bank failed to make a cash dividend to the amount mentioned in the agreement, and failed at all times to make such dividend; that the plaintiff notified the defendant of such failure, and of his election to return the stock, and have the defendant pay him the amount called for in the agreement, and tendered to the defendant the certificate of stock for the 20 shares duly indorsed, and demanded of him the \$2,080 and 12 per cent. interest thereon, as per the terms of the agreement, which he refused to pay. There was a prayer for judgment for \$2,080 and 12 per cent. interest thereon from the date of the contract. The answer was a general denial. The case was tried before the court, which found the issues for the plaintiff, and rendered judgment in his favor against the defendant for the amount claimed

in the petition. The errors assigned are that the judgment rendered was not warranted by the pleadings, and that the damages allowed were excessive.

There is in the record what purports to be a special finding of facts by the court. But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the Revised Statutes of the United States. The recital in the record that "both parties in open court having waived a jury, and agreed to trial before the court," does not show a compliance with section 649. The following recitals in the record have been held insufficient for this purpose: "The issue joined, by consent, is tried by the court, a jury being waived;" and "the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury;" and "the parties having stipulated to submit the case for trial by the court without the intervention of a jury;" and "said cause being tried by the court without a jury, by agreement of parties;" and "upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties,"—*Bond v. Dustin*, 112 U. S. 604, 608, 5 Sup. Ct. Rep. 296; and "jury waived tentatively," and "finding of facts and verdict,"—*Merrill v. Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849. In the absence of a statute authorizing it, the finding of issues of fact by the court is not a judicial act of which this court can take any notice. *Campbell v. Boyreau*, 21 How. 223; *Rogers v. U. S.*, 141 U. S. 548, 12 Sup. Ct. Rep. 91; *Merrill v. Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849. The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this court can consider is the sufficiency of the declaration to support the judgment. *Flanders v. Tweed*, 9 Wall. 425; *Kearney v. Case*, 12 Wall. 275; *Alexander Co. v. Kimball*, 106 U. S. 623, 2 Sup. Ct. Rep. 86; *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. Rep. 296; *Campbell v. Boyreau*, 21 How. 223; *Merrill v. Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849.

It is said the proper measure of the plaintiff's damages was the difference between the market value of the bank stock and the contract price, and that there is no allegation in the petition as to what that difference was, or that the stock was of no value. The petition set out the contract, alleged its breach, and prayed judgment for the full amount of the damages recovered. Under this petition it was competent for the plaintiff to show that the bank stock had no value, and after a general verdict and judgment for the plaintiff it will, if necessary to support the judgment, be presumed that such proof was made. The presumption is that the judgment of a court of record is supported by whatever is essential to its validity, and, in the absence of an affirmative showing to the

contrary, it will be presumed that a general verdict was supported by the evidence.

Under section 914 of the Revised Statutes of the United States, the sufficiency of the petition in this case must be determined by the laws of Kansas regulating the practice and pleadings in the courts of that state. It is very well settled by the decisions of the supreme court of that state that the petition in this case is sufficient to uphold the judgment. In *Laithe v. McDonald*, 7 Kan. 261, Judge Brewer, (now Mr. Justice Brewer,) speaking for the supreme court of that state, said:

"After answer filed, an objection to a petition that it does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege some matter which is essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite, or statements or conclusions of law."

The doctrine of that case has been affirmed by that court in many other cases. *Moody v. Arthur*, 16 Kan. 419. This is the general doctrine, and was recognized in this court in *Glaspie v. Keator*, 56 Fed. Rep. 203, 211, where, in answer to an objection similar to the one here relied upon, Judge Thayer, speaking for the court, said:

"The demurrer seems to have been based on the ground that the complaint was defective in not showing with sufficient certainty that any damage was sustained in consequence of the alleged deceit. The point is untenable. The complaint averred generally, in the concluding paragraph, that damages had been sustained in a certain sum, which was all that the pleader was required to aver. But even if the complaint had been defective, as supposed, it was merely a technical defect, which was waived by pleading to the merits, and was cured by the verdict."

If the complaint was defective in the respect claimed, it was a defect which the plaintiff had a right to remedy by amendment, and such defects are cured by the verdict. *Elliott's App. Proc.* §§ 471, 473. The judgment has the merit of enforcing the contract of the parties according to its very terms. It coerces the defendant to do what he plainly agreed to do, and for not doing which he offers no excuse.

The question as to whether, in case the bank stock had some value, plaintiff's recovery would be limited to the difference between the agreed price and the market value of the stock, we are not called upon to decide, under the state of the record.

The judgment of the court below is affirmed.

KELLEY-GOODFELLOW SHOE CO. v. MILLIGAN et al., (SCALES,
Intervener.)

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 214.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE OF ASSIGNEE—RIGHTS OF ATTACHING CREDITORS.

A firm executed a bill of sale of their goods, notes, accounts, and other assets, in order that the transferee should use the property in the pay-

v.58f.no.1—11

ment of firm debts, for some of which he was liable, because the business had been conducted in his name, and should return the surplus. The transferee subsequently made an assignment of his own and the firm property for the benefit of his creditors. *Held* that, whether the bill of sale was or was not valid as an assignment for benefit of creditors, the transferee's assignee could not claim title to the firm property as against attaching creditors of the firm.

In Error to the United States Court in the Indian Territory.

At Law. Action by the Kelley-Goodfellow Shoe Company against Isaac H. Milligan and others for the price of goods sold and delivered. A writ of attachment having been issued and levied, Peter J. Scales intervened, and filed an interplea, claiming possession of the attached property, and verdict and judgment were rendered in his favor. Plaintiff appeals. Reversed.

Statement by SHIRAS, District Judge:

From the record in this case it appears that John R. Mayfield at one time owned a stock of merchandise at Webber's Falls, in the Indian Territory, which he sold to Isaac H. Milligan on credit, receiving security on a farm owned by Milligan, and being entitled to one-half the profits derivable from the store business until the debt due him from Milligan was fully paid. The management of the mercantile business was placed in the hands of G. F. Wilson, and subsequently a further agreement was made under which Milligan put a further sum of \$1,800 into the business, one-third of the profits being paid to Mayfield to apply on the debt due him from Milligan, the remaining two-thirds being divided between Wilson and Milligan.

In December, 1890, W. L. Geren and G. F. Wilson formed a partnership under the name of Geren & Wilson, and purchased the stock of goods and business from Milligan, paying him the sum of \$800, and agreeing to pay the amount still due and owing to Mayfield. Owing to the fact that neither Geren or Wilson were at that time licensed to do business in the Indian Territory, it was agreed that until such license was obtained the store should be conducted under the name of I. H. Milligan. In March, 1891, some of the creditors began to press for payment of their claims, and thereupon Milligan induced Geren, in the absence of his partner, Wilson, to execute a bill of sale in the firm name, conveying the goods, notes, accounts, and other firm assets to Milligan, who was to use the property in the payment of the firm debts, and to return the surplus to Geren & Wilson. This transfer was subsequently acquiesced in by Wilson. On the 13th of March, 1891, Milligan executed a written instrument, purporting to be a deed of assignment, whereby he conveyed to Peter J. Scales "all the merchandise, goods, wares, and fixtures of every description in the storehouse used and occupied by me at Webber's Falls, Indian Territory, and known as the 'Old Mayfield Store,' and all notes and accounts and other evidences of indebtedness due me from whomsoever, and all personal property, of whatsoever nature the same may be and where-soever the same is situated, except my household furniture and wearing apparel, and whatever else may be exempt to me by law; * * * to sell, and out of the proceeds of sales and collections said Peter J. Scales will pay to my creditors as follows: First. He shall pay to W. T. Hutchings the sum of two hundred and fifty dollars, (\$250,) his fee for services in preparing and perfecting this assignment, the same not being for any future service; and the claims of W. J. Echols & Co., of Fort Smith, Arkansas. These to be paid in full. Second. The residue shall be paid to all my creditors, share and share alike."

On the 14th day of March, 1891, the Kelley-Goodfellow Shoe Company brought an action at law, aided by attachment, in the United States court for the Indian Territory, against I. H. Milligan, William Geren, and G. F. Wilson, to recover the sum of nine hundred and ten and 10-100 dollars, due for goods sold, and caused the attachment writ to be levied upon the stock of goods covered by the bill of sale executed by Geren & Wilson to I. H. Milligan. In this action Peter J. Scales intervened, and filed an interplea, wherein he

averred that he was entitled to the possession of the attached property by virtue of the deed of general assignment executed to him by Isaac H. Milligan. The issue thus created was tried before the court and jury, and a verdict was rendered in favor of the interpleader, sustaining his right to the goods attached, upon which judgment was entered by the court, to reverse which the Kelley-Goodfellow Shoe Company brings the case before this court upon writ of error.

L. P. Sandels and J. M. Hill, for plaintiff in error.

W. T. Hutchings, for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge, (after stating the facts.) In the petition of intervention or interplea filed by Peter J. Scales, all the right or title claimed by him in or to the attached property or its proceeds was that held by him as assignee of Isaac H. Milligan, under the deed of assignment of March 14, 1891. He did not claim to be a purchaser in his own right for value of the property. If the money realized from the sale of the attached property, and now under the control of the trial court, through the possession of the receiver appointed in the case, is paid to the defendant in error, in pursuance of the judgment rendered by the court below, the same will be held by Scales, in trust, for the benefit of the parties named in the deed of assignment to him, who are individual creditors of Milligan. The ultimate question at issue on the trial was whether Scales, as assignee of Milligan, was rightfully entitled to the attached property or its proceeds, in order that he might use the same in paying the creditors of Milligan. The trial court instructed the jury that the deed of assignment from Milligan to Scales was valid on its face; that it vested the legal title to the property in dispute and the possession thereof in the interpleader, Peter J. Scales; that if Milligan took back the stock of merchandise previously sold to Geren & Wilson, because of their failure to pay the indebtedness they had agreed to pay, and in order that he might dispose of the stock and pay his own debts, then the bill of sale to him was not an assignment, but that if, in fact, it was an assignment for the benefit of creditors, it was void under the law; and that if subsequently Milligan made an assignment of these goods for the purpose of paying the debts contracted in their purchase with the knowledge of Geren & Wilson, or if they ratified his act after the same was done, then the transfer of the property from Geren & Wilson to Milligan could in no wise affect the validity of the assignment from Milligan to the interpleader. The instructions given to this effect were excepted to, and the giving thereof is assigned as error.

The effect of the instructions given the jury was to eliminate from the case the question of the title held by Milligan under the bill of sale executed to him by Geren & Wilson. The evidence shows without contradiction that in December, 1890, Geren & Wilson bought the goods and business from Milligan, paying him in cash \$800, and agreeing to pay the balance due Mayfield from Milligan.

The title of the goods unquestionably passed from Milligan to Geren & Wilson at that time. We fail to find in the record any evidence to sustain the theory that the transfer of the property made in March, 1891, from Geren & Wilson to Milligan, was intended to be a rescission of the original contract between these parties. On the contrary, all the testimony is to the effect that the bill of sale was intended to transfer the firm property to Milligan, in order that he might realize therefrom the means necessary to discharge the firm debts, including the sum due Mayfield, and the other creditors who could hold Milligan liable to them, because the business for a time had been run in his name. It is clear, therefore, that the property was conveyed to Milligan in trust, and not absolutely. It was conveyed to him for the purpose of enabling him to realize therefrom a sum sufficient to pay the debts of the grantor firm, the surplus to be returned to Geren & Wilson. In substance, the conveyance was an assignment for the benefit of creditors. Whether it had the requisites to constitute it an assignment under the statute in force in the Indian Territory is immaterial. Milligan received the property for the purposes contemplated by the grantors, and he could not, by refusing to carry out the trust imposed on him, make the property his own. Finding nothing in the evidence which tends to show that, in the making the bill of sale to Milligan, it was the intent of Geren & Wilson to rescind the contract with Milligan, whereby they became the owners of the property and business, it must be held that it was error to submit the question to the jury, as was practically done in the first part of the third instruction given the jury. In the latter half of this instruction the court held that, if the transfer to Milligan was in fact an assignment, it was void as a matter of law, and therefore it would not affect the validity of the assignment made to Scales, if the same was made with the knowledge of Geren & Wilson, or if they ratified his act after it was made. The court did not state the reasons for holding the bill of sale, considered as an assignment for the benefit of creditors, to be void as matter of law. In the argument of counsel it is said the reason was that no inventory or bond was filed by the assignee. A failure to observe the substantial requirements of the statute regulating assignments or fraud upon part of the assignee will enable the creditors to attack the assignment, if they so desire. As to them the assignment becomes voidable at their option, but they may waive the irregularity or fraud, and elect to have the trust carried out for their benefit. This option, however, is not possessed by the assignee named in the deed. If he accepts the trust, and receives the property for the purposes thereof, he cannot be permitted to assert a title to or interest in the property adverse to the trust, on the ground that the transfer to him is lacking in formality, or does not meet the requirements of the statute, and still less can he be permitted to assert that the assignment to him has become void or inoperative because he himself has failed to file an inventory or give bond in accordance with the provisions of the statute. In effect, the jury was instructed that even if the conveyance to Milligan was intended to be an as-

signment for the benefit of the creditors of Geren & Wilson, and Milligan received the property charged with the duty of realizing therefrom the sum necessary to discharge the debts of Geren & Wilson, the surplus left, if any, to be returned to Geren & Wilson, such conveyance was void as a matter of law, and Milligan could deal with the property as his own, and that the conveyance to Scales was valid if the same was made with the knowledge of Geren & Wilson. This instruction ignored the rights of the creditors of Geren & Wilson, the beneficiaries of the conveyance to Milligan, and of Geren & Wilson, the owners of the property conveyed to Milligan in trust. Certainly, mere knowledge on part of Geren & Wilson of the execution of the deed of assignment to Scales would not estop them or their creditors from objecting thereto. Consent on their part might have that effect upon Geren & Wilson, but not mere knowledge of the fact of the transfer. It seems clear that the instructions of the court were framed upon a misapprehension of the real issue involved, and of the rights of the parties dependent thereon. Beyond dispute, it appears that all the right or title which Milligan had to the attached property, when he executed the deed of assignment to Scales, was that derived from the conveyance to him by Geren & Wilson.

If, according to the view of the court below, this conveyance was absolutely void, then Milligan took no title thereunder. The title remained in Geren & Wilson, and Milligan held the mere possession of the property as their agent or trustee. If, however, the conveyance to Milligan was intended to be an assignment for the benefit of the creditors of Geren & Wilson, then the title passed to Milligan as trustee, charged with duties and obligations both to Geren & Wilson and their creditors. In neither view of the case did Milligan become vested with the absolute ownership of the property, nor could he repudiate the duties of his position of trustee, and be thereby enabled to convey the property to Scales as his assignee, and charge the property with a trust in favor of his individual creditors. Certainly, Milligan could not himself lawfully use the property received in trust in the payment of his individual debts, and what he could not lawfully do himself he could not empower his assignee to do. Under the instructions given by the court, the jury could find only in favor of the interpleader, and the practical effect of the judgment rendered upon the verdict is to hold that Scales, as assignee of Milligan, is entitled to the proceeds of the attached property, in order that he may pay the same to the creditors of Milligan. We fail to find upon the record any evidence which sustains the theory that the property passing to Milligan by virtue of the conveyance from Geren & Wilson became his property, so that he could lawfully appropriate it to the payment of his own debts; and hence the ruling of the court below that the deed of assignment executed by Milligan conveyed the title and possession of this property to Scales was clearly erroneous, and requires a reversal of the judgment entered in the circuit court. A number of other assignments of error are made and have been discussed

by counsel in their briefs, but it is not necessary to consider them in view of our ruling upon the main question at issue between the parties.

Reversed at cost of defendant in error, and cause remanded to the court below, with instructions to grant a new trial.

PHOENIX ASSUR. CO. OF LONDON v. FRANKLIN BRASS CO. OF BUCHANAN.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.)

No. 44.

FIRE INSURANCE—CONDITIONS OF POLICY — BUILDER'S RISK — NOTICE OF COMPLETION—INCREASE OF RISK—TRIAL—INSTRUCTIONS.

A policy of fire insurance for a builder's risk on a factory and its machinery provided that assured, as soon as they were ready to begin manufacturing, should notify assurers, and the rate should be adjusted, and that the policy should be void if the premises were used so as to increase the risk. The disputed questions on the trial were whether the building was completed and the machinery used before the fire, so as to avoid the policy. *Held*, that clear instructions should have been given that an actual beginning of manufacturing, without notice, or readjustment of the rate, would avoid the policy, and that a use or occupancy beyond the ordinary hazard of builders' risks, and without notice, would do likewise; leaving to the jury the questions whether there had been a commencement of manufacturing without notice or readjustment, and whether there had been an increase of the risk without notice or consent.

In Error to the Circuit Court of the United States for the Western District of Virginia.

At Law. Action by the Franklin Brass Company of Buchanan, Va., against the Phoenix Assurance Company of London on a policy of fire insurance. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

B. B. Munford and W. R. Staples, for plaintiff in error.

Thomas J. Kirkpatrick and R. G. H. Kean, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

HUGHES, District Judge. This is a suit for a loss by fire. The policy sued upon was taken out on the 25th June, 1891, in the sum of \$7,333.33. It was one of several policies issued by insurers to assured on different properties. The properties insured by the policy which is the subject of this suit were a large frame building, and a small adjoining one, in the town of Buchanan, Va., that were in process of construction, and intended to be used in the manufacture of brass goods, and also a quantity of material and machinery deposited in the large building, which likewise was intended to be used when the manufacturing operations should commence. The large building and the machinery were burned.

The machinery insured was described in the policy as "engines,

boilers, machinery, belting, gearing, and all implements, appurtenances, and appliances, to be used in their business as manufacturers of brass goods, all contained in and on their premises," as described. The insurance was of the class called "builders' risks." The policy was taken out, nominally, for a year, but the terms were to be revised and readjusted whenever the assured should be ready to commence the business of manufacturing, a clause of the policy reciting, "It is understood that the above buildings are in course of construction, and privilege is hereby granted to complete the same;" another clause providing, "This company to be notified as soon as assured are ready to commence manufacturing, and rate to be adjusted." The policy also provided that it should be void "if the above-mentioned premises shall be occupied or used so as to increase the risk," "by any means whatever," "without notice to, and consent of, the insurer, in writing;" the insured being informed that the rate would be higher when manufacturing operations should commence.

The insurance, to the amount of \$13,950 on the main building, and of \$9,450 on machinery, having been thus procured, the assured proceeded with the erection of their buildings, and between the 25th of June and the last of July, 1891, the main building was completed, with the possible exception of a staircase and a gangway, and a considerable quantity of machinery brought to that building, and set up in it, preparatory to commencing the working operations.

In the latter part of July, 1891, the assured took out on its buildings and machinery six other policies, amounting to \$51,000, in another company, permanent, and not of the class of builders' risks, which went into effect on the 1st of August ensuing. Assured do not seem to have given notice of these policies to the insurers. These policies are designated in the record as the "Otey Policies," the original policy on which this suit is brought having been negotiated by the insurance agency of Leftbridge & Davidge.

On the 27th August, a month after the procurement of the Otey policies, and shortly before the date of the fire which was the occasion of this suit, and which happened on the 4th September, 1891, the assured wrote to Leftbridge & Davidge, asking:

"Why have you not canceled the policies, which we told you to do August 1st, on our buildings here?"

Leftbridge & Davidge replied August 31st:

"We have received no instructions from you to cancel your policies on the buildings, &c., at Buchanan, which we took out in June last. If you desire us to cancel them, please return the policies, and we will do so without delay, and at the same time collect the return premiums due, and remit them to you."

Before the receipt of this letter, the assured again wrote to Messrs. Leftbridge & Davidge, saying:

"We are awaiting an answer to our letter of the 27th ulto., regarding the cancellation of our policies on our buildings in this place, which we told you to do when in New York, on the 1st of August."

To which letter, Messrs. Leftbridge & Davidge, under date of September 5th, replied:

"We are in receipt of your favor of the 3d inst. and note contents. Your favor of the 27th ulto. was duly received, and we herewith inclose a copy of our reply to the same. We can only add that, if you send forward the policies referred to, we will return them to the companies without delay, and remit you the return premiums."

Before the date of the fire, to wit, about the 27th of August, 1891, the Otey policies were, by direction of the companies, canceled, and thus were not in force at the time of the fire; but the assured had forthwith procured other policies of insurance in still another company, alike in character and purport to the Otey policies, some of which said new policies were in force at the time of the fire, from which the assured derived a partial indemnity.

After the procurement of the Otey policies, which, as has been seen, went into effect on the 1st day of August, 1891, the assured, without notifying the plaintiff in error, started fires in its furnaces, as early as the 4th day of August. By the 20th August, some ten or more operatives living in and around Buchanan were employed. The machinery was put in motion daily at the sounding of the whistle, at 7 o'clock in the morning. These operatives went to work, working until dinner time; then, after a short recess, worked until the factory closed for the night. They were paid off by the week. There is testimony tending to prove that at the time of the fire there were as many as 30 people employed in and about the factory. As many as 700 brass balls, which had been brought to the factory from the north in a partially completed state, were manufactured and sold upon order. Some thousands of brass hinges, one of the principal products of the works, were made, and only required to be polished in the buffing room—which was just about completed at the hour of the fire—to make them marketable goods. Several employes testify they had been working continuously day after day at the same presses, in the manufacture of the same class of goods, which presses were propelled by steam. While so engaged, the fire, which originated from the boiler, occurred, and the property was destroyed.

This fire occurred, as before stated, on the 4th of September, 1891, in the large building, in the daytime, the machinery being then set up and running. The fire originated at the boiler, and consumed the large building and its contents, embracing property mentioned in the policy. No notice had been given by the assured, either of an increase of risk from starting fires in the building that was burnt, or of readiness to commence manufacturing operations on or at any time after the 4th of August.

The foregoing narration embraces all the facts of the case, material to its decision.

The insurers contend that the lighting of the fires on or about the 4th of August, and the carrying on of manufacturing operations from that day until the occurrence of the fire, one month afterwards, was a double violation of the contract of insurance—First, in having been a commencement of manufacturing operations without

previous notice to them, and without a previous adjustment of the premium for a permanent, as distinguished from a builder's, risk; and, second, in having been a violation of that stipulation of the policy under which they were entitled to notice of, and were to have the option of consenting to, any use of the premises which should increase their risk beyond the builder's risk.

The assured, on the other hand, insist that the use of fire and steam was necessary for the preparation and completion of this plant, and that such use in preparing and testing it for the commencement of manufacturing operations was a necessary incident of the risk insured against; whatever work that was necessarily incident to the completion of preparations having been implied by the contract, whether it increased the risk or not.

At the trial of the cause the court gave, among others, the following instruction to the jury, (third instruction prayed by the plaintiff below:)

"If the jury believe from the evidence that the main building of the plaintiff was not in fact completed when the loss occurred, and that at that time the plaintiff was not ready to commence manufacturing, and that the raising of steam in the boilers, and the running of such portions of the machinery as has been shown in evidence to have been run upon such work as it was suited to do, was in good faith intended as a test of the proper adjustment of the said machinery and tools used therewith, and was a proper mode of making such test, then the time had not arrived when, according to the terms of the typewritten portion of the policy sued on, it was incumbent on the plaintiff to notify the defendant that the plaintiff was ready to commence manufacturing, and the rate was to be adjusted; and the said policy, so far as said provisions are concerned, was in force at the time the loss occurred."

The court gave as its own the following instructions:

"However, if the jury believe from the evidence that the true intent and meaning of the policy sued on was not to insure the engines, boilers, and other machinery mentioned therein, in operation, but only to insure the same while the building was being constructed, and the machinery, etc., placed in position preparatory to commencing work, and that the plaintiff started fires in the furnaces, and used the engines, boilers, etc., without the permission of the defendant indorsed on the policy, and that thereby the risk was increased, then such acts were in violation of the terms of the policy, and the plaintiff is not entitled to recover in this action, and they should find for the defendant."

"And although the jury may believe that the engine, etc., were being used to test the machinery, with a view to getting it ready to commence manufacturing, still, if they believe that the policy did not cover the engine, boilers, etc., when they should be put in operation in the building, if the risk was thereby increased, they must find for the defendant."

The court refused to give, among others, the following (third and fourth) instructions prayed for by the defendants below.

"(3) The jury are instructed that by the terms of the policy the plaintiffs were prohibited from occupying or using the building described in said policy so as to increase the risk, or by any means whatsoever, within their control, from increasing such risk, without the assent of the defendants indorsed on said policy; and these provisions continued of binding force and effect, unless canceled by consent of the parties, or by notice given by plaintiffs to the defendants that they were ready to commence manufacturing, and a new rate actually adjusted. And if the jury believe that the risk was increased by lighting fires in the furnaces (in said building) previous to and at the time

of the fire which destroyed the building, and that this was done without the assent of the defendants indorsed on the policy, the plaintiffs are not entitled to recover in this case, although the jury may further believe that the plaintiffs, at the time of the fire, were not ready to commence manufacturing.

"(4) The jury are instructed that, according to the true intent and meaning of the policy, the plaintiffs were not entitled to manufacture goods for any purpose, if thereby they increased the risk, without notice to the defendants; and if the jury believe that the plaintiffs, by their agents, were engaged in manufacturing goods, previous to and at the time of the fire which destroyed the building, without such notice to the defendants, the jury must find for the defendants, whether the building was at the time of the fire completed, or not completed, or whether the plaintiffs were or were not in condition to complete and finish the goods which were in course of manufacture in said building."

Upon these instructions prayed for on either side and given or refused by the court, and other instructions on questions not involving the one under consideration, the case went to the jury, who found a verdict for the plaintiffs, assessing their damages at \$6,933.33. A motion for a new trial was made and refused, judgment was entered for the plaintiffs, and the case is here on a writ of error.

The insurers contend in their petition for the writ of error that the testimony showed that the assured had completed their preparations for commencing work as manufacturers by or before the 1st of August, and that this fact was practically conceded by their own conduct in effecting permanent insurances under what were termed the "Otey Policies," and those by which the Otey policies were replaced, and by directing the cancellation of all the builder's risk policies. They insist, therefore, that by the 4th August, when fires were lighted and the machinery set in motion, they were entitled to notice of readiness to commence work under the clause of the contract, entitling "this company to be notified as soon as the assured are ready to commence manufacturing, and the rate to be adjusted." They further contend that even if, in point of fact, the assured were not ready to commence work, yet, by lighting fires and putting the machinery in motion, and actually manufacturing goods, whether merely for testing the machinery or not, they increased the risk of fire, and that the insurers were not responsible for casualties, by reason of that clause of the contract which provided that "if the premises shall be occupied or used so as to increase the risk without notice to, or consent of, insurers, in writing, or the risk be increased by any means whatever, within the control of the assured, without the assent of the insurers," the policy should be void.

We think the court should have instructed the jury, in simple, positive terms, (1) that unless the insurers were previously notified of the readiness of the insured to commence manufacturing operations, and the rate of insurance adjusted and fixed, an actual commencement of the manufacturing of goods would release them; and (2) that during the period antecedent to readiness for commencing the work of manufacturing, if the assured so used or occupied the premises as to increase the risk of the insurers beyond the ordinary hazard of builders' risks, the latter would not be responsible for loss by fire, if their consent had not been given upon previous

notice; leaving it for the jury to decide, upon the questions of fact, first, whether there had before the fire been a commencement of manufacturing operations without notice of readiness to commence to the insurers, and without a readjustment of the rate; or, if not, whether there had been an increase of the risk of fire without notice to, or the consent of, the insurers.

The court erred in failing to give such instructions. We think it erred in giving the third instruction prayed for by the insured, which left the question, both of law and of fact, to the jury. We think it erred in giving the court's instruction, in which the court withheld its own interpretation of the contract, and left it to the jury as well to determine the legal purport of the contract as to ascertain the facts of the case. In the absence of other proper instructions covering the points involved, we think the court erred in refusing instructions third and fourth prayed for by the defendants below, which, we are of opinion, embodied the law of the case.

We have failed to find in the rulings of the court on the other points assigned as error anything of which the plaintiff in error can justly complain, but, for the reasons before stated, the judgment must be reversed, and the case remanded for a new trial.

SOUTHWESTERN VIRGINIA IMP. CO. v. FRARI.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.)

No. 29.

1. APPEAL—REVIEW—INSTRUCTIONS—BILL OF EXCEPTIONS.

Under rules 10, 11, and 24 of the circuit court of appeals for the fourth circuit, (47 Fed. Rep. vi., xi.) that court will not consider a bill of exceptions to instructions given or refused, unless it contains the evidence on which the question of law raised by the instructions arose. It is not enough that the testimony be found in another part of the record.

2. SAME—REVIEWABLE ORDERS—DENIAL OF MOTION FOR NEW TRIAL.

According to the practice of the federal courts, the ruling of a trial court on a motion for a new trial is not reviewable in the appellate court.

In Error to the Circuit Court of the United States for the Western District of Virginia.

At Law. Action by Nicola Frari against the Southwest Virginia Improvement Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

A. J. May, for plaintiff in error.

Daniel Trigg, for defendant in error.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and HUGHES, District Judge.

GOFF, Circuit Judge. This action of trespass on the case was brought in the circuit court of the United States for the western district of Virginia by Nicola Frari against the Southwest Virginia Improvement Company to recover damages for injuries received by

the plaintiff while he was in the employment of the defendant; the claim being made that, because of the carelessness of a superintendent of defendant, the plaintiff was injured. The case was tried by a jury, and a verdict returned for \$1,000 damages for plaintiff, on which judgment was duly rendered. The defendant brings the case here on writ of error from this court. A number of the assignments of error, as found in the record, have been abandoned, while the others refer to, and depend upon, the bills of exceptions—three in number—taken at the instance of the defendant below. The first exception is to the action of the court in giving instructions to the jury at the request of counsel for the plaintiff, over the objection of counsel for defendant; the second is to the refusal of the court to give instructions asked for by counsel for defendant; and the third alleges error in the refusal of the court to set aside the verdict, and grant a new trial.

No part of the evidence considered by the jury was certified in either one of the bills of exceptions; and therefore we cannot pass on the questions of law raised by the instructions given and refused, as there is nothing before us showing that they have any relation to the issue that was submitted to the jury. In the preparation of the bills of exceptions and the assignments of error, there was an utter disregard of the rules of this court, and of the practice, in cases of this character, as established by the decisions of the supreme court of the United States. The rules and practice so instituted have been frequently announced, and the reasons for the enforcement of the same so often given, that we do not deem it necessary to again set forth the one, or explain the other. See rules 10, 11, and 24 of this court; also *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. Rep. 500; *Mining Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. Rep. 665; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. Rep. 832; *Deitsch v. Wiggins*, 15 Wall. 539; *Van Gunden v. Iron Co.*, (4th Circuit,) 8 U. S. App. 229, 3 C. C. A. 294, 52 Fed. Rep. 840.

We find in exception No. 3 the following:

"And the court certifies that the following evidence (here insert same) is the evidence, all the evidence, and the only evidence introduced by the plaintiff and by the defendant on the trial of this cause."

But the evidence here alluded to was not inserted either in said bill of exceptions, or in any of the others signed by the judge presiding at the trial; and we cannot consider the "testimony" found in another part of the record as "the evidence," or "all the evidence," referred to in the exception mentioned. The exceptions should show all the testimony relied on to make the propositions of law included in the instructions asked for applicable to the case before the jury. *Jones v. Buckell*, 104 U. S. 554. Chief Justice Waite, in delivering the opinion of the court just cited, said:

"As long ago as *Dunlop v. Munroe*, 7 Cranch, 242, 270, it was said by this court that each bill of exceptions must be considered as presenting a distinct and substantial case, and it is on the evidence stated, in itself alone, that the court is to decide."

In *Reed v. Gardner*, 17 Wall. 409, Mr. Justice Hunt said:

"It has been frequently held by this court that, in passing upon the questions presented in a bill of exceptions, it will not look beyond the bill itself. The pleadings and the statements of the bill, the verdict, and the judgment are the only matters that are properly before the court. Depositions, exhibits, or certificates not contained in the bill cannot be considered by the court."

See the cases of *Norris v. Jackson*, 9 Wall. 125; *Lincoln v. Clafin*, 7 Wall. 136; *Leftwitch v. Le Cann*, 4 Wall. 187; *Russell v. Ely*, 2 Black, 580.

If the evidence pertinent to the instructions given and refused had been properly certified in either of the bills of exceptions, then the court, in passing on the questions raised in one, might be warranted in referring to such evidence so appearing in the other; but, as no such record was made, there is absolutely no evidence that this court can consider. Where the bills of exceptions contain simply the instructions given and refused, the appellate court will not reverse the judgment. *Worthington v. Mason*, 101 U. S. 149; *Jones v. Buckell*, *supra*.

The assignment of error founded on the refusal of the court to set aside the verdict of the jury and grant a new trial is not well taken. The ruling of the court below on a motion for a new trial is not reviewable in the appellate court. *Pomeroy's Lessee v. Bank*, 1 Wall. 592; *Laber v. Cooper*, 7 Wall. 565; *Insurance Co. v. Barton*, 13 Wall. 603; *Kerr v. Clampitt*, 95 U. S. 188; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. Rep. 8; *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36; *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201; *Henderson v. Moore*, 5 Cranch, 11; *Railway Co. v. Heck*, 102 U. S. 120.

The judgment of the circuit court is affirmed.

EDGE MOOR BRIDGE WORKS v. FIELDS.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.)

No. 51.

APPEAL—REVIEW—MOTION FOR NEW TRIAL.

Action on a motion for a new trial is not reviewable on writ of error in the circuit courts of appeals.

In Error to the Circuit Court of the United States for the Western District of Virginia.

At Law. Action by Lewis N. Fields against the Edge Moor Bridge Works to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. On motion to dismiss or affirm. Affirmed.

Statement by FULLER, Circuit Justice:

This was an action to recover damages for injuries inflicted, as alleged, through the carelessness and negligence of defendant below, appellant here, which resulted on trial in a verdict for the plaintiff, and judgment thereon after motion for new trial made and overruled.

No exception appeared to have been taken during the trial to evidence or

instructions, nor was there any demurrer to evidence, or equivalent motion. Some days after judgment was entered, defendant renewed its motion to set the verdict aside and grant a new trial, assigning as grounds that the verdict was contrary to the law and the evidence, and that the court gave certain instructions, which were set forth. The motion was denied, and exception taken, and preserved by bill of exceptions. The case came before this court on motion to dismiss the writ of error, or affirm the judgment.

Edward S. Brown, for the motion.

T. J. Kirkpatrick, opposed.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and SEYMOUR, District Judge.

FULLER, Circuit Justice, (after stating the facts.) The judgment is affirmed, on the authority of *Railroad Co. v. Horst*, 93 U. S. 291, 301; *Reagan v. Aiken*, 138 U. S. 109, 11 Sup. Ct. Rep. 283; *Express Co. v. Malin*, 132 U. S. 531, 10 Sup. Ct. Rep. 166; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. Rep. 8; *Improvement Co. v. Frari*, 58 Fed. Rep. 171; and other cases.

DUN et al. v. CITY NAT. BANK OF BIRMINGHAM.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

No. 85.

1. PRINCIPAL AND AGENT — FRAUDULENT REPRESENTATIONS OF SUBAGENT — MERCANTILE AGENCIES.

A mercantile agency which contracts with its subscribers to communicate, on request, information as to the financial responsibility of merchants and manufacturers throughout the United States and Canada, expressly stipulating that the information is to be obtained mainly by sub-agents of its subscribers, whose names are not to be disclosed, and that the "actual verity or correctness of the said information is in no manner guaranteed," is not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a subagent in furnishing false information. 51 Fed. Rep. 160, reversed.

2. SAME.

Under such circumstances, the rule that, where one of two innocent persons must suffer by the wrongful act of a third person, the principal who has placed the agent in the position of trust should suffer, rather than the stranger, has no application.

Error from the Circuit Court of the United States for the Southern District of New York.

At Law. Action by the City National Bank of Birmingham, Ala., against Robert G. Dun, Erastus Wiman, Arthur J. King, and Robert Dun Douglass. Verdict and judgment for plaintiff, and new trial denied. See 51 Fed. Rep. 160. Defendants bring error. Reversed.

W. W. McFarland and Douglass & Minton, for plaintiffs in error.
Lorenzo Semple and Roger Foster, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

TOWNSEND, District Judge. The defendants are partners, doing business as a mercantile agency, under the firm name of R. G. Dun & Co. The plaintiff is a national bank, located at Birmingham, Ala. In April, 1889, the plaintiff became a subscriber to said agency, under a written agreement, the material portions of which are as follows:

"Terms of Subscription to the Mercantile Agency.

"Memorandum of the agreement between R. G. Dun & Co., proprietors of the mercantile agency, on the one part, and the undersigned, subscribers to the said agency, on the other part, viz.:

"The said proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been, and shall mainly be, obtained and communicated by servants, clerks, attorneys, and employees, appointed as our subagents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit: (1) All verbal, written, or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the Reference Book, hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never, under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our establishment. (2) The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employees in procuring, collecting, and communicating the said information; and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co. The action of said agency being of necessity almost entirely confidential in all its departments and details, the said R. G. Dun & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney, or employee, or any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained. (3) The said R. G. Dun & Co. are hereby requested to place in our keeping, for our exclusive use, a printed copy of a Reference Book, containing ratings or markings of estimated capital and relative credit standing of such business men, as aforesaid, prepared by them or the servants, clerks, attorneys, and employees aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the Reference Book, the one now placed in our hands shall be surrendered to them, and also that upon the termination of our relations as subscribers the copy then remaining in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title to said Reference Book is vested and remains in said R. G. Dun & Co."

Plaintiff paid \$75 in advance for services to be rendered under said agreement till July 1, 1890. Shortly after the making of said agreement, one Rollins, a customer of the plaintiff, applied to it to discount certain drafts drawn by him, and accepted by W. A. Kitts, of Oswego, N. Y. Before discounting the drafts, the plaintiff presented an inquiry slip at defendants' agency, at said Birmingham, asking, as a subscriber, for such information as defendants had respecting the standing and responsibility of said Kitts. The inquiry was sent from Birmingham to the office of defendants in

New York city, and thence to one Burchard, their agent at Oswego, N. Y. Burchard and Kitts were connected in business, and Burchard, in order, apparently, to promote his own interests, sent false reports as to the standing and responsibility of Kitts to the defendants. These reports were pasted on printed forms, and delivered by defendants to the plaintiff. Said printed forms were as follows:

"The Mercantile Agency of R. G. Dun & Co., Dun, Wiman & Co., and E. Russell & Co.

"The information given on this sheet is an answer to an inquiry made by a subscriber to the mercantile agency, who asks for the same as an aid to determine the propriety of giving credit. The information is communicated under the conditions of an agreement signed by the said subscriber, which expressly stipulates that the said information is obtained by the servants, clerks, attorneys, and employes of the said subscriber, and on his behalf. The said agreement also expressly stipulates that the said mercantile agency shall not be responsible for any loss caused by the neglect of any of the said subscriber's servants, clerks, attorneys, and employes in procuring, collecting, and communicating the said information; and the actual verity of the said information is in no manner guaranteed. The agreement further provides that the information thus communicated shall be strictly confidential, shall never be communicated to the persons to whom it refers, and that all inquiries made shall be confined to the legitimate business of the subscriber's establishment."

The plaintiff, relying on said reports, discounted the acceptances of said Kitts to the amount of \$5,264.46, which have never been paid, and are of no value. The plaintiff thereupon brought an action at law for damages by reason of said false and fraudulent representations, and the jury rendered a verdict in favor of the plaintiff. The defendants moved for a new trial, which motion was denied, and the case comes before this court upon a bill of exceptions.

The defendants' counsel, at the close of the testimony, moved the court to direct a verdict in favor of the defendants, which motion was denied. Among other requests, they requested the court to charge the jury as follows:

"If Burchard knew the reports to be false in any respect, and, so knowing them to be false, made them to the defendants, to advance, promote, or carry out some private end of his own in connection with his agency and the duties thereof, then the defendants are not liable for his false reports, and are not liable to the plaintiff by reason thereof."

The court refused so to charge, but charged the jury as follows:

"The contract between the plaintiff and defendants in regard to the reciprocal obligations of the two parties to a certain extent has been placed in evidence. It is stated in the contract that the information is to be mainly obtained by the servants, clerks, and employes appointed by the defendants, and characterized in the contract as appointed by the R. G. Dun & Co., as the subagents of the plaintiff. For any loss occasioned by the neglect of these employes in seeking and obtaining accurate information Dun & Co. are not responsible. For losses occasioned by the indolence or carelessness of the employe, which causes the information to be inaccurate, Dun & Co. are not liable. Neither do they guaranty the actual truth or correctness of the information. But, notwithstanding that these employes are the subagents of the persons who seek the information, they are also employed by, and are paid by, and are legally, as well as in popular language, the agents of Dun & Co. For losses occasioned by the willful fraud, and not by the mere care-

lessness or ignorance of the agents in communicating information known by them to be untrue, and with intent to mislead the inquirer, the defendants are liable if the plaintiffs, having placed reliance upon the fraudulent misrepresentations, gave credit in consequence of such fraud, and were lured thereby to their pecuniary loss and damage.

"In this case the business of the firm of R. G. Dun & Co. was to furnish information to subscribers who had employed them for that purpose for a pecuniary consideration. If, in the discharge of the duties of an employee, and in undertaking to furnish information in reply to an inquirer, and acting in the business of the agency, Mr. Burchard knowingly gave false information with intent to deceive the inquirer, the defendant is liable, although Burchard's private inducement to commit the fraud was desire to help Kitts.

"The questions of fact in any contested case become at least three in number:

"(1) Were the statements untrue at the time they were made?

"(2) Were they known by the agent to be untrue at the time, and did he then act fraudulently, with intent to mislead the inquirer, for that he knew that the information was sought for the purpose of aiding the inquirer to determine the propriety of giving credit to the person inquired about, is palpable? and

"(3) Did the plaintiff, relying upon the truth of the information, give credit upon the faith of the untrue representations and thereby incur a loss?"

The briefs and arguments of counsel on the appeal were largely devoted to a discussion of the liability of an innocent principal for the frauds and deceit of his agent, causing damage to a third party. That the decisions are not altogether harmonious must be conceded, but the apparent conflict is one not as to the principle, but as to its application. As is said by the learned judge who heard the cause in the court below, "the cases turned upon the question whether the alleged agent was, under the circumstances in each case, acting within the scope of his authority." And the law laid down in said cases seems generally to be, as is stated by him in his opinion, denying the motion for a new trial, "that the principal is liable whenever his agent, who is at the time acting within the scope of his authority, and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury." Most of the decisions relied on by counsel for plaintiffs were rendered in cases where an agent was intrusted by his principal to effect a sale, and where it appeared that the principal had ratified the act of the agent by having accepted and retained the benefit derived from the fraudulent representations of the agent, acting for the principal. In the other cases, notably that of *Railroad Co. v. Schuyler*, 34 N. Y. 30, the deceit was practiced by an officer of a corporation. But, as is said by Mr. Justice Miller in *Pollard v. Vinton*, 105 U. S. 12, referring to the *Schuyler Case*:

"Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent. In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelli-

gence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts. We do not think that case presents a rule for this case."

A careful examination of the agreement between the parties and of their respective rights and obligations thereunder, shows that Burchard, the agent of plaintiff and of defendants, did not stand in the same relation to the parties as the agents in the cases referred to. There was no contract between plaintiff and defendants for a sale of commercial paper. This is not a case of deceit in a sale, where an agent, within the scope of his authority, and acting for his principal, has made false statements, or suppressed the truth, to effect the contract of sale. The agreement in the case at bar was purely and simply an agreement by defendants to transmit information to subscribers who might wish to contract with outside parties. The defendants, as proprietors of the mercantile agency, agree to communicate such information as they may possess, as an aid to the subscribers in determining the propriety of giving credit, such information to be mainly obtained and communicated by subagents. Defendants are not to be responsible for loss by negligence of such subagents, "and the actual verity or correctness of the said information is in no manner guarantied."

A consideration of the objects which the parties respectively had in view in connection with the provisions of the agreement seems to show that it could not have been intended that Dun & Co. should be responsible in a case like the present. They were expressly exempted from any obligation to disclose the sources of information. It was not intended that they should themselves obtain information, but it was agreed that they should transmit to the inquirer information, necessarily obtained, mainly by subagents, concerning which they had no knowledge, and over the obtaining of which they had no control. They were engaged in the preparation of a reference book containing ratings of estimated capital and relative credit standing of business men throughout the United States and Canada. While the subagents appointed by Dun & Co. were their agents in the preparation of said book, and the general business of the agency, they were, by the express terms of the agreement, subagents, appointed on behalf of the subscribers, to obtain and communicate information in response to their requests. In this case the defendants were the agents of the plaintiff to transmit such information as they might receive. Their failure to transmit the information would have been a violation of their agreement. They did transmit it, together with a notice that they did not in any manner guaranty its truth. So far as these defendants are concerned, they completely fulfilled the terms of their contract with the plaintiff. They did nothing more nor less. The deceit and fraud were committed by the subagent. It is not claimed that there was any negligence either in his selection or in the transmission of the information by the defendants. The false information was not obtained for Dun & Co. to aid them in

a contract to sell or buy commercial paper, for Dun & Co. were not a party to any such contract, but was furnished by the subagent for the purpose of having it transmitted to the plaintiff, his real principal, through the defendants, who acted as intermediary agents, in order that, by the fraud of said subagent, Kitts, one of the parties to the contract of the sale of the paper, might be assisted, and the other party, this plaintiff, might be defrauded. To accomplish this purpose the subagent perpetrated a fraud upon the plaintiff and the defendants. Burchard was not employed as the agent of either party in reference to the contract of sale which he caused to be effected by his deceit. He was only an agent under the agreement of subscription to furnish information.

The vital distinction upon which the question turns is to be found in the fact that neither the defendants nor Burchard were parties to the contract in which the alleged fraud was committed. That contract was between one Rollins, a customer of the plaintiff, and the plaintiff, for a sale of his commercial paper to the plaintiff. Burchard did not know to whom the information was to be furnished. Neither he nor the defendants knew the terms of the proposed contract, or the parties to it, or even that such contract was to be made. They had no means of knowing the amount involved in the proposed transaction between Rollins and the plaintiff, and no opportunity to protect themselves from liability for false information. No case has been cited where a stranger to a contract has, under such circumstances, been held liable for damages for fraud. The reason, apart from the exemption provided for by the subscription agreement, would seem to be that, as the defendants had no knowledge, and no notice of the character of the transaction, and were not parties or privies thereto, they could not be expected to assume any liability, except for negligence or fraud, provided they transmitted such information as they possessed, in accordance with the terms of the contract.

But plaintiff's counsel claim that defendants are estopped to make these claims, because, although they were innocent, yet the plaintiff has acted on the faith of these representations, to its prejudice. They seek to apply to this case the principle that, where one of two innocent persons must suffer for the wrongful act of a third person, the principal who has placed the agent in the position of trust should suffer, rather than the stranger. But here the plaintiff was no stranger. The subagent was his agent as well as the agent of the defendants. He was the subscriber to an agreement which from its character implied, and in its terms expressed, that the defendants could not and did not insure in any manner the verity of information to be furnished. By the use of the terms "the actual verity," etc., "is in no manner guaranteed," they provide for exemption from liability for untruthful information from whatever cause, whether received through the fraud of an outsider or of the subagent. The irresistible inference to be drawn from the agreement seems to be that the accuracy of the information is to be at the risk of the subscriber.

In *Friedlander v. Railroad Co.*, 130 U. S. 425, 9 Sup. Ct. Rep.

570, where an innocent purchaser of a bill of lading, fraudulently issued by one Easton, the station agent of the defendant, sought to hold it liable thereon, Mr. Chief Justice Fuller, referring to the principle above stated, says:

"Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became particeps criminis with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort. 'The general rule,' said Willes, J., in *Barwick v. Bank*, L. R. 2 Exch. 259, 265, 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' See, also, *Limpus v. Omnibus Co.*, 1 Hurl. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and, being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mut. Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. Div. 714."

In this latter case Lord Esher, master of the rolls, says:

"But, although what the secretary stated related to matters in which he was authorized to give answers, he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist, and could assist by making the false statements, and, as he made them in his own interest, or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal; since, if there is authority to do the act, it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements, not for his employer, but in his own interest."

See, also, *Pollard v. Vinton*, supra.

There is another aspect of the case which leads to the same conclusion. It appears from the agreement that the services demanded by the principal—the obtaining of information—cannot be rendered by the agent, but must be mainly rendered by subagents. In such cases the agent will not be liable for the negligence or misconduct of his subagent, provided there was no negligence in his selection. 1 Amer. & Eng. Enc. Law, 394, and cases cited; *Story*, Ag. 224. The rule is stated by Judge Dewey in *Warren Bank v. Suffolk Bank*, 10 Cush. 585, as follows:

"Where the nature of the business in which an agent is engaged requires for its proper and reasonable execution the employment of a subagent, the principal agent is not responsible for the defaults of the subagent, provided a proper subagent was selected. This latter rule was sanctioned and applied by this court in *Fabens v. Bank*, 23 Pick. 332; *Dorchester Bank v. New England Bank*, 1 Cush. 177."

When the business intrusted to an agent is to be performed at a distance, or requires or justifies the delegation of an agent's authority to a subagent who is not his own servant, the original agent

is not liable for the errors or misconduct of the subagent if he has used due care in his selection. *Darling v. Stanwood*, 14 Allen, 507; *Dorchester Bank v. New England Bank*, supra; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. Rep. 364.

In the case at bar the inquiry in Birmingham, Ala., for information as to the standing of a person in Oswego, N. Y., necessarily required the employment of a subagent in the latter place. The plaintiff, under its subscription agreement, authorized the employment of a subagent to obtain such information. In collecting special information the subagent was acting in consequence of the special request of the plaintiff, and he was the agent of the plaintiff, selected by the defendants in accordance with a rule fixed by the subscription agreement. The defendants did not undertake to do this part of the business; they declined to do it, but agreed that they would transmit the information so obtained to the plaintiff.

For these reasons we think the court erred in that portion of his charge to the jury in which he stated that "for losses occasioned by the willful fraud and not by the mere carelessness or ignorance of the agents in communicating information known by them to be untrue, and with intent to mislead the inquirer, the defendants are liable, if the plaintiffs, having placed reliance upon the fraudulent misrepresentations, gave credit in consequence of such fraud, and were lured thereby to their pecuniary loss and damage."

The judgment is reversed.

WESLEY v. CLOW et al.

(Circuit Court, D. Illinois. March 3, 1893.)

PATENTS FOR INVENTIONS—NOVELTY—CEMENT WASHTUBS.

Letters patent No. 327,209, issued September 29, 1885, to Carl Wesley, for washtubs and sinks made with metal strips at the upper edges, having flanges imbedded in the cement, are void for want of novelty.

In Equity. Suit by Carl Wesley against James B. Clow and others to restrain alleged infringement of a patent. Decree for defendants.

Dyrenforth & Dyrenforth, for complainant.
Coburn & Thacher, for defendants.

WOODS, Circuit Judge. Suit to enjoin infringement of the second claim of letters patent No. 327,209 issued September 29, 1885, to the complainant. The following is the claim:

"(2) As a new article of manufacture, a washtub, sink, and other articles, made substantially as herein described, the upper edges of the vessel of metal strips, F, having flanges imbedded in the outer and inner surfaces of the cement or cement compound, as and for the purposes set forth."

The proof shows that, before the issue of this patent, tubs and other articles had been made of marble, slate, and soapstone, with metal edges fastened on with screws or nails, and cement tubs had been made with wooden protection upon their edges. The

mechanical difference between the metal edges of the complainant's tub, and those of the older tubs of marble or slate, is that the former, being imbedded in the cement, adhere without other fastenings; this imbedding being effected in the process of casting or molding the tubs. There was, it is plain, no invention in the conception or design of a metal edge for a tub or other vessel made of cement. The claim is not for a process, but simply for an article of manufacture; but, if it were possible to include in it the process of manufacture, it would still be without novelty. Patents No. 114,946 (James J. Johnston) and No. 180,794 (F. Schaffer) show articles of manufacture (artificial stones and building blocks) made of cement or cement compounds, with metal casings or facings attached or imbedded in the same manner. The patent in suit must therefore be deemed void for want of novelty. Decree accordingly.

NORTHWESTERN STOVE REPAIR CO. et al. v. LEE et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 57.

PATENTS FOR INVENTIONS—PATENTABILITY—HEATING STOVES.

Letters patent No. 289,802, issued December 11, 1883, to Philo D. Beckwith, for an improvement in heating stoves, consisting of a flaring ring cast in two sections which fit into the top of the fire pot in which the coal basket, cast integral, is suspended, the ring having legs which rest on an annular flange at the base of the fire pot, and having holes in its periphery into which pintles cast on the under side of the coal basket pass, so as to hold the ring together, are void for want of invention. 50 Fed. Rep. 202, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Bill by Fred E. Lee and William G. Howard against the Northwestern Stove Repair Company and others to restrain alleged infringement of a patent. Decree for complainants. 50 Fed. Rep. 202. Defendants appeal. Reversed.

Statement by WOODS, Circuit Judge:

The appellees, as executors of the will of Philo D. Beckwith, sued the appellants for infringement of letters patent No. 289,802, dated December 11, 1883, and for an accounting. The specification, claims, and drawings of the patent are as follows:

"Be it known that I, Philo D. Beckwith, of Dowagiac, in the county of Cass, and state of Michigan, have invented a new and useful improvement in heating stoves, relating to the 'Round-Oak Stove,' and all heating stoves of this class; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making a part of this specification. The stove herein represented is one on which I have obtained several letters patent, and was designed for burning wood. My present invention consists in the arrangement of a basket, a shaking grate, and the means employed for supporting the parts within the fire pot of the stove; also, in the construction of the parts that enables me to use a coal basket cast integral,—one that may be readily inserted or taken out through the ordinary stove door,—as set forth in the following specification. This invention is designed as an improvement upon my letters patent dated April 28, 1874, No. 150,277, and is designed for burning hard and soft coal. * * *

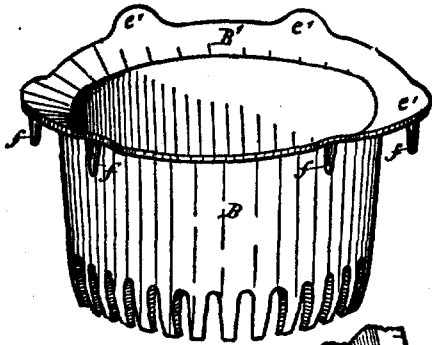


Fig. 3

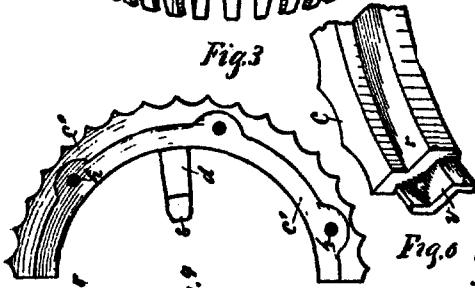


Fig. 6

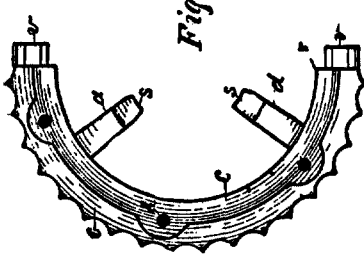


Fig. 9

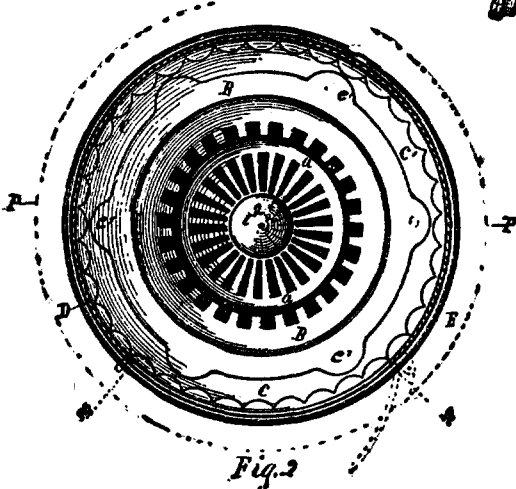


Fig. 2

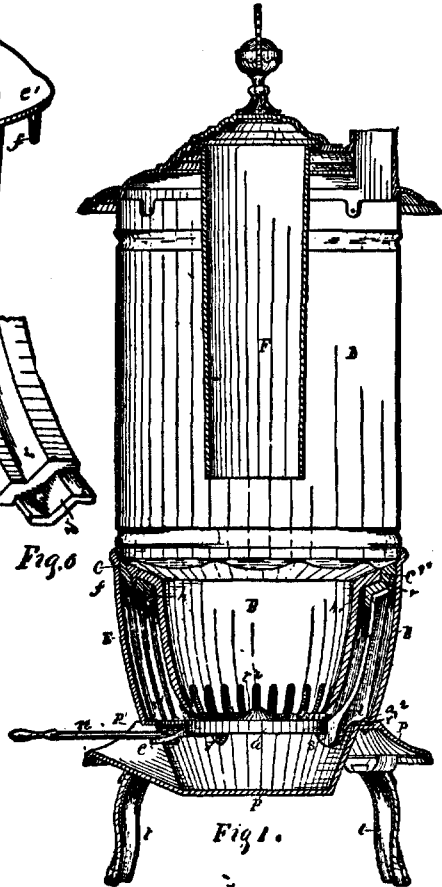


Fig. 1.

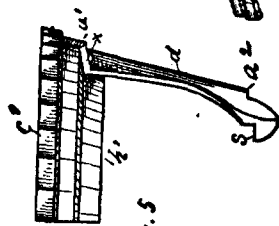
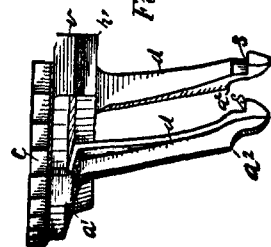


Fig. 5



"Figure 1 is a sectional view of the stove containing my present invention. Fig. 2 is a top perspective view of my invention within the fire pot of the same. Fig. 3 is an enlarged perspective of the coal basket, showing flange, B', having pintles, f, projecting therefrom. Fig. 4 is a top plan view of the sectional supporting ring, C, C', having supporting legs, d, d, d, attached thereto. Fig. 5 is an elevated plan of the same, showing the manner of attaching the legs. Fig. 6 is a detached end portion of the ring, C, showing the supporting arm, v, as will be hereinafter set forth. In the drawings, Fig. 1, D represents the sheet-iron body of the stove, E, the fire pot, P', the base of the stove supported by the legs, t, t, and F, the magazine, all of which are old. The fire pot, E, is corrugated, as shown in Figs. 1 and 2. I place within the fire pot the sectional ring, C, C', the periphery of which is made fluted, thus fitting to the form of the fire pot, as shown in Figs. 1 and 2. The ring lies just within the top of the fire pot, and has a sloping upper side extending inward, being provided with an annular rabbet, r. (See Figs. 1, 4, and 6.) The depth of the rabbet is equal to the thickness of the flange, B', of the basket. The ring has a series of vertical holes, h, through it. Opposite the holes the upper surface of the ring is rabbeted, for the purpose hereinafter described. The part, C, of the ring is provided at its free ends with projecting arms, v. (See Figs. 4, 5, and 6.) These arms are cast upon the under side of the ring or part, C, corresponding in form to the under side of said ring. On the under side of the part, C, are two lugs, a', and one on the part, C'. These lugs meet and support the upper end of the legs, d, d, d, as shown in Fig. 5. These legs are attached to the ring, as shown at x, and are provided at the lower end with shoulders, a'. (See Figs. 1 and 5.) These shoulders rest upon the annular flanges, r', of the fire pot. (See Fig. 1.) On the inner or facing side of the legs at the bottom I provide horizontal supports, S, (see Figs. 1 and 5,) for the purpose hereinafter mentioned. Fig. 3 represents the basket. This retains the combustible matter, and is provided at the top with an obliquely-flaring flange, having convexed projections or ears, e', and pendant from the under side thereof is a series of pintles, f. In the drawings, Figs. 1 and 2, a represents the bottom or reciprocating grate, and is provided with a conical center, r², having radial openings from the base of the cone outward. * * * The grate, a, is supported below the basket, and lies upon the horizontal supports, S, of the legs, d, d, d. (See Figs. 1 and 5.) It will also be observed that the bearings, S, have vertical shoulders, which meet the edge of the grate, a, (see Fig. 1,) thus preventing the grate from working away from the center when shaken. I provide the flange of the basket with ears, e', to enable placing the pintles, f, at a proper distance from the side of the basket, which also allows me to place the series of holes, h, in the ring at midway of its width, so that when the basket is suspended within the ring, as shown in Figs. 1 and 2, the pintles, f, will pass through the holes, h, back of and free from the lower vertical flange, h', of the ring, C, C'. (See Figs. 1 and 5.) As the pintles enter the holes, the ears, e', fill the concave rabbeted portion of the ring, while the flange, B', enters the annular rabbet, r, of the ring, as shown in Fig. 1, thus bringing the surface of the flange of the basket and that of the ring on a line with each other, forming an upwardly-flaring flange from the mouth of the basket to the walls of the fire pot, E. In order that the air entering at the base of the stove shall be driven through the basket of combustible matter, the circle of the stove at the top of the fire pot must be closed, all of which is accomplished by this arrangement, also allowing a free circulation of heated air between the fire pot and the basket, as shown in Fig. 1. It is obvious that the basket with pintles and sectional ring, when united in the manner set forth, are firmly interlocked. It being necessary to construct the parts so that they may be readily put into or taken out at the common stove door, the basket is made small enough to pass through the door, but the distance across the door, as indicated by dotted lines, i, i, of Fig. 2, being less than across the fire pot at the top, I make the flaring ring, C, C', in two parts, in order to pass them through the door. It will also be observed that when the parts are in position, as shown in Fig. 1, the legs, d, d, d, support them, also the weight of combustible matter, and that the legs form a support for the grate, a, in the

manner set forth. When using the stove for burning soft coal or wood, the magazine, F, may be taken out through the top of the stove, when the usual door feed may be used.

"Having thus fully described my present invention, what I claim as new, and desire to secure by letters patent, is:

"(1) The sectional flaring ring, fitting within the top of the fire pot of the herein-described stove, being adapted to encircle and support the basket, cast integral, as and for the purposes set forth. (2) In a heating stove, the combination of the sectional ring having leg supports attached thereto, being adapted to fit within the fire pot of the stove; said leg supports resting upon the horizontal flange of the fire pot, substantially as set forth. (3) The coal basket, cast integral, having a flaring flange with a series of pintles projecting downward from said flange, for the purposes specified. (4) The combination of the sectional ring with leg supports attached thereto, said supports resting upon the flange of the fire pot, being also provided with horizontal supports for receiving and retaining the reciprocating grate, substantially as set forth."

The respondents, besides denying infringement, have interposed special answers, among others to the effect that the patent, both upon its face and in view of the prior art, including numerous patents on stoves, lacks patentable novelty.

For opinion of the court below, see 50 Fed. Rep. 202.

C. C. Linthicum and Chas. K. Offield, (Offield, Towle & Linthicum, on the brief,) for appellants.

W. G. Howard and G. S. Payson, (Howard & Roos and Banning & Banning & Payson, on the brief,) for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge, (after making the foregoing statement.) "My present invention," says the patentee, "consists in the arrangement of a basket, a shaking grate, and the means applied for supporting the parts within the fire pot of the stove; also, in the construction of the parts that enable me to use a coal basket cast integral, one that may be readily inserted or taken out through the stove door." But it will be observed that no one of the claims is so worded as to cover the arrangement of parts specified, and if invention exists, within the claims, it must be found either in the particular construction of parts described, or in such combinations of parts as are defined and claimed. There is a notable lack of clearness in the wording of the claims of the patent, but it is unnecessary to enter upon the disputes which have arisen concerning their meaning, because, upon any construction which has been suggested, they are wanting in invention.

If, as the appellants contend, they are all to be read as including the stove, there has been no infringement. Excluding the stove, the elements mentioned in the 1st, 2d, and 4th claims are only two—the sectional flaring ring and the legs which support it; all else in the wording of the claims serving only to show the manner of construction and use of those parts, the ring fitting, or being adapted to fit, within the fire pot, near the top, so closely as to prevent the passage of air between them, and the legs resting upon the flange of the fire pot, and provided with horizontal supports for receiving

and supporting the grate. But neither in the construction of the ring and legs nor in the combination of them is there a mechanical conception which is not found or suggested in stoves, grates, and furnaces, and, indeed, in tables, stands, chairs, stools, and other devices of long and familiar use. The reciprocating grate, itself old, is not embraced in the claims, and it required only common skill to provide notches in the legs to receive and support it. So, too, the coal basket, which is the subject of the third claim, and is described as cast integral, and having a flaring flange with a series of pintles projecting downward, has no feature of essential novelty either in construction or use. It has been urged as important that when in place in the stove the parts of the ring are held together by the pintles of the flange of the basket projecting through the holes of the ring. There is, however, no claim which covers the basket and ring so made and combined, and there would be no invention in it if there were. Considering the manner in which the ring is fitted into the fire pot, the necessity for providing special means for holding the parts together is not apparent, and, if there were such necessity, it was a matter of small intelligence and skill to meet it, either as it was done, by using pintles and holes, or other form of dovetailing between the flange and ring, or by some form of fastening between the pieces of the ring when in place, for which purpose the pintle and hole, links, clasps, hinges, or other devices might have been used.

It follows that the decree below should be set aside, and the bill dismissed for want of equity; and it is so ordered.

WESTERN ELECTRIC CO. v. SPERRY ELECTRIC CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 104.

1. PATENTS FOR INVENTIONS—ABANDONMENT OF APPLICATION—PLEADING.

Where, in granting a patent several years after the filing of the application, the patent office decided that there had been no such delay in the prosecution of claim as to forfeit the application, the question of abandonment of the application will not be considered by the court in an action for infringement, where the answer does not specifically aver that the application was abandoned, but merely denies having any information or belief whether the patent was duly issued.

2. SAME—ABANDONMENT OF INVENTION—EVIDENCE.

The fact that an inventor, after making a successful experimental machine, puts it away, and pays no further attention to it for more than two years, and then applies for a patent, does not show an abandonment of the invention, where the machine is not in the mean time manufactured for sale, and the application for patent is duly prosecuted.

3. SAME—APPLICATION FOR PATENT—CHANGE OF SPECIFICATION.

An inventor has a right to change his specification, so long as he does not change the structure of his device or invention, even though he makes the change with reference to another patent which has been applied for and issued while his application was pending.

4. SAME—INFRINGEMENT—ELECTRIC ARC LAMPS.

Letters patent No. 420,109, issued January 28, 1890, to Charles E. Scribner, for an improvement in electric arc lamps consisting of the combination, with an electro-magnet in the shunt of the arc and its armature, of an electro-magnet in the main circuit and its armature, the latter carried upon a movable support which is controlled by the armature of the other electro-magnet, is infringed by lamps constructed under letters patent No. 405,440, issued June 18, 1889, to Elmer A. Sperry, such lamps being the same as those described in the Scribner patent except as to the relative positions of the two magnets, the horizontal parts being changed to vertical and the vertical parts to horizontal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Bill by the Western Electric Company against the Sperry Electric Company and others to enjoin infringement of a patent. Defendants obtained a decree. Complainant appeals. Reversed.

Statement by WOODS, Circuit Judge:

The appellant, as assignee of the inventor, Charles E. Scribner, to whom had been granted letters patent No. 420,109, brought this suit to enjoin infringement and to obtain an accounting. The respondents, not admitting that the patent was issued in due form of law, nor that the complainant was the sole and exclusive owner thereof, answered that the invention described was not new nor useful when the application for the patent was made; and that the inventor, Scribner, and the complainant "actually abandoned the said alleged invention." In respect to infringement the respondents allege "that they have not since January 28, 1890," (as charged in the bill,) "or at any other time, * * * made, used, or sold any electric lamps embodying the invention described and claimed; * * * that since the 28th of January, 1890, they have made certain electric arc lamps in accordance with and under and by virtue of the patent to Elmer A. Sperry, dated the 18th day of June, 1889, No. 405,440, and the invention therein described and claimed." The court below found and held that the application for the patent had been abandoned, before the letters were granted, by reason of the failure of the applicant to prosecute the same within two years after action thereon, as required by section 4894 of the Revised Statutes, and dismissed the bill for want of equity. Counsel for the appellee insists that the record shows abandonment of the invention as well as of the application.

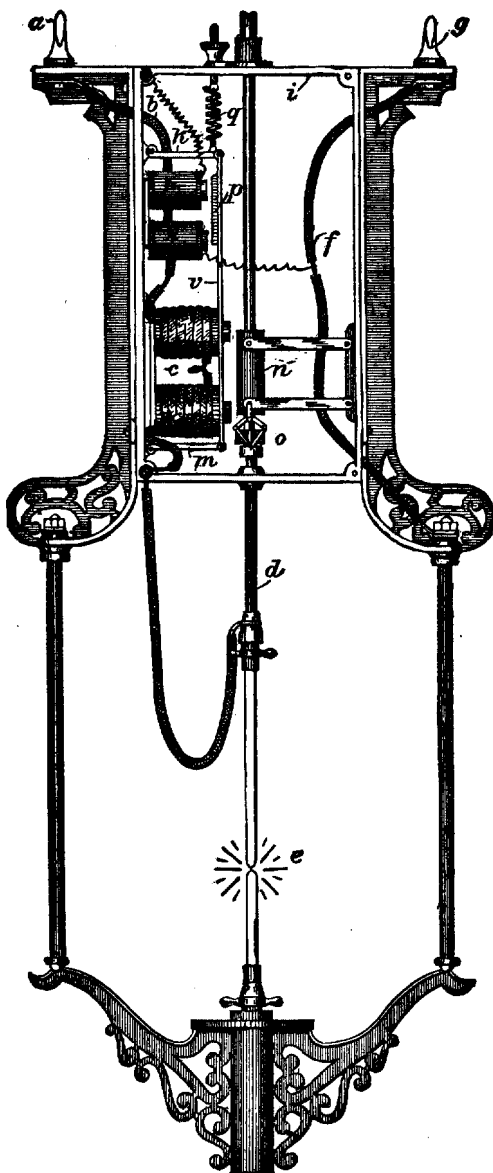
The facts pertinent to the question of abandonment are as follows: Scribner's application for the patent in suit was filed January 2, 1883. On the 25th of the same month the patent examiner wrote him, to the effect that the claims were rejected on references cited; and nothing further was done until the 26th of December, 1884, when Scribner's attorney wrote to the commissioner of patents, "Please reconsider last official action," etc., to which, on January 9, 1885, an examiner replied: "Further action will be taken in this case when the requirements of office rule 67 have been complied with. No invention has been pointed out in this case over the references of record, and none is believed to exist. The last official action is repeated." The next movement was made July 25, 1885, when the applicant proposed amended claims, and from that time there were communications, dated, respectively, August 13, 1885, July 6, 9, and 16, October 13, 1886, August 10, 1887, and September 15, 1887; the last being to the effect that claims 2 and 3 as they then stood, were indefinite in form, and did not clearly distinguish the construction sought to be covered. To this the applicant made no response nor took other step in the matter until August 30, 1889, when he wrote to the commissioner in support of his claims, and in conclusion said: "Applicant's attorney, being in doubt whether the action of September 15th, 1887, would be considered a final or second rejection, files this request for reconsideration, and asks that action be had thereon immediately, in order that the appeal

may be perfected. If the office holds, however, that the action of September 15th, 1887, was a second action, this paper may be returned to applicant's attorney, and the appeal filed." The necessary papers and money for the taking of an appeal accompanied the letter. On September 9, 1889, the examiner responded to the effect that the action of September 15, 1887, was of a purely formal character, the repetition of which would not warrant an appeal to the examiners in chief, and concluded by saying: "As the action of September 15th, 1887, appears, on reconsideration, to have been well taken, it is now repeated, but the appeal filed cannot be entertained for the reasons above explained. Applicant's remedy is by a petition to the commissioner, as indicated." On October 1, 1889, the same examiner declared the application abandoned, because there had not been proper action by the applicant within two years after September 15, 1887. The action of the office on that date having been upon the form of the case, by the last paragraph of rule 171, the applicant was required, as the examiner held, to treat the formal matter within two years; but instead of doing that he had requested a reconsideration, and at the same time filed an appeal to the examiners in chief, the rule of practice being that action upon the merits cannot be had until all formal objections have been disposed of. On October 29th ensuing this decision was overruled by a new examiner, meanwhile come into office, who, "in view of the fact that a reconsideration of claims 2 and 3 was requested within the two-year limit after the action of Sept. 15, '87, (by which objection to their form was made,) and in view of the fact that such reconsideration was accorded, (as shown by the letter of Sept. 9th, '89, in which the examiner refuses to act upon the merits of the case and file the appeal, and repeats the formal objection,)" held that the ruling that the application had been abandoned was not justified, was made through oversight, and was therefore withdrawn. On December 12, 1889, the applicant presented an amended specification, and on January 28, 1890, the patent was issued to the appellant as the assignee of Scribner.

The drawing which accompanied the original application has not been changed, and the specification remains substantially the same as at first, except that by the amendment of December 12, 1889, the part in brackets was added. The specifications, claims and drawings of the patent are as follows:

"My invention herein set forth relates to electric arc lamps, in which a regulating magnet is attached rigidly to the frame of the lamp, and a suspending lifting magnet is employed, as hereinafter described and claimed. In lamps now in common use, including those in which the lifting magnet is wound differentially, one winding being a portion of the main circuit and the other a portion of a shunt around the arc, and also including those lamps like the Von Hefner Alteneck, (United States patent No. 243,341, June 21, 1881,) in which the lifting solenoid in the main circuit and the solenoid in the shunt of the arc act upon the same carbon rod, the current of the main circuit acts in opposition to the current of the shunt of the arc. In all these lamps the armature of the lifting magnet, in order to compensate or feed, moves away from the poles of said lifting magnet. This movement of the lifting armature away from the poles of its magnet, which produces the feed, is caused chiefly by the variations in the strength of the current of the shunt of the arc. As the strength of the current in the shunt of the arc increases, the armature of the lifting magnet moves away and causes the feed. The compensation for the inequalities of the current is caused chiefly by the variations of the strength of the current of the magnet in the main circuit. In my lamp, however, as herein described, the electro-magnet in the shunt of the arc does not act in opposition to the electro-magnet in the main circuit. The strength of the lifting magnet is not changed, nor is the position of the armature of the lifting magnet changed relatively to the poles of said lifting magnet, by variation in the strength of the electro-magnet in the shunt of the arc.

"The accompanying drawing, which is illustrative of my invention, shows a front elevation of an electric arc lamp.



"The circuit may be traced from hook, *a*, by wire, *b*, through the suspended lifting magnet, *c*, and thence to the carbon rod, *d*, and thence through the arc, *e*, and by wire, *f*, to hook, *g*. The regulating magnet, *h*, is included in the shunt of the arc, and attached rigidly to the frame, *i*, of the lamp, and controls the regulating mechanism of the lamp. The three pieces *k*, *l*, and *m*, pivoted as shown, form a kind of pivoted armature lever supporting the lifting magnet, *c*, the poles of which extend toward the lifting armature, *n*, that carries the usual friction clutch, *o*. The lifting armature, *n*, with its suitable

movable supporting parts, is carried up and down with the lifting magnet. It should therefore not extend either above or below the poles of the lifting magnet. The two ends of the lifting armature come, preferably, opposite the centers, respectively, of the two poles, as shown. The armature, p, of the regulating magnet is mounted upon the pivoted armature lever. The frame is held suspended by means of the adjustable retractile spring, q. Armature, n, of the main-circuit magnet is mounted upon armature levers, n', pivoted to the frame of the lamp. The clutch, o, is suspended directly upon the lower one of these two pivoted levers upon which the armature, n, is mounted.

"The operation of my lamp, as thus described, is as follows: As soon as the circuit is closed, the armature, n, is raised by the lifting magnet, and the clinch, o, lifts the rod, thus separating the carbons, and establishing the arc, as shown. The action of the magnet, h, will at the same time draw upon its armature against the tension of spring, q. The spring, q, must therefore be adjusted to sustain its armature lever and the parts it supports after the lifting magnet has raised the rod. The armature, n, will move as the magnet, c, moves. It has also a compensating motion up and down, as the strength of the magnet, c, increases and diminishes. As the resistance of the arc increases, the regulating magnet becomes more strongly magnetized, and the armature, p, is drawn downward, and also piece, l, which carried the lifting magnet, c. The lifting armature, n, it is evident, will descend at the same time, thus compensating and feeding as the current varies or the carbons burn away. It will thus be seen that the current in the shunt of the arc acts to change the position of the lifting magnet and its armature. This action is in no way opposed to the action of the current which is passing through the coils of the lifting magnet. Increase of the current in the shunt lowers the armature, p, and the lifting magnet, c, just the same, without reference to the magnetic force of the lifting magnet; [that is to say, armature, n, is attracted by the main-circuit magnet, and assumes a definite position with relation thereto, which position it holds, no matter what changes may take place in the strength of the shunt magnet. Armature, n, through the attraction of the main-circuit magnet, is connected through magnetic action with armature lever, k, l, m, and the movements of this armature lever in responding to the changes taking place in the electro-magnet in the shunt of the arc are communicated to armature, n, its lever, and to clutch, o. Thus it will be seen that clutch, o, is carried and controlled by the pivoted armature lever, k, l, m, and the pivoted armature lever upon which said clutch is supported.] The compensation and feeding of my lamp is thus more delicate than in lamps heretofore known or used.

"I claim as my invention: (1) In an electric arc lamp, the combination, with an electro-magnet in the shunt of the arc and its armature of an electro-magnet in the main circuit and its armature, said electro-magnet in the main circuit being carried upon a movable support, said support being controlled by the armature of the electro-magnet in the shunt of the arc, whereby the position of the main-circuit electro-magnet and its armature is caused to vary in response to the variations in the strength of the current passing through the electro-magnet in the shunt of the arc. (2) In an electric arc lamp, the combination, with a clutch suspended upon suitable movable supporting parts, an armature forming part of said movable supporting parts, an electro-magnet in the main circuit with its poles presented to said armature, a regulating mechanism pivoted to the lamp frame, and carrying the main magnet, and an electro-magnet in the shunt of the arc with its poles presented to an armature carried by said regulating mechanism, whereby the position of the carbon-feeding mechanism is varied as the strength of the magnet in the shunt varies independently of the action or electrical condition of the magnet in the main circuit. (3) In an electric arc lamp, an electro-magnet in the shunt of the arc, a pivoted armature lever responding to the changes in the strength of said shunt magnet, in combination with a magnet in the main circuit, and a pivoted armature lever responding to the changes in strength of said main-circuit magnet, a carbon rod, and clutch for the same, said clutch being carried and controlled by the said armature levers, whereby the movements of either armature lever may be communicated to the clutch to feed and regulate the lamp."

In his specification for patent No. 415,571, Scribner made the following statement concerning the application for the patent in suit:

"In my application, Serial No. 80,752, filed Jan. 2, 1883, I have described a lamp, in which the position of the lifting armature relative to the poles of the lifting magnet remains unchanged by any action of the shunt magnet, a change in the relative positions of said lifting armature being only effected by a change in the strength of the main circuit. In this case, however, the lifting magnet is made movable, and moves with its armature by the action of the shunt magnet."

The specification of the Sperry patent No. 405,440, after giving a lengthy and minute statement of the construction and operation of the device, concludes with the following comprehensive description:

"The entire device, consisting of the parallel moving frame, supported on elastic bars, and containing the main-circuit electro-magnet or solenoid and carbon-rod clamp, is described as a carbon-separating device, since its office is to seize and separate the carbons in the first instance. The entire frame is then bodily moved by means of the derived-circuit electro-magnet or solenoid for the purpose of feeding the carbons."

Of the 18 claims of this patent, some of which are distinguishable from others only by very slight differences, the first is as follows:

"(1) In an arc lamp, the combination of a main-circuit electro-magnet or solenoid with a moving frame, on which it is supported, a carbon-rod clamping device moved by said electro-magnet or solenoid, and a shunt magnet or solenoid, adapted to move said frame."

Chas. A. Brown and Geo. B. Barton, for appellant.

F. W. Parker, for appellee.

Before FULLER, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, (after making the foregoing statement.) There is a material difference between the abandonment of an invention and the abandonment of an application for letters patent thereon by failure to comply with section 4894 of the Revised Statutes. The first gives the invention to the public, and, once done, the act is irretrievable; but, besides the power conferred upon the commissioner of patents to relieve an applicant from an abandonment of his application under the statute, an application, which has lapsed, or been rejected or withdrawn, may be renewed or repeated so long, we suppose, as the invention itself has not been abandoned by reason of a two-years public use or otherwise. The subject has been considered by the supreme court quite fully in *Planing Mach. Co. v. Keith*, 101 U. S. 479, where, after citing *Kendall v. Winsor*, 21 How. 322, and *Shaw v. Cooper*, 7 Pet. 292, the court says:

"These were cases, it is true, where the alleged dedication to the public, or abandonment, was before any application for a patent; but it is obvious there may be an abandonment as well after such an application has been made and rejected or withdrawn as before, and evidenced in the same manner. In *Adams v. Jones*, 1 Fish. Pat. Cas. 527, Mr. Justice Grier said: 'A man may justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delay, not caused by the laches of the applicant, should not work a forfeiture of his rights.' The patent law favors meritorious inventors by conditionally conferring upon them for a limited period exclusive rights to their inventions. But it requires them to be vigilant and active in complying with the statutory conditions. It is not unmindful of possibly intervening rights of the public. The invention must not have been in public use or on sale more than two years before the application for a patent is made, and all applications must

be completed and prepared for examination within two years after the petition is filed, unless it be shown to the satisfaction of the commissioner that the delay was unavoidable. All this shows the intention of congress to require diligence in prosecuting the claims to an exclusive right. An inventor cannot without cause hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventors. It is not unfair to him, after his application for a patent has been rejected, and after he has for many years taken no steps to reinstate it, to renew it, or to appeal, that it should be concluded he has acquiesced in the rejection, and abandoned any intention of prosecuting his claim further. Such a conclusion is in accordance with common observation. Especially is this so when, during those years of his inaction, he saw his invention go into common use, and neither uttered a word of complaint or remonstrance nor was stimulated by it to a fresh attempt to obtain a patent. When, in reliance upon his supine inaction, the public has made use of the result of his ingenuity, and has accommodated its business and its machinery to the improvement, it is not unjust to him to hold that he shall be regarded as having assented to the appropriation, or, in other words, as having abandoned the invention."

See, also, *U. S. Rifle & Cartridge Co. v. Whitney Arms Co.*, 118 U. S. 22, 6 Sup. Ct. Rep. 950.

Guided, as we must be, by these decisions, we are not able to find in the present case an abandonment either of the invention or of the application for the patent. The final decision of the patent office was that there had been no such delay in the prosecution of the claim as to work a forfeiture of the application, and, even if we had the power to do it, we are not required to review that decision, because the answer in the case does not raise the question,—the abandonment alleged being of the invention, and not of the application for the patent. It is true that the respondents denied any information or belief whether "the letters patent referred to in the bill of complaint were issued in due form of law," and asked for strict proof of that and of other averments not admitted; but the facts touching the prosecution of the application were matters of record in the patent office, easily accessible if not known already, and, if the respondents proposed to tender an issue of abandonment, it was necessary to do it by averments to that effect, specific and clear enough to be understood. The abandonment of the invention, it has been suggested, is alleged in terms too general and indefinite to be available; but the essential meaning of the allegation is unmistakable, and, there having been no effort in the court below to obtain a more specific statement, the objection made here comes too late. In respect to the merits of the question, it being established or conceded that the application for the patent was kept alive until the letters issued, it follows, upon the proofs before us, that if there was ever an abandonment of the invention it must have occurred before January 2, 1883, when the application was filed. But there is nothing in the evidence to warrant that conclusion. As tending to show such abandonment, reference is made to Scribner's own testimony, to the effect that he made the discovery and reduced it to successful form in an experimental lamp more than two years before he applied for a patent; that he dismembered that lamp, and laid away its parts for reference, but never afterwards used them, and did not produce them in evidence; that he has never caused the

lamp to be manufactured for sale, but has put upon the market in large numbers another lamp, which he invented later, and that he made no earnest effort to obtain this patent until he had seen the Sperry lamp. But, viewed in the strongest possible light, these things show no purpose to abandon the invention, because, so long as it was not in public use, and no one else had made and procured a patent for the same discovery, his right to apply for a patent was subject to no restriction. Even if he had forgotten the invention, or laid it aside as worthless,—abandoned it,—he had the right to take it up again, and to proceed as if he had then first made the discovery. And once the application was filed it became notice to the world of his claims and rights as they should finally be defined by letters patent, and that notice in this instance, besides being lawful, was fair and ample, because one of the experts in the case has testified that “from the dimensions of the drawing” he made a lamp which he found “to operate as described in the specification.”

Scribner denies that he had seen the Sperry lamp before his own patent was granted; and even if he did acquire earlier knowledge of Sperry's patent, it was only natural and right, as the quotation from the decision of the supreme court recognizes that he should be stimulated to a fresh attempt to obtain a patent,—it being clear beyond dispute that he was the first discoverer.

There remains the question of infringement. The claims of the patent in suit, it is conceded, may in terms cover the device of the respondents, but, it is insisted, should be construed so as to include the construction which alone is illustrated in the drawing, described in the specification, and pointed out as material in this patent and in the inventor's second patent application; that is, that construction in which the main-circuit magnet and its armature are separated mechanically, and the armature has “a compensating motion up and down as the strength of the magnet increases and diminishes;” that, so construed, the device of the defendant does not infringe, because in it the main-circuit magnet and its armature are mechanically connected, and when the magnet is energized, become and remain rigidly connected until the current is turned out of the lamp; making impossible the up-and-down compensating motion incident to the other form of construction. There is the difference of construction stated between the two lamps. In Scribner's drawing the poles of the lifting magnet, c, are in a horizontal position, while the position of the armature, n, is vertical. The armature is mounted upon levers, which prevent its coming into actual contact with the poles of its magnet, and for that reason it is said to be not connected mechanically with the magnet. In the Sperry lamp, the main-circuit magnet or solenoid is carried upon a movable frame, but in a perpendicular position, with its armature in a horizontal position, and when the current is on the armature is lifted into actual contact with the magnet, and so remains in cohesion or mechanical connection while the current lasts. In each lamp the frame on which the lifting magnet or solenoid is carried is drawn downward by force of the shunt magnet, and so by the reciprocal action of the two magnets,

one lifting the carbon so as to form the arc and being itself drawn down by the other so as to shorten the arc, an arc of constant length and a steady light are maintained; that effect being produced, not by the resultant or differential force of the two magnets working in opposition upon the clutch and carbon, but by their independent and nonconflicting action.

To what extent the regulation of the arc in the complainant's lamp is affected by a compensating movement up and down "of its armature, as the strength of the magnet, *c*, increases and diminishes," is a disputed point. In the original specification the fact of such compensating motion was asserted; but in the amended specification, filed December 12, 1889,—the Sperry patent having been issued June 18th, of that year, upon application filed October 22, 1888,—though the first statement was left unchanged, the expression shown in brackets was interpolated, that the "armature, *n*, is attracted by the main-circuit magnet, and assumes a definite position in relation thereto, which position it holds, no matter what changes may take place in the strength of the shunt magnet." As a change in the strength of the shunt magnet implies a corresponding but reversed change in the other magnet, this statement seems to be inconsistent with the other, but, being the later and more definite, should be regarded as controlling. Upon this question, Scribner's testimony was to the effect that within the ordinary limits of variation of current strength the operation of feeding will be independent of the strength of the current, though a great decrease in current without an abnormal length of arc existing would cause a feeding down of the carbon rod as magnet, *c*, would be weakened by the change; that the pull upon the armature would be constant so long as the magnetism of the pole pieces of the electro-magnet, *c*, is constant; that if the pole pieces were magnetized to saturation, a change of current strength would not appreciably vary the pull of the magnet upon the armature; but that if the magnet were not charged to saturation a change of strength in the current would vary the strength of the pull, but not necessarily affect the position of the armature, which is raised by the attraction of the magnet to the position shown in the drawing and held there during immaterial changes of current strength, not in equilibrium, but in a practically fixed relation, though conditions might arise by which a slight movement of parts would be brought about, which, however, would not affect the successful operation of the lamp; that the special utility of the invention is its freedom from complicated and differential features of action in prior lamps; that the special and valuable feature of construction is the mounting of the main-circuit magnet upon a movable frame, which is moved by the magnet in the shunt of the arc, so as to control the feeding of the rod.

On the other hand, Prof. Carhart, teacher of physics at Ann Arbor, has testified that, since the magnetic connection between the armature and poles of the magnet, in the complainant's lamp, is an elastic one, so long as the armature is not in actual contact with the poles, any weight in a vertical direction brought to bear

upon the armature must necessarily depress it below the symmetrical position shown in the drawing, and that without change from the construction shown by the drawing the armature, sustaining as it does the weight of the rod and carbon, will have a compensating motion up and down as the strength of its magnet increases and diminishes; that the connection between the magnet and its armature, being through lines of magnetic force, is elastic, and, since the direction of the pull is nearly horizontal, a vertical force applied to the system must necessarily depress it, the result in the lamp being to produce a compensating motion up and down, according to the varying strength of the magnet; that the position of the armature is one of equilibrium when the lamp is in operation, and can be practically independent of moderate changes in the current only when the size of the magnet, *c*, is so great as to be out of all proportion to the lamp of which it forms a part. There was other testimony to the same effect.

There is little of the prior art in the record, but enough to show that Scribner was mistaken in thinking that by his invention he was the first to arrange magnets so as to have independent and not differential action; which latter, as he explains it, means "the differential or opposing action of two separate electro-magnets or solenoids, one in the main circuit and the other in the shunt of the arc, upon a common armature or armature lever, the mechanical pull of one being opposed to the pull of the other, to bring about a regulation of the carbon." The Kellogg patent, No. 229,536, dated July 6, 1880, shows a lamp with separate magnets or solenoids, each acting independently through a clutch or lifting bar of its own, one to raise and the other to draw down the carbon; and, the lifting bars being so arranged that the grip of one is released before that of the other commences, there arises no opposition between the magnets to produce a resultant or differential effect. So, too, in Scribner's patent, No. 415,571, issued November 19, 1889, upon an application filed December 31, 1883, there are main-circuit and shunt-circuit magnets, which operate independently and without conflict to move the same carbon rod. But in neither of these patents is the lifting magnet mounted upon a movable frame, which is controlled by the other magnet in a shunt circuit, and in that respect the novelty of the patent in suit is unquestioned. That feature the respondents have appropriated and are using in a structure which is a clear infringement of the patent, unless the horizontal position of the poles of the lifting magnet and the vertical position of its armature are essential features of the invention. These features, as we have seen, are important only with regard to the question of the compensating up-and-down movement of the armature as the strength of the magnet increases and diminishes; and that strength increases and diminishes with the force of the current through the magnet. But the magnetic current itself is not a part of the device any more than is water an element of a water wheel. In the one water is the power and in the other the electric current, and the devices are contrived for the purpose of controlling and

applying the power. The invention is in the device, which may have one, two, or more functions, one of great and another of trifling worth. It may be supposed to have a function which it has not. The patent is upon the device, and not upon the functions, real or supposed; and if the device is appropriated in its essential features it will be an infringement, notwithstanding some change in the location and relation of parts, whereby a doubtful function of little comparative worth is eliminated. At first Scribner, it is clear, believed the up-and-down compensating movement of the armature in the main circuit, irrespective of the action of the regulating magnet, to be an important feature of his lamp; but before the patent issued, without changing the drawing or modifying the structure of his device in the least, he presented an amended specification, in which he repudiated that idea, and described the armature in operation as assuming and holding a definite relation to the magnet. So long as he did not change the structure of his device or invention, he had the right to change the specification, even though he did it with reference to the Sperry patent, which was applied for and issued while his application was pending; and, the specification being as we find it, there is no support for the proposition that for the purpose of preserving the possibility of a function, which the patentee had repudiated before the patent issued, the claims, though worded differently, should be so read as to cover only the exact construction and relation of parts illustrated in the drawing. The proposition is not reasonable, nor, so far as we know, supported by authority.

The first claim of the Sperry patent, and other claims not quoted, are essentially the same as the first and second claims of the patent in suit, and the lamp made by the respondents differs in essential elements from the complainant's lamp only in respect to the relative positions of the main-circuit magnet and its armature, horizontal parts being made vertical and vice versa.

Our conclusion, therefore, is that the patent in suit is valid, that it belongs to the complainant as assignee of the patentee, and that the respondents before suit had infringed the first and second claims thereof as charged. The decree below, it follows, must be reversed, and it is so ordered.

TEMPLE PUMP CO. v. GOSS PUMP & RUBBER BUCKET MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 111.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CHAIN-PUMP BUCKETS.

Letters patent No. 347,342, issued August 17, 1886, to Sanford A. Goss, for improvement in expansion rubber buckets for chain pumps, consisting of "the rubber bucket, A, having its largest inward diameter at a', thickened at its lower end to form the inward incline, a, whereby it is adapted to be expanded by moving an interior nut in either direction along the supporting link, substantially as described," is not infringed by buckets made on a model different in shape from the drawing in the specification, since the patent, in consideration of the prior state of the

art, should be limited to the exact bucket shown in the drawing referred to as A.

2. SAME—CONSTRUCTION OF PATENT.

Where certain claims in an application for a patent have been rejected in the patent office, and the rejection acquiesced in by the inventor, the court will not so construe the claim that is allowed as to make it by implication include the rejected claims.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Bill by the Goss Pump & Rubber Bucket Manufacturing Company against the Temple Pump Company and others. Complainant obtained a decree. Defendant pump company appeals. Reversed.

Statement by WOODS, Circuit Judge:

This appeal is from a decree for an accounting and of perpetual injunction against infringement by the appellant, one of the defendants below, of letters patent No. 347,342, issued August 17, 1886, to Sanford A. Goss, assignor to the appellee, for improvements in expansion rubber buckets for chain pumps. The specification and claim of the patent read as follows:

"Be it known that I, Sanford A. Goss, of Chicago, county of Cook, and state of Illinois, have invented certain new and useful improvements in expansion rubber buckets for chain pumps, of which the following is a full, clear, and exact description, that will enable others to make and use the same, reference being had to the accompanying drawings forming part of this specification. This invention relates to an improvement in that class of pump buckets set forth in letters patent No 305,071, granted to me September 16, 1874. The means for attaching the bucket and link in the present device being the same as that shown in said patent, illustration of said attaching means in this case is unnecessary.

"Figure 1 is a side elevation of a pump bucket embodying my improved features; Fig. 2, a vertical section of the bucket proper; and Fig. 3 shows

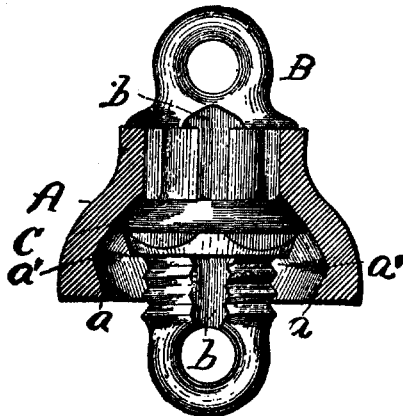


FIG 2

the bucket doubled back, so as to permit of the expansion nut being adjusted with facility. Referring to the drawings, A represents a bell-shaped rubber bucket mounted on the screw-threaded link, B. The exterior contour of this bucket is about the same as set forth in the patent above referred to. The improved features consist principally in reversed inclines of the interior of the bucket, so that the expansion cavity has its largest diameter above its lower end, with a gradual diminution in diameter both upwardly and downwardly, or gradually sloping inwardly from the angle or recess, a', and in com-

binning the bucket with a screw-threaded link, and an expansion nut adapted to expand the rubber, or present new wearing surfaces, when moved in either direction along the link. Now, by placing the expansion nut, C, having a threaded adjustment on the link, B, in the center of the recess, a', the bucket may be expanded by turning the nut, C, either in an upward or downward direction. The expansion nut is set in recess, a', and for the best wearing results it is first turned or adjusted in the upward direction until it has gradually reached its limit, and the upper part of the bucket has become so much worn that it cannot be any longer expanded in that direction. The nut, C, is then returned to the recess or angle, a', and so adjusted as to bring the bearing surface of the same against the inward incline of the thickened part, a, and thereby expand the lower part of the bucket, and change the exterior bearing or wearing surface, thus not only providing a bucket possessing increased expansive qualities, but also lengthening the life and durability of the same. The thicker part, a, likewise prevents the expanding nut from working off the link. The upper edge of the nut, C, is beveled to correspond to the inner circumferential surface of the bucket, the lower part being slightly beveled or rounded, so as not to present a sharp bearing edge to the bucket. The bucket may be doubled back on the link in the manner illustrated in Fig. 3, in which position it will remain fixed, thus allowing the expanding nut to be readily and conveniently adjusted to a new position, and, when so adjusted, the bucket is turned back upon the nut, as in Fig. 2, and the rubber or bucket operates as a nut lock, to prevent changing the adjustment, and a guard to prevent the reel or its forks from moving it. The link, B, is provided with the drip groove, b.

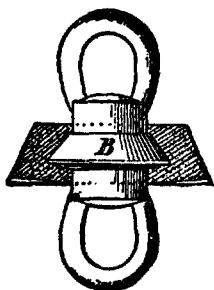
"Having thus described my invention, what I claim, and desire to secure by letters patent, is the rubber bucket, A, having its largest inward diameter at a', thickened at its lower end to form the inward incline, a, whereby it is adapted to be expanded by moving an interior nut in either direction along the supporting link, substantially as described."

The objects of the invention in patent No. 305,071 are stated in the specification to be—First, to prevent the bell-shaped rubber from slipping or turning upon the link; and, second, to prevent the nut or washer from becoming loosened, displaced, or turning upon its thread, by striking against the reel of the pump; and the two claims are each for the combination of the link, nut, and rubber as set forth.

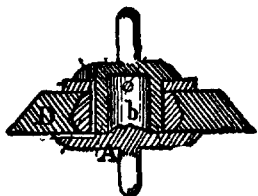
The file wrapper of the patent in suit shows that the following claims were first presented: "(1) An expansion bucket for chain pumps provided with the inwardly projecting annular shoulder, a, as and for the purpose set forth. (2) An expansion bucket for chain pumps thickened at the lower end and having the recess, a', as set forth. (3) The combination with an expansion bucket, provided with the shoulder, a, and the recess, a', of the link, B, and the expanding nut, C, whereby said bucket may be expanded by adjusting the nut in either direction on the link B, and the nut prevented from working off and lost, all substantially as set forth." The first and second were "refused on patents to Hathaway, No. 158,075, Dec. 22, 1874, and Miller, No. 304,442, Sept. 2, 1884; the third on Temple, No. 290,282, Dec. 18, 1883;" and thereupon the following were proposed: "(1) In a chain pump the combination of an expansion bucket provided with the inwardly projecting shoulder, a, and the recess, a', the link, B, and the expanding nut, C, of greater diameter than the opening formed by the inwardly projecting shoulder, a, substantially as described. (2) An expansion bucket having a chamber formed by the recess, a', and the inwardly projecting shoulder, a, having the inner inclined face, substantially as described." These were "held to be answered by Temple and Hathaway, of record, and therefore refused," and thereupon the specification was amended in particulars which need not be stated, and two claims proposed, of which the first was allowed, after a voluntary withdrawal of the second, which was as follows: "(2) The elastic bucket, A, constructed as described, in combination with the link, B, and expansion nut, C, substantially as described."

The respondents admitted making and selling rubber buckets for chain pumps, but in view of the prior art, and of the concessions made by Goss in order to obtain the patent in suit, as shown by the file wrapper, denied both invention and infringement. The prior art, as averred and proved, consists

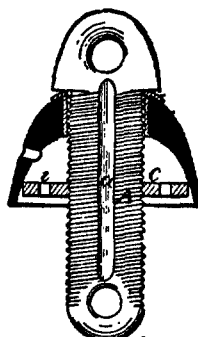
of the following letters patent, of which illustrative drawings are given: No. 158,075, to Hathaway; No. 178,208, to Van Sant; No. 178,735, to Churchill; No. 218,746, to Hoyt; No. 269,809, to Miller; No. 290,282, to Temple; and No. 304,442, to Miller.



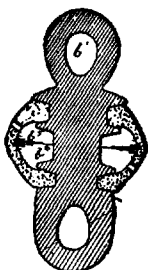
Hathaway 1874.



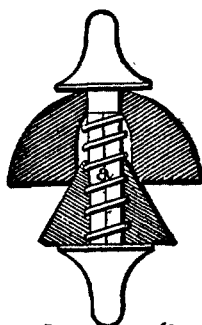
Van Zant 1876.



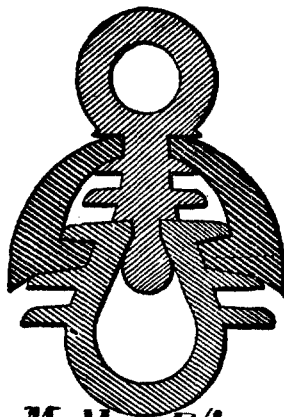
Churchill '76.



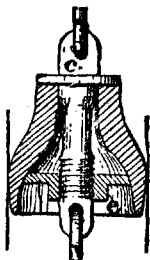
Hoyt '79



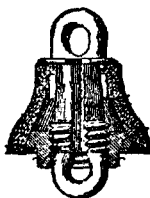
Miller Pat. 1882.



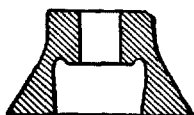
Miller Pat. 1884.



Temple 83



Goss 1884.



Abbellant's Bucket



Runkle 89.

Mr. Bates, an expert, examined on behalf of the complainant, testified, in substance, that the complainant's bucket is secured to a metal link, on the thread of which a nut travels to expand the bucket; that, as shown in the patent, the interior of the bucket is contracted in both directions from a point of greatest diameter, the lower edge being thickened because the greatest wear comes at that point; that the most important features of the construction are the thickened lower edge, and the fact that the nut is always inside the bucket, so that the rubber acts as a lock, and as a guide to prevent contact of the nut with the reel or its forks; that the buckets of the defendants are of like construction and parts, the interior of the rubber growing smaller in both directions from a point of greatest diameter, and the bottom edge thickened so as to secure all the advantages of the complainant's patent; that the variations of the interior of the bucket are less pronounced than in the buckets of complainant, but that this is a difference of degree merely, and is made up for by the increased size of the nut, which forces the rubber, when in use, to the shape shown in complainant's patent; that in both buckets there must be a downward movement of the nut in order to expand the lower edge; that in each, when the lower edge is worn off, an upward movement of the nut will expand the thick upward portion, so as to compensate for the wear on the lower part; that the complainant's device is not anticipated by any of the patents in evidence; that Temple's second patent shows a bucket which is practically the same as that of the complainant; that it has a rubber, which is thick at the top where it embraces the link, and is thick at the bottom so that the lower edge will draw inward below the nut; that it also has a screw-threaded link and nut thereon, which acts upon the interior of the rubber, and is locked in the position to which it is adjusted by the action of the rubber embracing it, due to the thickness of the lower edge, which also protects the nut from the reel; that in all other respects it acts just as complainant's bucket does; that the variations in the shape of the rubber simply amount to taking material from the inside next to the cavity, and putting it upon the outside, so that the action and effect are the same; that in one figure the cavity is shown to be of uniform diameter, but the thickened lower edge of the rubber is present and acts in the same way as in the other form; that in either the straight or flaring cavity a nut larger than the largest part would produce exactly the same form of cavity shown in the Goss patent, in which there is no limitation upon the size of the expanding nut; that before the date of that patent the forms of link and nut shown were old, and also their use in connection with a concavo-convex rubber, as shown in the Churchill patent, and also an expansion rubber bucket with interior cavity and with thickened lower edge, as shown in one of Miller's patents; that it was also old to effect the expansion of the rubber either by moving the nut or by moving the rubber along the link, as was intended by Churchill, and also to protect the nut by locating it within the cavity of the bucket, as Temple undertook to do in 1883; that in Temple's bucket of 1889, with the straight wall cavity, there is no point which corresponds with the angle or recess, a', of the Goss patent, but that in Fig. 1 the top of the cavity corresponds to all intents and purposes with the point of greatest internal diameter of the Goss patent, because it is the point of greatest internal diameter in the Temple device, and the point at which the wall is thinnest, and from which the nut can be started and moved downward, gradually expanding the rubber, and bringing new surfaces into contact with the well tube; that while not literally the exact rubber shown in the Goss patent, it must be held to be the full mechanical equivalent, especially when used with a large nut; that a nut larger than the cavity of the Temple bucket, started below the top and moved upward, would expand the rubber above it as it moved, and if moved downward would expand that below it as it moved that way, in both particulars the same as in the Goss device; that Goss improved upon prior buckets by adding a reverse incline, so that the rubber could be expanded usefully by moving the nut downward; that in that respect his bucket is distinguished from all prior buckets, and is identical with defendant's bucket; that "the specification of the patent describes the old operation of expanding by an upward movement of the nut, and the new operation of expanding by the downward movement of the nut, in such a mixed-up way that it is hard to tell from the specification whether the patentee

meant that his buckets should have both operations or only the latter one," but that, when the functions and the objects of the invention are considered, it is perfectly clear that the latter operation, namely, the expansion of the rubber by a downward movement of the nut, is sufficient, and, if his patent is to be construed as commensurate with his invention, it will be limited only to his downward movement; that the claim of the patent would seem to indicate the same thing, since it expressly mentions the incline below the point of greatest diameter, and says nothing of the incline above that point,—manifesting an intention to claim simply that which the art shows to be new, "namely, a rubber bucket with a thickened lower end, in combination with a nut and link by which the rubber is expanded as the nut is moved downward;" that it is therefore not essential that the bucket be so constructed as to admit of expansion by an upward movement of the link,—though it makes no difference in this case whether or not that is so, because, owing to the large size of the nut in the bucket of defendants, the rubber is expanded by an upward as well as by a downward movement of the nut from an intermediate position.

The proof shows that in the manufacture of the Goss bucket, from the first, the nuts were made larger in diameter by about a quarter of an inch than the largest diameter of the rubber.

It is conceded that Goss's idea was, as the specification shows, that he still retained the upward expansion of his 1884 bucket; but since he nowhere locates the position of the angle or recess, a', it is insisted by appellee that "what he invented was a rubber bucket constructed 'so that the expansion cavity has its largest diameter above its lower end,' and that his claim is for a rubber bucket 'thickened at its lower end to form the inward incline,'" and that, the device itself being right, a mistaken description of its operation does not nullify or vitiate the patent.

On the other hand, Mr. Temple, one of the respondents, testified, in substance, that the bucket of the defendants was of the form shown in the Temple patent of 1889, of which the diameter of the cavity is greater at the top than at the bottom by about one-sixteenth of an inch; that when the nut is at its highest place on the link the lower edge of the bucket will be of a size to fit the well tube; that when worn away that edge is expanded by moving the nut downward; that in no position on the link will the nut force any other part of the rubber except the lower edge into bearing with the pump tube; that in this form of construction the nut must be larger than the greatest diameter of the cavity, in order to produce by downward movement an expansion of the bucket at its lower edge to an appreciable extent; that the actual diameter of the nut is about one-half greater than the greatest diameter of the cavity, so that when at its topmost position it will force the thin wall of rubber next to it outward, but not enough to produce at that point a bearing against the pump tube; that the buckets of Goss and Temple are radically different in their modes of operation and in the principles of expansion employed,—the one with the reversed inclines having been planned on the theory theretofore employed by Churchill of producing the expansion by moving the nut from a wider to a narrower part of the cavity, and the other of "placing opposite the nut of greater diameter than the cavity a downward constantly increasing thickness of the wall of the rubber;" that this bucket is not expanded by reason of any peculiar formation of its cavity, and would operate in the same manner substantially if the cavity were cylindrical from top to bottom; that the diameter of the nut in the Goss bucket should be equal to the greatest inner diameter of the cavity; that, if made larger, so as to expand the rubber opposite that part of the cavity, the upward movement of the nut from that point would not expand the upper portion of the rubber effectively, for the reason that the previously expanded portion would contract in some degree as the nut advanced; that the nut should be just large enough to fill the cavity, a', of the patent in order to expand the upper part of the bucket with the best result; that in the Goss bucket the wearing surface is constantly opposite or near the expanding nut, wherever placed on the link, and consequently is hard and unyielding to the inequalities of the tube, while the bearing of the defendants' bucket is constantly at the extreme bottom of the rubber, which

is expanded by moving the nut downward from time to time as needed to compensate for wear, and though increased slightly in vertical extent by the wear, yet, being elastic, produces little friction with the pump tube.

The chief contention of the appellant is that the patent sued on describes and claims a rubber bucket that can be expanded to compensate for wear, first by an upward movement, and second by a downward movement, of its interior nut upon the supporting link.

Geo. P. Fisher, Jr., for appellant.

L. L. Bond, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge, (after making the foregoing statement.) However construed, it is not clear that the patent in suit is for an invention. The thickened lower end of the bucket is its only novel feature, and from that there results no new function, and no advantage which had not been attempted, and in some useful measure accomplished, in the prior art. The angle or recess, a', and the inward incline, a, are mere results of adding the thickened lower end to the Goss bucket of 1884, and in view of that, and of the earlier devices in evidence, it is difficult to see that in adding this thickened extension to the bucket there was employed more than ordinary skill and judgment in adapting means to an end. It is not pretended that the characteristics of rubber which are thereby brought into play—its powers of compression, expansion, and contraction—were not already well understood. Besides the use already made of it in rubber buckets for chain pumps by Goss himself and by Temple, Churchill, Miller, and others, its employment in various arts and manufactures had made its qualities well known, and left but little room for invention merely in devising and adapting new forms to old uses. Witnesses and counsel have not omitted to point out with elaborate precision the various particulars in which the earlier buckets differ one from another, and from the one in suit,—as, for example, the obvious fact that Churchill and Temple both sharpen the lower edge of the rubber, one from the inside and the other from the outside; but such differences can hardly be within the domain of invention, and it is not perceived how the consideration of them can bring much aid to the solution of the question whether or not, after what had already been done by himself and others, Goss, by producing his bucket of thickened lower end and reversed inclines, wrought out a patentable discovery. That question does not depend upon merely accidental differences which, by appropriating the devices, or by following the plain suggestions of the prior art, could easily be made to disappear. The proof shows that the bucket of Goss's first patent was of better form, and operated more successfully, than any of those which preceded it, and yet he claimed nothing for the rubber alone, but only a combination of the rubber and nut and link as set forth; and if there was invention in merely extending and thickening the lower end of that bucket, as claimed in the second patent, for the purpose of admit-

ting, locking, and protecting the nut and forming the recess and reversed inclines, so that the bucket could be expanded both by the upward and downward movement of the nut from its place in the recess, it was certainly not a pioneer discovery, which would justify extending the patent by a liberal construction of the claim to include different forms or designs, though they be capable of performing similar functions, and even of being forced by manipulation of the nut into the form which the patented device has when not itself distorted by a nut of enlarged diameter.

It is contended, however, that besides being first to devise a bucket which could be expanded by a downward movement of an expanding nut, Goss was absolutely the first to effect the expansion without compressing or squeezing the rubber; because, it is said, the buckets patented by Churchill and Temple in 1883 and by Goss in 1884 are expanded "by compressing the rubber against a fixed or nonmovable top projection or flange on the link, operating to oppose the upward movement of the nut and to expand the rubber by squeezing it out." The proposition is not necessarily true of the patents named, and in respect to the Miller device of 1882 seems to be essentially untrue. In any of the devices, if the nut is moved within the cavity without first turning the rubber back or somehow forcing it out of the way, the tendency will be, as the nut advances on the link, to compress the rubber in front, producing in that direction an expansion by "squeezing," while behind the nut there will be a tendency to pull the rubber loose from its attachment on the link, or, if the rubber be free at that end, it will tend to contract behind the nut. But manifestly it is not necessary nor desirable in any of the devices that changes in the position of the nut should be effected solely by pushing it against the thickened rubber in front, although in the form shown in Churchill's drawings probably it would be done mainly in that way. Yet in that form possibly, and certainly in some of the forms shown in the first patents of Temple and Goss, it would be practicable without alteration of parts or structure, by a manipulation which would not be difficult, to put the nut at the top of the bucket's cavity in the first instance, and, the diameter of the nut being greater than the diameter of the cavity, it would make an impression in the wall of rubber similar to the recess, *a'* of the patent, and from that point, by repeating the manipulation, it could be moved downward whenever necessary to provide new wearing surface between the bucket and the well tube; the resulting compression and expansion being produced, not by the movement of the nut, but by force of the nut in place after the completion of each movement. And in the Miller bucket of 1882 the same results could be accomplished without the necessity of forcing or manipulating the rubber into shapes and modes of operation like those of the patent in suit; because it is to begin with a bucket with the thickened lower edge, which needs only the substitution of a nut for the rubber cone by which it is expanded to make it essentially the same as the bucket manufactured by the appellant. Of course, such a substitution, in view of the existing state of the art, could not be in-

vention. It is pronounced impossible, because, it is said, the effect of a nut in that bucket would be to expand the upper part of the rubber, and loosen it on the link; while it is essential to the complainant's bucket that it be thickened both at the top and bottom, and that the Miller bucket is not of that form. The objection is one of those which do not touch the question of invention, because the upper part of the bucket, if too light or weak, could easily be strengthened enough to overcome a tendency to loosen, and, that once done, the combined action of the nut and rubber would be the same as in the bucket of the appellant, which is alleged to be identical with that of the appellee.

It is, of course, true that a mistaken description, or even misconception, of the operation of a device which is itself fitly described and claimed, does not vitiate a patent; because, as is said in *Western Electric Co. v. Sperry Electric Co.*, 58 Fed. Rep. 186, the patent is upon the device, and not upon the functions, real or supposed. But it is equally true, we suppose, that when a device designed merely for the improvement of a well-advanced art is described as having particular features of construction which are adapted to accomplish specific results or modes of operation, and the claim of the patent is for that device, the features so described are covered by the claim, and may not be rejected, or treated as of secondary importance, in order to extend the patent over other forms or features not described. The claim has been treated in argument as if it read, "A rubber bucket, having its largest diameter," etc., and, if it were so, it might perhaps be construed broadly enough to cover "a rubber bucket thickened at its lower end to form the inward incline, a'," or a bucket with a single incline; but being, as it is, for "the rubber bucket, A," etc., it can be fairly interpreted only as meaning the particular bucket described in the specification, having a cavity with reversed inclines sloping gradually upward and downward from the angle or recess, a', at which, when in use, the nut is to be first placed, and so constructed as to admit of expansion, which shall present new wearing surfaces as needed, first by turning or adjusting the nut gradually in the upward direction, and then (after returning the nut to the recess) by repeating the process in the downward direction. Much of the specification, while explanatory of intended functions, is at the same time descriptive of the device, and there is no reason for doubting that the patentee understood and intended his bucket to be one of two inclines, and capable of effective expansion by alternate upward and downward movements of the nut. It is clear enough, too, that the nut was not designed to be larger than the recess into which it was to go, because the proposed expansion is described as being caused, not by the insertion of the nut, but by moving the nut first upward and then downward from the recess. It was, of course, the right of the appellee, making the rubber smaller if necessary, to enlarge the nut, and also to locate the recess or largest inner diameter at the top of the cavity; but the patent did not, on that account, become different. Seeming to think his patent as pliable as the rubber of his bucket, the appellee has presented two

lines of argument and proof which are at once inconsistent and fallacious: First, as just stated, it has made its own buckets upon a model essentially different from the form patented, and because the appellant has made buckets of similar form the patent has been infringed; and, second, it is manifestly true, as the proof shows, that in the appellant's bucket with either straight or flaring cavity, a nut of the kind used, which is larger than the largest part of the cavity, will produce, when placed intermediate between top and bottom, two inclines like those shown in the Goss patent, and therefore the former is an infringement of the latter. How the same treatment would produce like effects in some of the older buckets, and make of them anticipations of the patent in suit, has already been pointed out.

The conclusion to which these considerations lead is materially strengthened by the history of Goss's application for his second patent, wherein it appears that he presented, and, after they were rejected, abandoned, claims so worded as to have the same meaning which it has been sought to put by construction upon the claim finally presented and allowed. It is insisted that the claim granted is broader than those rejected, and therefore cannot be limited by them; but that is a begging of the question. It can be made broader only by construction, and the effect of the decisions on the subject, as we understand them, is that a claim cannot by construction be enlarged to include the matter of claims in the rejection of which the patentee had acquiesced.

Our conclusion is that, conceding, without deciding, that the patent in suit has in it some measure of invention, it must be limited to the form of bucket described in the specification, and has not been infringed by the appellant. The decree below should therefore be set aside, and the bill dismissed for want of equity, and it is so ordered.

UNTERMEYER v. FREUND.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

1. DESIGN PATENTS—ANTICIPATION—EVIDENCE BASED ON RECOLLECTION.

Anticipation of a design patent is not made out by the evidence of workmen testifying after several years to the appearance of a few designs made by them, when it is shown that their recollection is at fault as to the only one of these designs which is produced, and when they are contradicted by other witnesses, having equal facilities for knowledge.

2. SAME—ORAL TESTIMONY AS TO DATES.

Anticipation of a patent is not made out by indefinite and contradictory testimony, entirely from recollection and after several years, as to the date at which a like device was produced.

3. SAME—INVENTION — TRANSFER AND ADAPTATION OF OLD DESIGNS — WATCH CASES.

While the mere transfer of an old form existing upon something else to a watch case is not patentable invention, yet a patent for a watch-case design is not invalidated by the pre-existence upon something else of all the elements of the design, but arranged and combined in a different manner, resulting in a materially different appearance.

4. SAME—VALIDITY OF PATENT.

Letters patent No. 15,121, issued July 1, 1884, to Henry Untermeyer, for a design for watch cases, are valid.

5. SAME—INFRINGEMENT—PENALTIES—EQUITY JURISDICTION—CONSTITUTIONAL LAW.

The act of February 4, 1887, relating to design patents, is not unconstitutional in that it imposes a penalty for infringement, and authorizes the enforcement thereof by a court of equity in an injunction suit.

6. SAME—MEASURE OF DAMAGES.

The act of February 4, 1887, enlarged the remedy for the infringement of a design patent by giving as damages the entire net profits made on the article to which the infringing design is applied, instead of requiring an apportionment of the profits attributable merely to the design. 50 Fed. Rep. 77, affirmed.

7. SAME—ACT FEB. 4, 1887—PENDING SUITS.

The measure of damages thus prescribed was applicable to pending suits, as to infringements occurring after the statute went into effect. 50 Fed. Rep. 77, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by Henry Untermeyer against Max Freund for infringement of a design patent. The circuit court rendered a decree for complainant, (50 Fed. Rep. 77,) and defendant appeals. Affirmed.

Frederic H. Betts, for appellant.

Rowland Cox, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity in this case was brought in the circuit court for the southern district of New York, against Max Freund and Adolph S. Freund, to restrain the alleged infringement of design letters patent No. 15,121, applied for May 8, 1884, dated July 1, 1884, to Henry Untermeyer, for a design for watch cases. The circuit court entered an interlocutory decree ordering an injunction against the defendants, and an accounting, and upon the return of the master's report overruled the defendants' exceptions thereto, confirmed the report, and entered a final decree against Max Freund, the surviving defendant, for the sum of \$1,139.02, and the master's fees and the costs. This appeal is by the surviving defendant from each decree.

From the specification it appears that the design consists of a conventional star, in which any ornament may be set, and which is placed upon a ground of leaves which is larger than the star, and of corresponding shape. Between the points or leaves of the larger star are projections. The whole is in relief. The claims are three in number. The third claim is as follows:

"(3) A design for watch cases, consisting of the star, A, containing the ornament, D, the larger star, B, representing leaves, and having between its points the ornamental projections, C, and the star, A, occupying the center of the star, B, all being in relief, substantially as shown and described."

The second claims omits the ornament, D, and the first claim omits the ornament and the ornamental projections.

The defenses are want of novelty, prior use for two years before the date of the application, and lack of patentable invention, in view of the state of the art when the improvement was made. Infringement is denied, in view of the limited construction of the patent which is thought to be rendered necessary by the prior state of the art.

The major part of the oral testimony upon the subject of anticipation related to the work which was done for Keller & Untermeyer at the shop of Ball, Parker & Waters before July 1, 1882. The patentee was and is a member of the firm of Keller & Untermeyer, jewelers. They employed, for some years prior to July 1, 1882, the firm of Ball, Parker & Waters, watch-case manufacturers, to make and ornament watch cases. Parker was the manager of the factory. Benfield was, until July 1, 1882, the foreman of the engraving department, when he left this firm, established one of his own, under the name of Benfield & Tissot, and thereafter obtained all of the business of Keller & Untermeyer. The theory of the defendants is that prior to July 1, 1882, in the Parker shop, watch cases were ornamented, by the workmen of Benfield, for Keller & Untermeyer, or for others, with the design which was subsequently placed on infringing watch cases, and which is substantially that of the Untermeyer patent. Parker and six workmen testify to this alleged state of facts. They are contradicted by Untermeyer, Benfield, and two workmen. One very significant fact appeared in the testimony of Parker. He testified with clearness and positiveness in accordance with the foregoing theory, and, among other things, was positive that watches from Nos. 13,193 to 13,198, inclusive, except 13,195, which were made for Keller & Untermeyer, were substantially identical in appearance with the design of the Untermeyer patent, and with the infringing watch cases. No. 13,193 was sold to Keller & Untermeyer on March 8, 1893, was traced to the purchaser from them, and was produced by the complainant. It neither has the design of the patent, nor such a resemblance to it that a purchaser would mistake one for the other. It has a conventional star placed over an engraved starlike figure, not the complainant's leaf star, and has no other features of the patented design except the ornament in the conventional star. This proof of the defective memory on the part of Parker, who is apparently an honest witness, greatly impairs the weight that is to be given to his testimony and that of his associates, who testify from recollection, unaided by written memoranda. Untermeyer's theory, in brief, is that about the beginning of 1882 he wanted a design for a watch case in which a diamond should be an attractive feature, and started with the idea of a single raised star carrying a diamond in the center, with a circle of engraved stars in the outer portion of the case. The next step was to raise the outer circle of stars. The next attempt was the design shown in No. 13,193. Next followed, in May or June, 1883, the patented design, which was produced at the shop of Benfield & Tissot, and the imperfect conception shown in No. 13,193 was abandoned. These successive steps were taken for the purpose of overcoming faults in the earlier design which became manifest as they were placed upon watch cases. An examination of the whole testimony results in a great distrust of the accuracy of the memory of Parker and his workmen, and in the conclusion that Untermeyer's history of the development of the patented design is substantially correct.

The alleged anticipation by the manufacture of watch cases, like

the one known as the "Muhr Watch Case, No. 22,056," is not satisfactorily established. It is substantially conceded that this case was ornamented by the Willamin Watch-Case Company, and that the work was charged in a bill of that company, March 18, 1884. It contained the patented design. The patent was applied for May 8, 1884. In this state of facts it became necessary for the patentee to establish to the satisfaction of the court that his invention preceded the time when the Muhr design was shown to have been first made. *Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. Rep. 803; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 11 Sup. Ct. Rep. 846. Simon Muhr, his brother, and their salesman, since September, 1879, also attempted to show that similar cases were also ornamented by the Willamin Company, about a year before, but neither one states the time with definiteness. The salesman says that cases with the same design were in Muhr & Son's stock two or three months—it may have been five months—before March, 1884, and that it was either in 1883 or in 1884. In reply to a question in regard to this date, Jacob Muhr is "almost positive that it was very nearly a year" before March, 1884. Simon Muhr, who says that his brother can give better dates than he can, cannot tell in which month of the spring of 1885 the Willamin Company ornamented cases with a design like that upon No. 22,056. Neither witness has any memoranda, but relies upon his memory. The existence of the Muhr design cannot be considered as established by this testimony at any time prior to that stated by the salesman. The first order by Keller & Untermeyer for an ornamented case like the patented design was undoubtedly given on July 25, 1883. The testimony of the defendants is altogether too vague to justify the conclusion that the Willamin Watch Company ornamented watches in the same way before that date.

The other testimony in regard to designs which preceded the Untermeyer invention was offered to prove direct anticipation, and also to show the state of the art at the date of the invention, and thence to deduce the conclusion that it contained nothing patentable. This testimony relates to badges, watch-case designs, a watch, and 30 tracings from drawings in the Astor Library. Much reliance was placed by the defendants upon four of these drawings, Nos. 8, 20, 26, and 29, which the respective experts united in regarding as the nearest resemblance of the 30 to the patented design. No. 8 is apparently of metal, and applied to a balcony or veranda. No. 20 is a decoration on the panel of a door. No. 26 is a piece of jewelry, and is a star of leaves with an ornamental center superimposed upon a star of leaves. No. 29 is a plaster ornament for a ceiling. Neither of them contained the conventional central star of the design. In reply to the question as to the probability of these designs, if placed upon watch cases, being mistaken by an ordinary purchaser for the Untermeyer patent, the defendants' expert simply said that, if placed upon a watch case in relief and chased, they would, to the ordinary purchaser, strongly resemble the Untermeyer design. The books which contained these drawings did not describe them.

Neither the appearance of any one of this general class of exhibits, nor the oral testimony of the defendants' witnesses, shows that any one of this class can be considered an anticipation of the patented design. All of them may be disregarded upon the mere question of novelty. They are important upon the question of patentable invention. If the patented design consisted in a transfer of an old form which had existed upon something else to a watch case, or in the mere adaptation by imitation of a pre-existing form to a watch case, it would not have been an invention. If the adaptation "is more than the exercise of the imitative faculty, and the result is in effect a new creation, the design may be patentable." *Smith v. Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. Rep. 768. In this case the patented design was not a copy of an old form, or an adaptation of the same pre-existing form to a watch case. The elements of the patented design, viz. conventional stars, with or without ornaments, and stars of leaves and projections of various kinds between the leaf points, existed, but arranged and combined in a different manner, and producing a resulting appearance and effect which differed materially from the patented design. Its combination was peculiar to itself, and had a characteristic grace of its own. While other combinations were graceful, and were effective for the purpose for which they were designed, this combination, which seems adapted to ornament a small surface, produced its own effect.

The remaining defenses relate to the statute of February 4, 1887, in regard to design patents. The first section, after providing that thereafter, during the term of letters patent for a design, the unauthorized use of such design was unlawful, provided as follows:

"Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement."

The bill in equity in this case was filed December 30, 1886, and the interlocutory decree was entered January 24, 1889. The master found that between July 1, 1884, and January 24, 1889, the defendants sold and received pay for 275 watch cases bearing the patented design, of which 82 were sold before February 4, 1887, and 193 were sold after that date; that the evidence failed to show what, if any, part of the net profit received by the defendant from the sale before February 4, 1887, or after that date, was due to the patented design, and failed to show that the entire net profit of sales, after February 4, 1887, was due to the patented design. He found that the entire net profit made by the defendants on watches sold after that date was \$1,139.02, which was \$889.02 in excess of \$250; and that nominal profits, or nominal damages, only, could be found upon the sales made before that date. The final decree adjudged that the

defendants pay to the complainant \$1,139.02, the master's fees, and costs.

The first position of the defendants is that the act of February 4, 1887, was unconstitutional because it imposes a penalty; that a court of equity has no jurisdiction of penalties, which must be recovered on the law side of a court, and by the verdict of a jury; that the act is of a quasi criminal nature, and trial of the accused by jury is imperative; and that a taking of property is authorized without due process of law. The argument of the defendants requires for its support the truth of three propositions.

The first may be stated in the language of the supreme court in *Root v. Railway Co.*, 105 U. S. 189, 206, that in the federal courts the "distinction of jurisdiction between law and equity is constitutional to the extent to which the seventh amendment forbids any infringement of trial by jury, as fixed by the common law; and the doctrine applies to patent cases as well as others."

Second. That a court of equity, in the exercise of its ordinary powers, does not enforce a penalty or a forfeiture. 2 Story, Eq. Jur. § 1319.

Third. That the legislature cannot, by express provisions of a statute, empower a court of equity, as incidental to its preventive remedy by injunction, to compel the defendant to pay damages in the nature of penalties. The first two propositions are true; the third does not follow as a logical consequence from them, and is not sustained by authority.

The subject of the power of a federal court of equity, under the statute now known as section 4921 of the Revised Statutes, to direct the payment of profits and damages, upon a bill in equity brought during the life of a patent to restrain its infringement, was considered historically, and with great care, in *Root v. Railway Co.*, supra. The supreme court held that "a bill for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court." The argument of the court assumed as undeniable that, when the patentee had secured his standing in a court of equity of the United States, by a bill in which he asked, and was entitled to obtain, the preventive remedy by injunction, the court could properly proceed to afford incidental relief, and assess the damages which the complainant had suffered in excess of the profits which the defendant had made by virtue of the infringement, and even, at its discretion, increase the actual damages. It is not material whether these damages are unliquidated and to be assessed by the court, or whether they are called a "penalty," provided the legislature has expressly empowered the court of equity, in a bill brought within its jurisdiction for preventive remedies, to afford this additional and incidental relief. This subject was considered generally in *Stevens v. Gladding*, 17 How. 454, (decided at the December term, 1854,) the question in the case being whether the copyright act of 1819, which provided for forfeitures of the infringing copies of a copyrighted book, had conferred upon courts of equity power to enforce forfeit-

ures, or had left them to be enforced at law. The court, speaking by Mr. Justice Curtis, was of opinion that nothing in the act extended "the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and necessary jurisdiction exercised by the courts of equity for the protection of analogous rights." Judge Curtis had, at the November term, 1854, of the circuit court, in *Stevens v. Cady*, 2 Curt. 200, considered the same subject of the power of a court of equity over penalties under the copyright statutes, and said: "A court of equity does not enforce forfeitures or penalties, unless expressly directed by statute to do so;" and reached the same conclusion, in regard to the absence of power conferred by any existing statute, which was confirmed in *Stevens v. Gladding*. It is difficult to suppose that the supreme court doubted the power of congress to confer this authority upon a court of equity, as incidental to the exercise of its ordinary jurisdiction.

The defendants next insist that, under a proper construction of this statute, all the profits which resulted to the infringer from the sale of the infringing article after February 4, 1887, cannot be allowed, but that his liability extends only to the amount of profits which the complainant can show were due to the use of the patented design. The well-settled doctrine of the supreme court was and is that the profits to be assessed, under section 4921 of the Revised Statutes, in suits in equity for the infringement of a patent, are those only which are properly attributable to the patented feature, and that the evidence of the patentee must "apportion the defendant's profits, and also the patentee's damages, between the patented and unpatented feature." *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. Rep. 291. If the profits upon the whole article are clearly due to the patented part, which gives to the article its marketable value, they are the measure of recovery. *Manufacturing Co. v. Cowing*, 105 U. S. 253. In this state of the statutes, applicable to patents for designs as well as to machine patents, the circuit court for the eastern district of Pennsylvania held, in a case for the willful infringement of a design patent for carpets, that where no profits were found to have been made, but the complainant's sales had decreased as the effect of the infringement by the defendant, but the amount of damages could not be ascertained by the master from the evidence, the court was justified in presuming that the infringing carpets displaced in the market the complainant's carpets, and hence that the profits which would have accrued to them upon the quantity of carpets put upon the market is the measure of their damages." *Carpet Co. v. Dobson*, 10 Fed. Rep. 385. Upon appeal, the supreme court disagreed with the conclusion of the circuit court, and held that the complainant must be required to establish the actual damages or profits by trustworthy legal proof; and, as there was no evidence in the case of the value which the patented designs had contributed to the infringing carpets, the decree must be reversed, and nominal damages, only, should be awarded. *Dobson v. Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945. The statute of 1887 was

passed in consequence of this decision. The manifest purpose of congress was to enlarge the remedy against infringers of design patents, and to declare that the measure of profits recoverable on account of the infringement should be considered to be the total net profits upon the whole article. A construction which should limit a recovery above \$250 to the amount which the complainant could clearly establish to be the value which the design had contributed to the infringing carpets would be at variance, not only with the apparent legislative intent, but with the language of the statute. The rule which congress declared for the computation of profits was the total profit from the manufacture or sale of the article to which the design was applied, as distinguished from the pre-existing rule of the profit which could be proved to be attributable to the design.

The defendants next insist that inasmuch as the bill was filed December 30, 1886, the complainant is not entitled, as to sales which were made after February 4, 1887, to the total profits, in the absence of proof that the entire profits were attributable to the use of the design. Upon an accounting for an infringement commenced before the bill was filed, and continued afterwards, the complainant is entitled to recover the profits derived by the defendant from his infringement to the date of the accounting. "The practice saves a multiplicity of suits, time, and expense." *Tatham v. Lowber*, 4 Blatchf. 86; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Marsh v. Nichols, Shepard & Co.*, 128 U. S. 605, 9 Sup. Ct. Rep. 168. This was also the rule in an accounting under a decree of foreclosure. *Robinson v. Bland*, 2 Burrows, 1086; *Holabird v. Burr*, 17 Conn. 563. In this case the infringement continued after the bill was filed, and after the act of 1887 went into effect. Under the decree, which sustained the patent, and found an infringement, and directed an accounting, it was the duty of the master to take an account during the entire period of infringement, in conformity with the statutes as they existed at the respective dates when the infringement was committed. The cases of *Williams v. Leonard*, 9 Blatchf. 476, and *Sarven v. Hall*, Id. 524, are not applicable. The decision in those cases was based upon the language of section 111 of the act of July 8, 1870, which limited the remedial provisions of the act to suits and proceedings commenced after its passage. Neither is it necessary to consider the rules of equity pleading in regard to amendments relative to circumstances which occur after the filing of the bill, for there was no necessity for an amendment or for a supplemental bill.

The decree of the circuit court is affirmed, with costs.

BAGLEY & SEWALL CO. v. EMPIRE WOOD-PULP CO.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

No. 95.

1. PATENTS FOR INVENTION — IMPROVED PAPER MACHINE — INVENTION — INFRINGEMENT.

Letters patent No. 393,538, issued November 27, 1888, to Charles H. Campbell, for an invention consisting, as covered by the first and second

claims, of a combination to relieve the main frame of a paper machine from the downward pressure of the pressure rolls, between which the wet pulp passes, and for adjusting the guiding roll so as to keep the felt upon which the pulp lies in proper alignment as it passes through the pressure rolls, are in that respect for a patentable invention, and are infringed by a similar machine in which the main frame is relieved from pressure.

2. SAME—WANT OF CO-OPERATION.

The combination of the third claim by which each end of the guide roller is adjusted, so as to bring the felt into proper relation with the pressure rolls, is not patentable, in that the separate sets of devices are an aggregation, and do not combine with each other, but work out an independent and separate result, not due to any co-operating action.

3. SAME—WANT OF NOVELTY.

The fourth claim of such patent contains nothing patentable, in view of the Downington Company's machine of 1882, in which the horizontal arms are bolted to the frame at one end and to the sill at the other end, whereas in the machine of the patent the arms are integral with the frame.

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. Bill by the Bagley & Sewall Company against the Empire Wood-Pulp Company for infringement of letters patent for an improved paper machine. From a decree dismissing the bill, complainant appeals. Reversed.

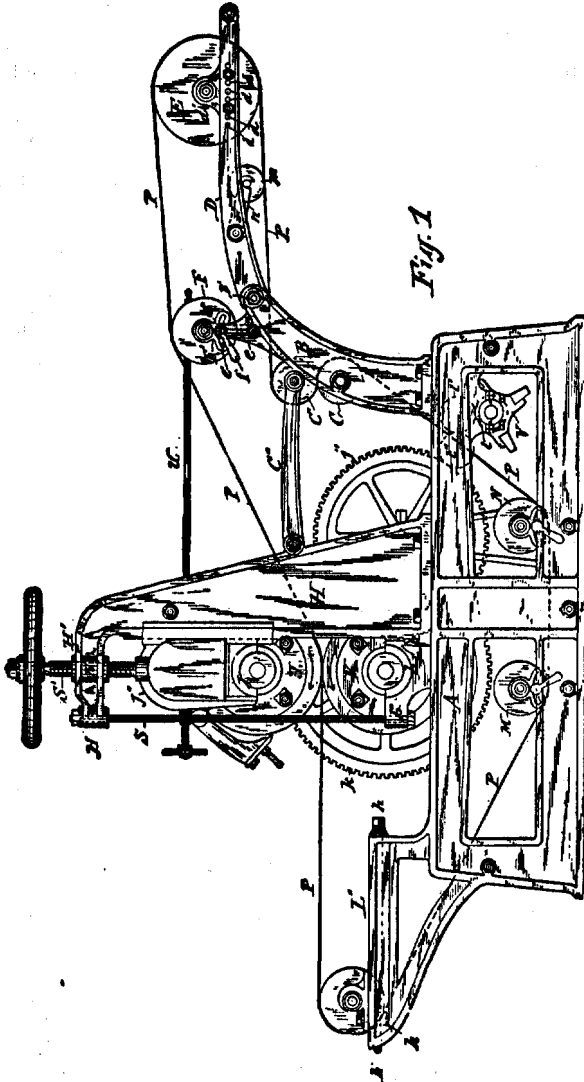
C. H. Duell, for complainant.

Risley & Robinson, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the northern district of New York, which dismissed the complainant's bill in equity for the alleged infringement of letters patent No. 393,538, dated November 27, 1888, to Charles H. Campbell, assignor of the complainant, for an improved paper machine. The patented improvements are particularly applicable to the machine for sheeting wood pulp, which is technically termed a "wet machine." The objects of the invention which are of importance in this suit were threefold. The first was to relieve the main frame from the heavy downward pressure of the pressure rolls between which the wet pulp is carried; the second was to provide means for adjusting the guiding roll so as to keep the endless felt upon which the pulp lies in proper alignment as the felt passes through the pressure rolls; the third was to furnish adjustable supports for the stretcher roll, so that it shall be in alignment with the frame. The parts of the machine which relate to these three respective improvements are described as follows: In this description the language of the inventor is substantially used. The first improvement consists of a main frame, called, in the patent, "Frame A," upon which is mounted a pressure head frame, called "H," carrying two large press rolls, the lower of which journals in a box which is attached to frame H, at one end, by a shoulder, and at the other end by a screw rod. The upper end of frame H is formed with a projecting head, which is provided with a vertical nut and sleeve, through which the screw rod passes. A nut tightens the hold of the screw rod upon the lower box, and the rod is supported in such a

manner, in conjunction with the shoulder, as to relieve the main frame from the pressure of the rolls. Through the vertical nut a screw passes, which is coupled to the upper press roll journal box, and is provided with a collar between which and the journal box a stout spring is interposed. This screw is for the purpose of adjusting the pressure of the spring upon the upper roll.



The mechanism of the second improvement is as follows: A standard is mounted upon the forward end of the main frame, and carries at its upper extremity an arm, upon which is mounted the couch roll. From the top of the standard rises a bracket, to which

is pivoted an upwardly projecting arm, at the upper end of which is a journal box carrying one end of the guide roll. Below the journal box the arm is formed with a segmental slot, through which, and the upper end of the bracket, a screw passes, which has a clamping nut at its outer end. The corresponding pivoted arm on the opposite side of the machine has above the journal box a swivel nut attached to it, through which a screw passes to the rear end of the machine, being supported by a suitable bracket provided with a hand wheel. The mechanism of the third improvement consists of horizontal arms projecting from the rear of the main frame, and provided with longitudinal ways, on which are movable mounted brackets carrying the stretch roller. These brackets are adjustable by nuts and adjusting screws.

The first improvement is described and claimed in the first and second claims of the patent, and the other improvements are respectively claimed in the third and fourth claims.

The first claim is as follows:

"(1) In combination with the frame, A, and pressure rolls, K, J, the pressure-head frame, H, formed separately from the frame, A, and with the sleeve, H, on the upper end thereof, the journal box, b, seated adjustably on the lower portion of the frame, H, and provided with the sleeve, b', and the screw, S, adjustably connecting the sleeves, H", and b", and supporting the box, b, independently of the frame, A, to entirely relieve said frame from the pressure of the aforesaid rolls, substantially as described and shown."

The second claim specifies the particular means for supporting the lower journal box, viz. a shoulder on the box, resting on a shoulder on the pressure head frame; and also the mechanism which is coupled to the upper press-roller journal box, viz. the screw, provided with a collar and spring.

The elements of the combination described in the third claim are numerous, but the important portion of the claim consists in the means employed for the adjustment of the pivoted arms which support the guiding roll. A segmental slot in one arm allows that arm, when unclamped, to be swung forward or rearward. The other arm is moved by the screw which passes to the rear end of the machine. The roller is moved towards or away from the pressure rolls, and, the arms being adjustable independently of each other, either edge of the felt upon the roll can be adjusted without changing the tension of the edge upon the other end of the roll.

The fourth claim states with care the combination of all the elements which have been mentioned in connection with the third improvement.

The circuit judge was of opinion that the first and second claims were not infringed, and that the third and fourth claims were invalid for want of patentable novelty.

The defendant's machine is one of four machines made by the Lowville Iron Company. The castings used in the first of these machines were purchased from D. B. Gotham of the firm of Gotham & Baker, foundry men. They had sent E. V. R. Plank to a mill in Brownville, N. Y., owned by James A. Outterson, in which was

the first Campbell machine, to take the measurements of it. From these measurements Plank made patterns, from which castings were made, and one set was purchased by the Lowville Iron Company. As made, the four machines were alike, and corresponded exactly with the machine of the Campbell patent. After this suit was brought, three of the machines were altered by removing the shoulder from each of the lower pressure-roll boxes and the shoulder from each pressure-head frame, H, so that each box rested on the frame, A. It is not contended that by this construction the first and second claims are now infringed. The shoulders are necessary parts of the invention described in those claims.

The circuit judge was of the opinion that before this change was made, although all the elements of the first and second claims existed in the defendant's machine, the journal box actually rested on the main frame, which was not relieved from pressure. This conclusion was based upon the testimony of Mr. Hughes, one of the Lowville Iron Company, that the shoulders in the four machines were fitted so that the journal box of the lower pressure roll, when placed on the upper surface of frame, A, could be moved by sliding the same on the frame, and the shoulders would overlap each other, and that the box was not supported independently of frame, A. This testimony is not substantially supported, is not in accordance with the testimony of the persons who saw these machines, and is not, we think, in accordance with the probabilities which the history of the machines indicates. The exhibits which were introduced by the defendant as anticipatory, or as showing such a state of appliances in machines having pressure rolls as to preclude patentable invention in the Campbell machine, fail to convince the mind that the improvement of the first and second claims was either anticipated or was not patentable. No pre-existing machine contained the specific means of supporting the journal box independent of the main frame which are incorporated in these two claims, and a manifest weakness and insecurity characterize the defendant's attempts to deny patentable invention. It is also reasonably certain from the history of the Campbell machine that these claims describe combinations which are practically operative and successful.

The third claim is for the combination of means by which each end of the guide roller is adjusted. The patentee says in his specification that the segmental slot upon one of the arms in which is journaled one end of the roller "allows the arm, when unclamped, to be swung forward or rearward, to carry the roller a greater or less distance from the couch roll and pressure rollers, as may be required to properly support and guide the felt, and also that by turning the screw which is connected with the arm at the opposite side of the machine, the roller is swung with its axis into various angles to the axis of the couch roll and pressure rolls." This adjustment is to take up the slack which sometimes occurs on one edge of the felt. In other words, as it is correctly stated by the complainant's expert: "The two arms being adjustable independently of each other allows the

tension of either edge of the felt to be adjusted without interfering with the tension of the other edge." The object of the invention, so far as is disclosed by the patent, was the independent adjustability of each end, so that each end of the felt might be brought from time to time, as occasion required, into proper relation with the pressure rolls. Each end is adjusted by a different group or set of devices. One group is akin to the adjusting mechanism in letters patent to J. T. Obenchain, No. 334,460; the other is akin to the adjusting mechanism in letters patent to James Dawson, No. 310,127. But the invalidity of the claim rests upon the fact that the separate sets of devices are an aggregation which do not combine with each other, and each of which works out an independent and separate result, which is not due to any co-operating action. *Pickering v. McCullough*, 104 U. S. 310.

The invention of the fourth claim contained nothing patentable, in view of the Downington Company's machine of 1882, in regard to which testimony was given by Guyon Miller. The difference between the two machines, so far as the improvement described in the fourth claim is concerned, is that the horizontal arms of the earlier machine were bolted to the frame at one end and to the sill at the other end, whereas in the patented machine they are integral with the frame. This improvement is not patentable.

The decree of the circuit court is reversed, with costs, with instructions to enter a decree and for further proceedings in accordance with the foregoing opinion.

ROCKER SPRING CO. v. WILLIAM D. GIBSON CO. (three cases.)

(Circuit Court, N. D. Illinois. September 7, 1893.)

Nos. 22,594, 22,871, and 22,872.

1. PATENTS FOR INVENTIONS — SUITS TO RESTRAIN INFRINGEMENT — RES JUDICATA.

Where, in a suit to enjoin infringement of a patent, the only evidence introduced in support of the defense of want of novelty relates to alleged prior inventions of the defendant, a decree for complainant is not conclusive in a second suit against other defendants, in which the claim is made that the complainant's patent was anticipated by the inventions of other parties, since the defenses to the two suits are not the same.

2. SAME—PRELIMINARY INJUNCTION—ROCKING-CHAIR SPRINGS.

The novelty of the inventions described in letters patent No. 354,043, issued December 7, 1886, to M. D. and T. A. Connolly, No. 247,472, issued September 27, 1881, to Biersdorf & Bunker, and No. 297,108, issued April 22, 1884, to W. J. Bunker, for spring attachments for rocking-chairs, is so questionable, in view of the previous state of the art, as shown by Carter's patent, No. 156,130, of October 20, 1874, Connolly's patent, No. 185,501, of December 19, 1876, and Biersdorf & Bunker's patent, No. 214,871, of April 29, 1879, that a preliminary injunction against their infringement should not be granted.

In Equity. Three suits brought by the Rocker Spring Company against the William D. Gibson Company to restrain the alleged in-

fringement of certain patents. Complainant moved for a preliminary injunction. Motion denied.

Banning, Banning & Payson, for complainant.
Offield, Towle & Linthicum, for defendant.

SEAMAN, District Judge. Motion is made for preliminary injunction in three actions in equity by the Rocker Spring Company against the William D. Gibson Company upon the following letters patent, respectively: (1) No. 354,043, of December 7, 1886, to M. D. & T. A. Connolly; (2) No. 247,472, of September 27, 1881, to Biersdorf & Bunker; (3) No. 297,108, of April 22, 1884, to W. J. Bunker. The complainant's claim rests mainly on the first-mentioned (Connollys') patent, and, for right to injunction, a decision is shown in the northern district of Ohio sustaining the first two patents, in *Spring Co. v. Flinn*, 46 Fed. Rep. 109. Public acquiescence is alleged as to all, and submissions to injunction, where suits have been brought.

It is asserted that these patents cover the use in platform rocking-chairs of "broad, short, stiff springs, closely coiled, rigidly attached to brackets at their ends, and constituting the only connection between the rockers and the base of the chair, so as to dispense with ancillary or additional fastening devices." If the Connolly patent appears valid, and entitled to this construction, for the purposes of this motion, I think infringement by defendant is clear, and the injunction must issue. The complainant owns these patents, and its principal business appears to be the manufacture of spring attachments for rockers. Its litigation in the *Flinn Case* was arduous and expensive, resulting in decree in its favor. There can be no just question as to the conduct of complainant in that matter. Its case was fairly presented, and the contest was bona fide. Under these circumstances, it has earned the right to protection by injunction against other infringers, unless new defenses are clearly shown, which did not enter into consideration at the other hearing, and which strongly tend to invalidate the patent, or change the construction there placed.

Respect for the rights and privileges guarantied by the law for the encouragement of invention, and well-recognized rules of comity, as well, forbid reconsideration here, for the purposes of this motion, at least, of the facts which were actually litigated and considered by the court in the *Flinn Case*. On the other hand, if the new defense appears material and cogent, presenting a different, new, and other state of facts than shown in the previous case, it is proper and necessary to give consideration to the new phase. As held by the circuit court of appeals, in this circuit, in *Starling v. Plow Co.*, 9 U. S. App. 318, 3 C. C. A. 471, 53 Fed. Rep. 119, (affirming 49 Fed. Rep. 637,) in such case "the rule of comity has no application, or its application is limited." It would be unjust to grant the preliminary injunction, based wholly upon that adjudication, if it appears probable that the new facts, well proved, would have led, or would lead, to different results. The record in the *Flinn Case* is here, with com-

plainant's moving papers, and it is claimed in behalf of complainant that the defense brings nothing "which was not produced in kind before Judge Ricks" in the former case. The issue will be considered as narrowed to a clear showing of material difference, and without unnecessary comment upon the merits, which must be determined at final hearing.

1. This record shows that the Flinn defense was entirely directed to acts of Flinn and his foreman, Bell, under him, and to proving his knowledge, use, and invention of platform rocker springs prior to the alleged Connolly invention, and that Flinn's patents were entitled to priority. There was no testimony upon the part of that defendant as to the prior state of the art, aside from his own operations or inventions. He evidently had complete faith in himself, and in the anticipatory character of his designs and personal experience, and refrained from calling in other experience or showing,—whether from conceit, undue confidence, ignorance, or desire to uphold his patents is not material here. The exhibit of a board of springs, produced there for his defense and here offered by complainant, is wholly made up of Flinn's own productions. The opinion there filed bases its conclusions in favor of complainant upon the futility of those proofs, and not upon any consideration of the prior art generally, as to which there was no testimony. In *Singer Rocking-Chair Co. v. Tobey Furniture Co.*, 14 Fed. Rep. 38, (in this circuit,) there was such showing of the prior state of the art in platform rockers that a patent of 1869 was held invalid, in a strong opinion by Judge Drummond, because a "mere mechanical change." There earlier devices were carried back to 1819, while in the Flinn Case they were not brought to notice. It is true that Mr. Bunker, president of complainant, and other witnesses in its behalf, refer in testimony to the prior existence of such rockers, both with rubber and with wire-spring attachments, but only incidentally, and by way of argument of benefits conferred by these patents, and in connection with and to emphasize their showing that the latter had revolutionized the rocker-chair industry,—a claim which is not urged here with much force. Comparisons were made with, and attention confined to, the appliances shown by Flinn, and no other exhibits were brought in. In this state of proofs, and in the absence of any showing of prior patents, the court was left without testimony upon which to raise, fairly, the question of novelty. The defense which there failed was priority of invention and anticipation.

Of the defense here presented, it is sufficient to mention that there is much testimony showing the existence and general use and popularity of platform rockers long prior to the invention here claimed, with various spring attachments, apparently answering the purposes here claimed, if not so perfect, and including an original exhibit of one old "Powers" platform rocker, out of a large quantity manufactured and sold prior to 1880, which had been in constant use since. There are numerous patents now introduced,—all prior to the date of the Connolly patent, and some prior to any claim of their invention,—which have important bearing, and may be found controlling; also, important expert testimony. Much light will then

be afforded, which was wanting in the former case, to determine whether the invention claimed was novel, or was anticipated. For the latter purpose, three of the patents now shown impress me as especially requiring consideration, viz.: Carter's, No. 156,130, of October 20, 1874, which has a rubber ligament or spring; Connollys', No. 185,501, of December 19, 1876, on application filed April 19, 1876, which has the broad, short, spiral spring, but applied to a tilting chair; Bjersdorf & Bunker's, No. 214,871, April 29, 1879, which shows two spiral springs for a rocker, rigidly attached, and to avoid which the Connollys appear to have amended their application in question. The Carter patent clearly antedates any claim of invention by the Connollys. The other two are prior to their application, and may be found to have priority in fact, under the circumstances.

2. The Connollys are now shown to have taken out two patents upon their application of July 30, 1880,—one numbered 354,042, and the other, here in question, No. 354,043,—on divisional application. The file wrapper and contents upon that application are brought in, and show, in the original, no reference to use of the spring for the well-known form of platform rockers, but only to "an improvement in a combined tilting and rocking chair." One spring is specified, but it is stated that "two springs of light tension may be employed" instead. As described, it would not seem applicable to the usual platform rocker, and it remains to be determined whether any description, claim, or diagram in the original would so apply it. If not, the patent sued on is invalid. The patents issued of like date; the first in number describing a combined tilting or rocking chair with (preferably) one spring, and the other a "rocker" with two springs,—the springs being similar. It is claimed by complainant that both can stand,—one as generic, and the other specific. In defense it is asserted that the last is for the same invention as the first, and therefore invalid. These questions are clearly open, as they were not before the court in the Flinn Case.

The view here taken renders further comment upon the record unnecessary, and a denial of the motion for a preliminary injunction must follow. The fact that final hearing may soon be had will save the complainant from serious hardship, if it shall successfully meet these difficulties.

The motion is denied.

HEATON-PENINSULAR BUTTON-FASTENER CO. v. ELLIOTT BUT-
TON-FASTENER CO.

(Circuit Court, W. D. Michigan, S. D. October 13, 1893.)

1. PATENTS FOR INVENTIONS—BUTTON FASTENER—ANTICIPATION.

The invention for which letters patent No. 293,234 were issued, February 12, 1884, to Charles H. Eggleston, for a setting instrument for attaching buttons to leather and other fabrics, was not anticipated by the device covered by letters patent No. 212,316, No. 220,932, and No. 220,933, granted to McGill, for attaching sheets of paper together; for although both patentees used devices for driving a metallic staple through the material and clinching its ends on the other side, and the McGill de-

vice could be adapted to fastening buttons, yet McGill had not contemplated such use of it, and the slot device of the Eggleston patent for guiding the button is not found in the McGill device, or, if found, is not used for the same purpose; and, further, the Eggleston patent had been sustained by the courts in two prior cases.

2. SAME—VALIDITY—FORCE OF PRIOR DECISIONS.

In patent causes, where an issue has once been passed upon by a circuit court, it is only in a case of clear mistake of law or fact, of newly-discovered testimony, or upon some question not considered by the court, that a circuit court sitting in another district is at liberty to review the findings, and it will not do so merely because there is doubt as to whether the patent in issue has been anticipated, when that question has been previously passed upon. *Searls v. Worden*, 11 Fed. Rep. 501, followed.

8. SAME—INFRINGEMENT—BUTTON-FASTENING DEVICE.

Letters patent No. 293,234, issued February 12, 1884, to Charles H. Eggleston, for a setting instrument for attaching buttons to leather and other fabrics by driving through the fabric, and clinching on the opposite side thereof, a metallic staple passed through the eye of the button, is infringed by Elliott's machine, in which the buttons are automatically fed to a certain point, where a piece of wire is passed through the eye, bent into a staple, placed in a guide, driven through the material and clinched upon its underside, for the Elliott machines use the narrow slot of the Eggleston machine to hold the eye of the button, and the widening of this slot at its lower end neither adds to nor detracts from the operation of the machine in any way, and fulfills no essential purpose, and the other devices for driving and clinching the staple are the same in both machines.

In Equity. Bill by the Heaton-Peninsular Button-Fastener Company against the Elliott Button-Fastener Company for infringement of letters patent. Decree for complainant.

Statement by BROWN, Circuit Justice:

This was a bill in equity for the infringement of letters patent No. 293,234, issued February 12, 1884, to Charles H. Eggleston, for a setting instrument for attaching buttons to leather and other fabrics.

In his specification the patentee states: "The invention relates to that class of setting devices used in clinching metallic staples or fasteners which engage with the eye of the button, and have prongs which pass through the fabric, and are clinched on the side of the fabric opposite the button; and the object of my invention is to produce a setting device which can be used conveniently for setting and clinching an ordinary metallic staple, and have the two prongs of the staple, if desired, in a line at right angles with the strain on the button."

This the patentee accomplishes by means of a guide provided with a slot and groove placed between, and in combination with, a pair of jaws, the groove and slot being so arranged that the groove will receive the staple, and the slot the eye, of the button. One of the jaws has a projection, so that, when the jaws are brought towards each other, the projection passes into the groove of the guide. This projection is provided with a recess or slot, P, leaving two projections, one on either side of the slot, and each grooved so as to fit upon the back of the staple.

In operation, the staple is placed in the eye of the button, and then placed in the groove, t, in the guide, G, the points of the staple being towards the jaw, J, and the rounded portion towards J'. The slot, i, receives the upper part of the button eye, and allows it to be moved freely therein. By closing the jaws, the staple is driven through the fabric, and, coming in contact with the grooved face, C, of jaw, J, the points are turned towards each other and clinched, thereby attaching the button to the fabric. There was but a single claim to the patent, which read as follows: "In a button-setting instrument, the guide, G, provided with the slot, i, and groove, t,

placed between and in combination with the jaws, J and J, the groove, t, and the slot, i, being so placed with reference to each other that the groove will receive the staple, and the slot, i, the eye, of the button, substantially as described."

The defenses were the usual ones of noninvention and noninfringement.

Sweet & Perkins, (Jas. H. Lange, of counsel,) for complainant.

T. J. O'Brien, (Taggart & Denison and John R. Bennett, of counsel,) for defendant.

BROWN, Circuit Justice, (after stating the facts.) While a large number of patents were put in evidence, either to anticipate or limit the Eggleston patent, the question of anticipation really turns upon the several patents to McGill, numbered 212,316, 220,932, and 220,933, covering devices for inserting metallic staples in papers; devices which, in their most improved form, have gone into general use for attaching legal papers together in a manner convenient for filing. Patent No. 212,316, the one most relied upon, exhibits an upright case, D, containing a plunger, F, and a spiral spring attached to raise the plunger after the staple is inserted. The plunger consists of a metallic cylindrical rod having at its base an enlargement, which latter is provided on opposite sides with feathers, which are forced down on the head of the staple, driving the shanks of the latter out of the guide, and supporting grooves through the articles, which are placed on an anvil adapted to bend the shanks of the staple in towards each other, clinching them against the underside of the papers to be attached together. In this connection the patentee states that "a staple provided with almost any shape or struck-up form of head may be inserted with this device, by mortising out the face of the plunger, F, so that the bottom of its feathers will always rest upon the top of the shoulders of the staple."

This device, which bears a closer resemblance to plaintiff's patent than any other put in evidence, was evidently not designed for the purpose of fastening buttons to cloth or leather, or driving staples with buttons strung upon them; and, while the experiments made in the presence of the court indicated that it can be adapted to such use, it could not be made effectual for that purpose without certain changes, which Eggleston seems to have been the first to make. The idea that a staple with a button strung upon it could be guided and driven through a tube was apparently new with Eggleston, and the carrying out of such idea required certain changes to be made in the McGill patent which were not very radical, but which never seem to have occurred to any one prior to Eggleston. Doubtless, a patentee is entitled to a monopoly of his invention for all purposes; but where it is designed for a particular purpose, and another has taken it, and, by certain changes in its construction, has adapted it to an entirely different purpose, the evidence of its original adaptation for such new purpose ought to be reasonably clear and convincing to deny the improver the benefit

of a patent for such new adaptation. Whatever be the technical rights of the original patentee, the equities of the patent law do not require that he should be protected for any use of his device beyond that originally contemplated by him, unless such new use involve changes of a purely trivial character. The evidence that the new use conceived by Eggleston was not contemplated is scarcely weakened by the testimony of McGill that his device was not devised by him for the special purpose of putting on the market an instrument for setting buttons on shoes, but that was an obvious use, "and in fact it did occur to me when I first made Exhibit A, in 1879, that the tool could be used for attaching buttons to cloth, leather, etc., and I on several occasions then and since showed to others its capabilities of such use by actually setting buttons."

Without going into details of the difference between the two devices, it is sufficient to say that the slot, I, of the Eggleston patent, which is made sufficiently narrow to act as a guide for the button, at least up to the point where the eye of the button is engaged by the recess, P, in the jaw, J', is not found in McGill's device, or, if found there at all, not used for the purpose for which Eggleston employed it, and not capable of such use except in a very awkward and insufficient manner.

But, assuming it to be a question of doubt whether the changes made in the McGill patent did involve invention, the fact that the patent has already been sustained in two other cases—one decided by Judge Colt of the first circuit, in the case of Peninsular Novelty Co. v. American Shoe-Tip Co., 39 Fed. Rep. 791, and the other by Judge Severens, in the case of Peninsular Novelty Co. v. Olds,¹—is sufficient of itself to turn the scale in favor of the patent. We repeat here the language which was used in *Searls v. Worden*, 11 Fed. Rep. 501:

"That in patent causes, where the same issue has been passed upon by the circuit court sitting in another district, it is only in a case of clear mistake of law or fact, of newly-discovered testimony, or upon some question not considered by such court, that we feel at liberty to review its findings."

Upon the question of infringement, the main defense is that the Elliott machine, with which the defendant is operating, does not have the guide of the Eggleston patent with its front slot, i, which, as before indicated, is really the essence of his invention. Defendant's machine is of a different class from that of the plaintiff's—a power machine in which the buttons are automatically fed to a certain point, where a straight piece of wire from a continuous roll is passed through the eye of the button, cut to a proper length, and bent around a former into a staple, where the former is withdrawn, leaving the staple with the button strung upon it in a guide provided with a groove for embracing and guiding the legs of the staple, and is then driven by the action of a driver through the guide into the material, and the legs of the staple

¹ Not reported.

clined against the underside of the material by the action of an anvil. In this connection defendant does show a front slot, which up to a certain point subserves the purpose of guiding the button; but it is claimed that this function ceases at the point where the wire is cut and turned to form a staple, and that below the point where the driver engages the crown of the fastener it is enlarged, and does not perform the function assigned to it in the Eggleston patent. It is therefore contended in behalf of the defendant that, because of this enlargement of the lower portion of the slot of the defendant, its machine does not have the guide of the Eggleston patent with its slot, i.

It is difficult to see what the object of the defendant was in widening the slot at its lower end, since such enlargement appears to fulfill no essential purpose, neither adding to, nor detracting from, the operation of the machine in any way. Indeed, it is quite possible it may have been done for the very purpose of evading this patent. If it be said that the narrow slot is useless to the defendant after the staple is formed and the setting operation begins, it is because at this point the driver straddles and seizes upon the eye of the button, and guides it to the point of insertion in the fabric, precisely as at a certain point in the operation of the Eggleston device the eye of the button is straddled by the slot, P, in the jaw, J, when the narrow slot in the guide becomes useless, and the button is held in place by the slot in the jaw. In neither device, after the driver has straddled the eye of the button, is there a necessity for a slot so narrow as to hold the eye centrally upon the crown of the staple; but it may be widened out, provided it be not widened out so much as to destroy the function of the groove, t, and permit the legs of the staple to escape laterally from the groove. It appeared that in the Elliott machine the slot, i, of the Eggleston patent is made use of so far as such use is of any value to the machine, and we do not think the charge of infringement is avoided by the fact that in the final operation of perforating the fabric and clinching the staple the narrow slot becomes superfluous. The main difficulty arises from the fact that in the Eggleston patent the button starts down the slot or groove with the staple already formed and strung upon it, while in the defendant's device the button starts down the groove alone, stops on its way to receive the wire, and to have this wire formed into a staple, and then to be impelled by a driver so fashioned that the narrow slot becomes unnecessary.

I have experienced some difficulty in the examination of this question by the intricacy of the Elliott mechanism and the absence of a model; but, upon the best consideration I have been able to give to it, it seems to me, though I confess not without some doubt, that the charge of infringement is fairly sustained, and that there should be a decree for the plaintiff. The defendant seems to have availed itself of the Eggleston device so long as it was useful in the structure of its machines, and to have discarded it when it became unnecessary.

SEVERENS, District Judge, (concurring.) In this case I concur in the opinion of the presiding justice. To what he has said in regard to the validity of the Eggleston patent I have nothing to add.

Upon the question of infringement there has been in my mind, during the progress of the case, a similar doubt to that expressed in the opinion of Mr. Justice BROWN; but a careful study of the mechanism of the machines of the respective parties has substantially dispelled that doubt, and upon his suggestion I will, as succinctly as possible, state the grounds upon which my conclusion rests.

Certain propositions are clear and undisputed. The clinching anvil of the defendant's machine is fashioned and operates in the same way as that of the Eggleston patent. The driver is constructed in the same way, has the same groove and recess, and it executes the same function, and in the same way, as that of the complainant. The same is true of the grooves in which the staple is fixed, guided, and driven, and all these elements—anvil, driver, and guiding grooves—in combination, acting upon the material employed, operate in the same way, and produce the same result, in both machines.

There remains the feature of the slot in which the shank of the button is held in position; and the question whether that of the defendant is substantially the same, and executes the same function in the defendant's machine, as in the combination of the claim of the Eggleston patent, is the only controverted one in the case. Now, it is to be observed that the practical purpose of the front slot, i, in that patent, is to hold the button shank perpendicularly to the crown of the staple, with the upper side of the eye centrally located on the crown of the staple, until the driver should engage the latter by the shoulders, and the eye of the button by its recess, and the relation of machinery and material should be so far adjusted and the moving parts sufficiently started on their way to insure the successful completion of the operation according to the intention of the patent. In the afterpart of the operation the slot is a mere clearance way. In so far as the use of the slot, i, is concerned, the thickness of the guide, G, in the Eggleston patent is not material, and the lower part of it might be widened indefinitely without any impairment of its functions. The thickness of the guide is necessary for the proportions of the staple to be driven, but, after the initial movement of the engaged parts takes place, the slot, i, is not necessary for the purpose of guiding.

The defendant's machine is undoubtedly a very successful one, and it demonstrates what I have just said, namely, that the continuance of the slot, i, in uniform width down to the anvil is not at all necessary, and is not a material requirement, and that if, in the afterpart of the movement, a passageway for the shank of the button is afforded, it is enough. Thus the very feature upon which the defendant undertakes to found its defense is by itself proved to be an immaterial one. So, also, the defendant's

machine shows the necessity for its due operation of so much of slot, i, as it is found in the Eggleston patent, as is material in the latter.

The patent covers the elements involved in the operation of taking the grip and starting, as well as the subsequent portion of the movement. Indeed, the former is the vital part of it.

It seems plain, therefore, that the defendant uses every essential element of the complainant's combination; that the elements operate in practice in substantially the same way, and produce the same result.

CONSOLIDATED PIEDMONT CABLE CO. v. PACIFIC CABLE RY. CO.,
(two cases.)

(Circuit Court of Appeals, Ninth Circuit. July 24, 1893.)

Nos. 50 and 55.

APPEALABLE DECREES—INTERLOCUTORY INJUNCTION.

On appeal, under section 7 of the judiciary act of March 3, 1891, from an interlocutory decree granting an injunction, made on a hearing upon the merits of the whole case, the circuit court of appeals has jurisdiction to review the merits.¹

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the Pacific Cable Railway Company against the Consolidated Piedmont Cable Company for infringement of letters patent No. 189,204, issued April 3, 1877, to William Eppelsheimer, for an "improved clamp apparatus for tramways or street railways." The decree of the circuit court sustained the validity of the third claim of the patent, found infringement thereof by defendant, perpetually enjoined further infringement, and directed a reference for an accounting.

Also, suit between the same parties for infringement of letters patent No. 244,147, issued July 12, 1881, to Henry Root, for a tension apparatus designed to take up the slack of the cable in cable railways. The decree of the circuit court sustained the validity of both claims of the patent, found infringement by defendant, and granted a perpetual injunction and a reference for an accounting as in the other case.

On appeals by defendant in both cases, numbered, respectively, 50 and 55, the circuit court of appeals, on consideration of the merits, affirmed both decrees. 7 U. S. App. 444, 3 C. C. A. 570, 53 Fed. Rep. 385; 7 U. S. App. 434, 3 C. C. A. 566, 53 Fed. Rep. 382. Subsequently a rehearing was granted in both cases, and they were reargued on the question of the jurisdiction of the court, on such appeals, to review the merits. Decrees reaffirmed.

Wheaton, Kalloch & Kierce, for appellant.

Wm. F. Booth, for appellee.

Before McKENNA and GILBERT, Circuit Judges.

¹See note at end of case.

McKENNA, Circuit Judge. This case was heard at the July, 1892, session of the October, 1891, term of the court, and the judgment of the court below affirmed. A rehearing was subsequently granted. This has satisfied us that the views expressed at the former hearing are correct.

The case came here on appeal from an interlocutory decree granting an injunction, but was heard as well on the merits. An inquiry was suggested whether this court had jurisdiction to review the merits. Counsel for both parties agreed that it had.

In the case of *Iron Works v. Smith*,¹ this point was specifically presented on a motion at this term of plaintiff to limit the appeal of the defendant to one from the order of the circuit court granting an injunction. The motion was denied, and the jurisdiction of the court to review the case on the merits affirmed.

The decree of the circuit court is affirmed.

For the same reasons, same ruling in case No. 55.

NOTE.

Decisions of the circuit courts of appeals in other circuits on the question of the extent of this jurisdiction in like cases are collected in a note to the report of the original decisions in the above cases. 3 C. C. A. 572, 53 Fed. Rep. 387.

PEORIA TARGET CO. v. CLEVELAND TARGET CO. et al.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1893.)

No. 40.

1. PATENTS FOR INVENTIONS—REISSUES—WHEN ALLOWED.

The commissioner of patents is without power to grant a reissue unless it shall clearly appear that the original patent was defective and inoperative for the invention intended; that this defect and inoperativeness arose through inadvertence and mistake; and, finally, that the patentee had not, by lapse of time and laches, abandoned his right to have the correction made.

2. SAME—OPERATIVE ORIGINAL PATENT—CHARACTER OF NEW CLAIMS.

A reissued patent is void if it shall appear from an examination of the old and the new patents that the old patent was not defective or inoperative, but was for a complete invention, and that the reissue was taken out to secure another and different invention lurking in the mechanical arrangement of parts. *Parker & Whipple Co. v. Yale Clock Co.*, 8 Sup. Ct. Rep. 38, 123 U. S. 87, followed.

3. SAME—INADVERTENCE AND MISTAKE — COMMISSIONER'S ACTION — WHEN REVIEWABLE.

The action of the commissioner of patents in granting a reissue is conclusive upon the question of the existence of inadvertence, accident, or mistake, if there is any evidence before him tending to show such accident, inadvertence, or mistake as will, in law, warrant a reissue; but if the records show that there was no such evidence before him, or that there was record evidence, of a conclusive character, showing that there could have been no accident, inadvertence, or mistake, the reissue is void. 47 Fed. Rep. 728, affirmed. *Huber v. Manufacturing Co.*, 13 Sup. Ct. Rep. 603, 148 U. S. 270, and *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451, and 112 U. S. 354, followed.

¹ No opinion filed.

4. SAME—TARGET TRAPS.

Claims 3 and 4 of reissued letters patent No. 10,867, granted September 13, 1887, to N. G. Moore, administrator of Charles F. Stock, covering a target-throwing trap which has the target-holding device pivoted to the end of the throwing arm, so as to give it, by centrifugal force, an independent, rotary motion, thus causing the target to spin in the air so as to have an even flight, are void for want of proof that, through inadvertence and mistake, this invention was omitted from the specifications and claims of the original patent, No. 295,302, issued to Stock March 18, 1884, which covered merely a novel device adapted to retain the target during the swing of the arm, and to release it at the proper time for causing it to be properly projected into the air; the proofs given being merely to the effect that Stock was much dissatisfied with his patent, when first received, and it appearing that neither he, nor those interested with him in the patent, made any attempt to procure a reissue until after they had seen the subsequent Marqua patent, No. 301,908, which covered, substantially, the invention claimed in the reissue. 47 Fed. Rep. 728, affirmed.

5. SAME—INFRINGEMENT.

The first claims of the original and reissued Stock patents, which cover the "combination with the throwing arm of a target-throwing device, of a clip for holding the target, arranged to automatically drop below the upper surface of the throwing arm for releasing the target," are not infringed by a trap made under letters patent No. 322,714, issued July 21, 1885, to Albert A. Hebbard, in which the centrifugal power arising from the motion of the throwing arm overcomes the resistance of a spring which actuates one arm of the clamping device, thus gradually releasing the target. 47 Fed. Rep. 728, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Equity. Suit by the Peoria Target Company against the Cleveland Target Company and others for infringement of a patent. There was a decree in the court below for complainant, (43 Fed. Rep. 922,) but on a rehearing the bill was dismissed, (47 Fed. Rep. 728,) and complainant appeals from the latter decree. Affirmed.

Statement by TAFT, Circuit Judge:

This is an appeal from a decree of the circuit court of the United States for the northern district of Ohio. The action below was for the infringement of a patent, and the recovery of profits and damages. The decree appealed from dismissed the bill. The bill was based on rights asserted under reissued letters patent No. 10,867, granted September 13, 1887, to N. Grier Moore, administrator of the estate of Charles F. Stock, deceased, for a new and improved device for throwing targets, of that class known as "clay pigeon and ball traps." The original patent was issued to Charles F. Stock, was numbered 295,302, and was dated March 18, 1884. It was granted on an application which was filed December 28, 1883. The application for a reissue was filed on March 27, 1885.

The bill averred that prior to March 18, 1884, Charles F. Stock was the true, original, and first inventor of certain new and useful improvements in ball traps; that he made application for letters patent, and that a patent was accordingly issued to him on March 18, 1884, numbered 295,302; that afterwards, on June 4, 1884, he sold an undivided half interest in the invention to the Isaac Walker Hardware Company, and that afterwards, on October 28, 1884, Stock died at Peoria, in the state of Illinois; that N. Grier Moore was appointed his administrator on December 13, 1884, and that Moore, by virtue of an order of the probate court, assigned all his interest in the improvement and patent, and to any extension or reissue thereof, to Edward H. Walker, and that this assignment was concurred in and signed by Elizabeth Stock, widow of Charles F. Stock, and was duly recorded; and that subsequently all the owners of this patent and its reissue assigned the same to the

Peoria Target Company. The bill further avers that said original patent being found inoperative and invalid, by reason of a defective and insufficient specification, which defect and insufficiency had arisen by reason of the inadvertence, accident, or mistake, and without any fraudulent or deceptive intention on the part of said Charles F. Stock, the inventor, was by his administrator, and with the consent of the said Isaac Walker Hardware Company, surrendered to the commissioner of patents, and an application was made for a new patent to issue for the same invention, which application was granted. The bill then avers: "And your orator shows unto your honors that for a long time prior to his death the said Charles F. Stock was in very poor health, at times unable to transact any business whatever; that your orator is informed, and believes it to be true, that shortly after the granting of the aforesaid original letters patent, and long before his death, said Stock discovered the many errors, inadvertences, and insufficiencies of the said letters patent, rendering the same inoperative or invalid as aforesaid, and that said Stock thereupon, and without delay, sought the advice of legal counsel thereon, and took steps to apply for a reissue thereon; that such application for reissues was delayed by reason of the illness of said Stock, his subsequent death as aforesaid, and by the delay in the administration of his estate, and without any fraudulent or deceptive intent; and that your orator is informed and believes that no other person, firm, or corporation, not acting under authority of said Stock or his assigns, ever began the manufacture, sale, or use of any target-throwing traps containing or embodying the said improvements or said invention until long after said Stock had sought legal counsel, and taken steps towards reissuing said original letters patent upon a corrected and amended specification as aforesaid." The bill then charges the defendants with infringement, and prays for an injunction and damages. The answer denies that Stock was the original inventor of the improvements covered by the original letters patent; denies that the original letters patent were inoperative or invalid by reason of any insufficient or defective specification, or that such insufficiency or defect arose through inadvertence, accident, or mistake and without any fraudulent or deceptive intention; avers that the surrender and application for a reissue were made solely for the purpose of securing in said reissued patent broader claims than were contained in said original patent; and that the alleged invention claimed in and by the new and broadened claims of said reissued letters patent were shown and described, prior to the application for said reissued patent, in two patents to Marqua, and in one to N. Grier Moore, the administrator of the estate of Charles F. Stock. The answer denies the statements concerning the decline in health of Stock prior to his death, and his inability to transact business. The answer denies infringement, and asks a dismissal of the bill.

The evidence in the case raised several issues. One was as to whether Stock was the first inventor of the device claimed in the reissue. Another was as to whether the defendants infringed the claims of the reissued patent. The only issues which the court found necessary to consider, however, were—First, the validity of the reissue; and, second, whether the defendants infringed the first claim of the reissued patent, which was substantially the same as the first claim of the original patent.

As already stated, the original and reissued patents sued on relate to target traps. The target used is dish-shaped, with a rim on the exterior circumference. It is thrown by an arm swinging upon a center, and given impulse by a strong spring. Stock's invention consisted in a novel device at the outer end of such throwing arm for holding the target, adapted to release the target at the proper time so that it might be properly projected into the air. The device consisted of a short arm or carrier connected with the throwing arm by a two-way joint. The target was placed over this short arm or carrier, and was held in place by an upward projection on the carrier in front of its outer rim. The carrier and the target upon it were in the plane of the throwing arm, but before the trap was sprung the carrier was at right angles to the throwing arm. As the throwing arm swung upon its center, it carried the target with it; and the centrifugal force caused the short arm or carrier, with the target upon it, to swing about on its pivot connection into line with the throwing arm. When it reached this position, the upward projection upon the carrier dropped below the plane of the throwing arm away from in front.

of the rim of the target, and the latter, being free, flew off into the air. The office of the two-way joint, as explained in the original patent, was to permit the motion of the target from a position at right angles with the throwing arm to a position in line with it, which motion would cause the target-holding projection or button automatically to drop below the plane of the throwing arm, and release the target.

The original patent disclosed six different varieties of the device for releasing dish-shaped targets, and one for releasing a ball target, in each of which the mode of release was different, but in all of which the target was held by a piece at right angles to the plane of the carrier and throwing arm, and was released by the dropping of that piece below the plane of the carrier and throwing arm automatically. In the original patent it was stated that the invention, which was a releasing device, was intended to release the target at the proper time so that it might be properly projected into the air. In the reissued patent it was said that the invention, which was a pivoted carrier, was intended to give a more even flight to the target, by imparting to it, as it left the trap, a rotary impulse or axial rotation in addition to that which it received from the throwing arm. The third and fourth claims of the reissued patent are based on the feature just stated, which feature is not mentioned in the original patent. The drawings are not changed in the reissued patent, and appear exactly as they did in the original. The specifications are changed. That a fuller understanding between the old and the new patent may be had, the old specifications and the new are given below in parallel lines, followed by the drawings which are applicable to both patents, and which were not changed in the reissue:

Original.

Be it known that I, Charles F. Stock, of Peoria, in the county of Peoria and state of Illinois, have invented a new and improved device for throwing targets, of which the following is a full, clear, and exact description:

This invention relates to that class of target-throwing devices known as "clay-pigeon and ball traps," wherein a throwing arm swinging upon a center is employed, and the invention consists in the employment of a novel device at the outer end of the throwing arm for holding the target; the same being adapted to retain the target during the swing of the arm, and to release it at the proper time for causing it to be properly projected into the air.

Reference is to be had to the accompanying drawings, forming part of this specification, in which similar letters of reference indicate corresponding parts in all the figures.

Fig. 1 is a perspective view of a target-throwing device having one form of my new target-holding plate or clip applied thereto, showing in full lines the target-holding clip in the position it occupies when the target is placed in the

Reissue.

Be it known that Charles F. Stock, deceased, late a resident of Peoria, in the county of Peoria, and the state of Illinois, did invent a new and useful device for throwing targets, and I, N. Grier Moore, administrator of the estate of said Charles F. Stock, do hereby declare that the following is a full, clear, and exact description thereof:

This invention relates to that class of target-throwing devices known as "clay-pigeon and ball traps," wherein a pivoted swinging or throwing arm is employed to project the target into the air, to be shot at by marksmen.

The object of the invention is to produce a trap capable of giving a more even flight to the target than is attained from the traps now in use, by imparting to the target, as it leaves the trap, an impulse or motion independent of that which it receives from the throwing arm thereof; and the invention consists in providing the end of the swinging or throwing arm with a device for holding the target during the swing or throw of the arm, in securing this device to the arm so as to permit an independent, rotary movement of the device on the arm, and in providing automatic means or mechanism on the throwing arm for releasing the target.

The invention will be better understood by reference to the accompanying drawings, which form a part of this specification, in which similar letters of reference indicate like parts.

In the drawings, Fig. 1 is a perspective view of a target-throwing device having one form of the new target-holding plate or clip applied thereto, showing in full lines the target-holding plate or clip in the position it occupies

trap, ready to be thrown, and in dotted lines the position it assumes at the time of releasing the target. Fig. 2 is a sectional elevation of the outer end of the throwing arm, showing the construction and arrangement of the clip. Figs. 3 and 4 show, respectively, in plan and side elevation, a modified form of clip, wherein a spring is used. Fig. 5 shows, in side elevation, another form of clip, wherein a spring is used. Fig. 6 is a perspective view of a clip arranged without a spring, and Fig. 7 is a perspective view of a clip for throwing glass balls or other targets having small orifices.

A is the throwing-arm of the trap, to the outer end of which arm my new clip, B, is hinged. The arm, A, is secured to the pulley, C, which is operated by pulling upon the cord, D, for rapidly swinging the arm, A, from the position shown in full lines in Fig. 1 (where it is retained by the tension spring, E) to that shown in dotted lines, for throwing the target into the air. The clip, B, is composed of the bent plate, a, which carries the rubber block, b, and has hinged to its under side the tongue, c, by which the clip is hinged to the outer end of throwing arm, A, in the slot, d, thereof upon the pin, e. The tongue, c, is beveled or brought to a point at its lower end, and against its lower pointed end impinges the bent end, f, of the friction spring, f, secured to the lower side of the arm, A, as shown clearly in Fig. 2. The pressure of the spring, f, upon the lower end of the tongue, c, may be regulated by the screw, g. When the clip, B, is arranged for use the tongue, c, will be brought to the position shown in dotted lines in Fig. 2, where it will be held with considerable force by the spring, f. The plate, a, will then be swung around upon the swivel or hinge pin, a', so that the block, b, will stand parallel with the arm, A, as shown in full lines in Fig. 1.

The arm, A, will now be "set," that is, swung back, so that the stud, a', thereof, will be engaged by the tension spring, E. The target, F, which is a cupped clay target, (shown in dotted lines,) will then be placed upon the weighted portion, A', of the body, B', of the target against the lip, C', and over the block, b, or lip of the clip, as illustrated in Fig. 1. Now, upon pulling upon the cord, D, the arm, A, will be detached from the tension spring, E, and swing rapidly to the position shown in dotted lines in Fig. 1, where it will be suddenly stopped by the reverse action of the cord, D, upon the pulley, C. As the arm, A, swings around, the target, F, will be carried with it, being held by the clip, B. The

when the target is placed on the trap ready to be thrown, and in dotted lines the position it assumes at the time of releasing the target. Fig. 2 is a sectional elevation of the outer end of the throwing arm, showing the construction and arrangement of the clip. Figs. 3 and 4 show, respectively, in plan and side elevation, a modified form of clip, wherein a spring is used. Fig. 5 shows, in side elevation, another form of clip, wherein a spring is used. Fig. 6 is a perspective view of a clip arranged without a spring, and Fig. 7 is a perspective view of a clip for throwing glass balls or other targets having small orifices.

The letter A represents the throwing arm of the trap, to the outer end of which the new clip, B, is pivoted or hinged. The arm, A, is secured to the pulley, C, which is operated by pulling on the cord, D, so as to rapidly swing the arm, A, from the position shown in full lines in Fig. 1 (where it is retained by the tension-spring, E, when the trap is "set") to the position illustrated in dotted lines in said Fig. 1. The clip, B, is composed of the bent plate, a, which carries the rubber block, b, and is secured by the pivot or pin, a', to the upper end of the tongue, c, so as to easily swing or turn thereon. The tongue, c, is pivoted or hinged in the slot, a', in the end of the arm, A, by the pin, c'. The bent end, f, of the friction spring, f, presses against the lower and pointed end of the tongue, c, and the screw, g, regulates the tension thereon. The arm, A', is secured rigidly to the standard, A'', of the trap, and is provided with weighted portion, a', having a projecting lip, a', against which the targets are placed when "setting" the trap. The spring, E, is secured to the arm, A, so as to engage the pin or lug, a'', on the arm, A.

To set the trap, the clip or holder, B, is brought in the position illustrated in Fig. 1, the tongue, c, turning vertically on its hinge pin or pivot, c', and the plate, a, is swung around on the pivot, a', so as to bring the rubber block parallel to the arm, A. The arm, A, is now set; that is, swung back so that the lug or pin, a', thereof, will engage the spring, E. The target, F, which is usually cup or dish shaped, (shown in the drawings in dotted lines in Fig. 1,) will then be placed on the weighted portion, a', of the arm, A, against the lip, a', and over the block, b, of the clip, B.

The target is thrown by pulling on the cord, D, which causes the arm, A, to disengage the spring, E, and to swing around to the position illustrated in dotted lines in Fig. 1, where it will be suddenly stopped by the reverse action of the cord upon the pulley, C. As the arm swings around, the target, F, will be carried with it, being held by the clip, B. The centrifugal force of

centrifugal force of the target, imparted by the rapid swinging of the arm, A, will gradually turn the plate, a, upon the hinge pin, a', as the arm, a, proceeds, until the direction of the centrifugal force comes in line with the slot, d, in the outer end of the arm A, whereupon the lower end of the tongue, c, will be forced back of the friction spring, f, which will permit the plate, a, to drop down to the position shown in full lines in Fig. 2, and in dotted lines in Fig. 1, and thus release the target. The slot, d, being made in the line of the length of the arm, A, it will be seen that the clip, B, will not release the target until the arm, A, reaches the end of its swing, so that the target will receive all of the propulsive force of rapid swinging of the arm, save that which is lost in overcoming the friction of the spring, f.

In the form of clip shown in Figs. 3 and 4, instead of hinging the main plate, a, to the tongue, c, and providing the plate with a block of rubber, I attach the plate rigidly to the tongue, c, and pivot upon the plate the button, h, which turns with the centrifugal force of the target, and releases the target at the proper time by the dropping of the main plate to an inclined position at the end of the sweep of the arm, A, of the same, as in the form of clip shown in Figs. 1 and 2; the tongue, c, turning in slot, a, against the action of the spring, f. In place of the button, h, a plain stud might be used with good results; but with the button there is no danger of breaking the rim of the target, as might be the case with the stud.

In the form of clip shown in Fig. 5, the target is held to the throwing arm, A, by the plate, j, attached to the upper end of the bolt, k, which passes through the arm, A, and has the coiled spring, l, placed upon it, so as to act between the under side of the arm, A, and the nut, i, on lower end of said bolt, k. In the upper side of the arm, A, is formed the transverse slot, m, into which the spring, l, suddenly draws the plate, j, when the target is to be released. In setting this form of clip, the plate, j, will be lifted out of the slot, m, against the tension of the spring, l, and turned across the slot, m, parallel with the length of the arm, A, and the rim of the target will be placed over the plate, j, as over the button, h, and block, b, in the forms of clips above described. As the arm, A, swings around, the centrifugal force of the target will turn the plate, j, until it comes parallel with the slot, m, whereupon the spring, l, will draw it quickly into the slot, m, and thus release the target.

the target, imparted by the rapid swinging of the arm, A, causes the plate, a, to turn on the pivot, a', as the arm, A, proceeds until the direction of the centrifugal force comes in line with the slot, a', in the end of the arm, A, whereupon, by the sudden stopping of the arm, the lower end of the tongue, c, will be forced past the friction spring, f, and, turning on its hinge or pivot, c', will permit the clip, B, to drop down into the position illustrated in full lines in Fig. 2, and in dotted lines in Fig. 1, and thus release the target.

The slot, a', being in the line of the length of the arm, A, it will be seen that the clip, B, will not release the target until the arm, A, reaches the end of its swing or throw, so that the target will receive all the propulsive force of the rapid swinging of the arm, save that which is lost by overcoming the friction of the spring, f.

In the form of clip shown in Figs. 3 and 4, instead of pivoting the main plate, a, to the tongue, c, and providing the plate with a block of rubber, the plate, a, is attached rigidly to the tongue, c, and the button, d, is pivoted on the plate, a, at a', which button turns with the centrifugal force exerted, and releases the target at the proper time by the dropping of the main plate to an inclined position at the end of the throw or swing of the arm, A; the tongue, c, turning in the slot, a', against the spring, f, as in the forms of clip described and shown in Figs. 1 and 2. In place of the button, d, a plain stud might be used with good results, but with the button there is no danger of breaking the rim of the target, as might be the case with the stud.

In the form of clip shown in Fig. 5, the target is held to the throwing arm, A, by the plate, h, attached to the upper end of the bolt, h', so as to turn or swing thereon. This bolt passes through the slot, a', in the end of the arm, A, and has a coiled spring, i, placed upon it, so as to act between the under side of the arm, A, and the nut, i', on the lower end of the said bolt, h'. In the upper part of the arm, A, is the transverse slot, a'', into which the spring, i, suddenly draws the plate, h, when the target is to be released. In setting this form of clip, the plate, h, will be lifted out of the slot, a'', against the tension of the spring, i, and turned across the transverse slot, a'', parallel with the length of the arm, A, as shown, and the target will be placed over the plate, h, as over the button, d, and block, b, in the forms of clips above described.

As the arm, A, swings around, the centrifugal force of the target will turn the plate, h, until it comes parallel with the slot, a'', whereupon the spring, i, will draw it quickly into the slot, a'', and thus release the target.

In the form of clip, shown in Fig. 6, the target is held to the throwing arm, A, by the block of rubber, b, held in the bent plate, o, which is hinged to the plate, p, pivoted upon the upper side of the arm, A. To the under side of the arm, A, is secured the slotted plate, q, the slot of which coincides with the slot, d, made in the arm, A. The edge of the plate, q, is rounded, and projects beyond the sides and end of the arm, A, as shown at q', and the under side of the bent plate, o, is formed or provided with the toe, o', which is adapted to rest against the outer edge of the plate, q, as shown, for holding the bent plate, o, and the rubber block, b, in position parallel with the arm, A, for receiving and holding the target. The edge of the target to be thrown will be placed, as in the other forms, over the block, b, which will hold the target until its centrifugal force swings the plates, p and o, around in line with the slot, d, in the arm, A, and the slot in the plate, q, whereupon the toe, o', will drop into the said slots, and permit the plate, o, and block, b, to drop to an inclined position, and thus release the target.

The form of clip shown in Fig. 7 is, to all intents and purposes, like that shown in Fig. 6, except that in place of the bent plate, o, and rubber block, b, the plate, p, has hinged to it the small toeplate, s, which is formed or provided with the pin, t, which is adapted to have placed upon it glass balls or other targets having small orifices suitable to receive the said pin. The pin, t, by means of the plate, q, and toe, o', is held in vertical position when the plate, p, is turned at right angles to the throwing arm, A, as shown, in which position it will hold the glass-ball target, and will continue to hold the same during the swinging movement of the arm, A, until the centrifugal force of the target swings the plate, p, around so that the toe, o', coincides with the slot in the plate, q, and the slot, d, in the arm, A, whereupon the pin, t, will drop to a position nearly parallel with the arm, A, and thus release the target.

Having thus described my invention, what I claim as new and desire to secure by letters patent is:

(1) The combination with the throwing arm of a target throwing device of a clip for holding the target, arranged to automatically drop below the upper surface of the throwing arm for releasing the target, substantially as described.

(2) The target-holding clip, consisting of the pivoted plate, p, having the plate, o, provided with toe, o', hinged to it, in combination with the slotted

In the form of clip illustrated in Fig. 6, the plate, a, is pivoted by the pin, a', directly to the end of arm, A, and to this plate, a, is hinged at e' the bent plate, e, which carries the block, b, over which the target is placed, as in the form first above mentioned. To the under side of the arm, A, is secured a plate provided with a slot coinciding with the slot, a', in the arm, A. The edge of the plate which projects beyond the sides and end of the arm, A, is made rounding, as shown at a'', and the under side of the bent plate, e, is directly to the end of arm, A, and to provided with a tongue or projection, e'', which rests against the outer edge, a'', of the plate, as shown, and thus holds the bent plate, e, and the rubber block, b, in position parallel with the arm, A, for receiving and holding the target.

The target to be thrown will be placed, as in the other forms, over the block, b, which will hold the target until, by centrifugal force, the plates, a and e, are swung around in line with the slot, a', whereupon the toe or projection, e'', will drop into the slot, W, and permit the plate, a, and block, b, to drop back into the inclined position, and thus release the target.

The form of clip illustrated in Fig. 7 is designed for glass balls or other targets having small orifices, and is substantially like the form last described, with this exception, viz.: The plate, e, is made smaller; the rubber block is not used, and in its place is used the pin, j, adapted to fit into the small orifices or openings in glass balls or other targets. The operation of this form is similar to that just described.

Having described the invention, what I claim as the invention of the said Charles F. Stock is as follows:

(1) The combination with the throwing arm of a target-throwing device of a clip for holding the target, arranged to automatically drop below the surface of the throwing arm for releasing the target, substantially as described.

(2) The target-holding clip, consisting of the plate, a, having the plate, e, provided with the toe, e', hinged to it, in combination with the slotted plate, a'',

plate, q, all adapted to be operated substantially as described.

Charles F. Stock.

Witnesses:

H. A. West,
Edgar Tata.

all adapted to be operated substantially as described.

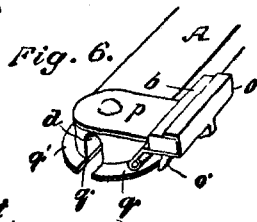
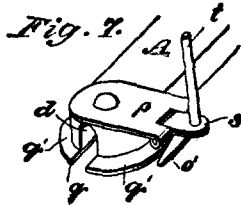
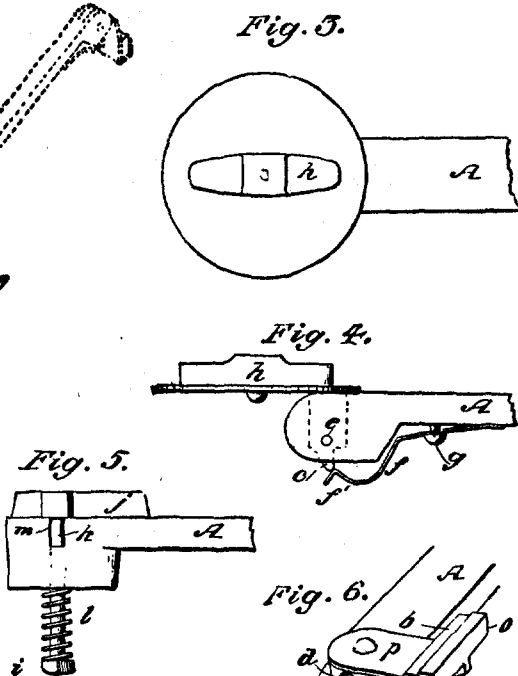
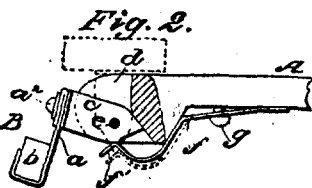
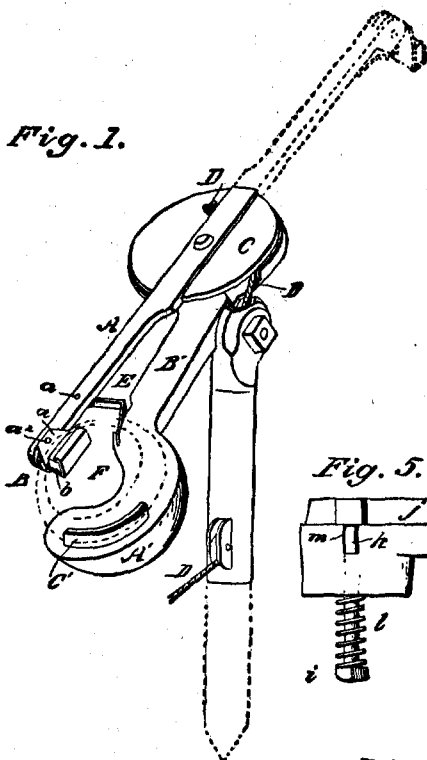
(3) In a trap or sending apparatus for flying targets, a throwing arm provided with a pivoted extension or target carrier, which, by the motion and arrest of the arm, is independently rotated on its pivot by centrifugal force into a position elongating said arm to project the target, substantially as specified.

(4) In a trap or sending apparatus for flying targets, a sending or throwing arm having a pivoted clip carrying the target, said arm being provided with means for automatically releasing the target at the extreme extension of the arm, as and for the purpose specified.

N. Grier Moore,
Administrator of the Estate of Charles F. Stock, Deceased.

Witnesses:

Frank Jack,
W. E. Coe.



The two affidavits upon which the reissue was obtained were as follows:

"State of Illinois, County of Peoria—ss.

"N. Grier Moore, the above-named petitioner, being duly sworn, deposes and says that he verily believes that the aforesaid letters patent, granted to Charles F. Stock, deceased, are inoperative, by reason of a defective and insufficient specification; that the statement of the invention on page one (1) of said specification contains no mention of the real invention, to wit, a pivoted carrier, as shown in the drawings, and described throughout the specification; that the description is not accurate; the 'clip, B,' is said to be hinged in one place, and swiveled in another, and is shown to be pivoted; that the claims do not point out the real invention, to wit, the pivoted feature; that at the time of preparing the original application, and for some time prior thereto, the said Charles F. Stock was in very poor health, and deponent is informed and believes that while in New York city, consulting with his old solicitors, Messrs. Munn & Co., the said Stock was attacked by the disease which afterwards caused his death; that for several days during his visit in New York city he was unable to attend to business at all, and that he was never, while there, able to devote much of his time or attention to the preparation of his application; that he explained his said invention to his said solicitors fully and completely, but when the said application was presented to him for signatures at his home, in Peoria, he was unable at that time to revise the work of his solicitors; that he was in such poor health that he was scarcely able to even read the papers, and he signed them, thinking they were prepared as he directed them to be; that after returning his application papers, properly executed, to his solicitors, Munn & Co., the said Stock did not see the application nor the claims until the patent was issued; that he discovered the errors and insufficiencies therein contained, and prepared to obtain a reissue thereof correcting said defects; that he consulted his attorney about this reissue application, but owing to his ill health he was unable to proceed; that the said Charles F. Stock died on or about the 28th day of October, A. D. 1884; that affiant verily believes said Charles F. Stock to be the original, first, and sole inventor of the invention set forth and claimed in the foregoing amended specification; that the said errors and defects in the patent aforesaid arose by inadvertence and mistake, and without any fraudulent intent, and, as administrator of the estate of said Charles F. Stock, affiant is the owner of an undivided one-half interest in said letters patent.

N. Grier Moore.

"Subscribed and sworn to before me this 18th day of March, A. D. 1885.

[L. S.]

"Douglas A. Myers, Notary Public.

"State of Illinois, County of Peoria—ss.

"Fred Kimball, being of lawful age, deposes and says that he is a resident of the city of Peoria, in the county and state aforesaid; that he was well acquainted with one Charles F. Stock, late a resident of Peoria, and now deceased; that he was in company with the said Stock in New York city in the latter part of the year 1883; that the object of the visit of the said Stock to New York city at that time was the preparation of an application for letters patent for the invention which was afterwards granted to the said Stock, in letters patent of the United States numbered 295,302, dated March 18, 1884; that while in New York city the said Stock was attacked by the disease which afterwards caused his death; that the said Stock explained his invention, and all parts thereof, to his solicitors, Messrs. Munn & Co., and instructed them to prepare the application, and forward it to him at his home, in Peoria, to which he returned at once on account of his sickness; that, when said application papers arrived at Peoria, affiant knows that the said Stock was in extremely poor health, and so sick as to be scarcely able to read them over; and that the said Stock made the remark, while looking over the papers, that he 'doubted if he should be able to get through with them;' that he did not examine them carefully, affiant knows, but that the said Stock executed the papers under the impression that they fully described and claimed his invention, as he had explained it to his solicitors, and

that when the said patent issued said Stock discovered many errors and insufficiencies therein, and proceeded to consult an attorney as soon as his health permitted, looking towards a reissue of the patent on an amended and corrected specification; that before said papers were fully prepared the said Charles F. Stock died, to wit, on or about the 28th day of October, A. D. 1884.

Fred Kimball.

"Subscribed and sworn to before me this 18th day of March, A. D. 1885, at Peoria, Illinois.

[L. S.]

"N. Grier Moore, Notary Public."

On April 11, 1884, Phillip Marqua filed an application for a patent ball trap, and on the 15th of July, 1884, letters patent 301,908 therefor were issued to him. In his specifications he stated that the object of his patent was to render the ball trap more efficient, and to produce a more even flight of the target, and also to adapt the same to the sending of a tongueless target. The specifications continued: "Such traps, as at present used, employ a pivoted arm carrier, the target usually secured thereto by a tongue, and by the partial rotation of the arm upon its pivot, and the sudden arresting of its movement, the target is projected into the air with an independent, rotary motion. The flight thus imparted is not always uniform or satisfactory, but may be rendered so by imparting to the target a sudden impulse at the instant of projection independently of the carrying arm. One of the objects of my invention is to produce a trap capable of imparting this sudden and independent impulse; and, to this end, it consists in mounting upon the main sending arm an independent, pivoted carrier, which by the movement of the arm, and at the instant of arrest, is swung around upon its pivot by its own centrifugal force, and suddenly thrown into line with the main arm, as an extension thereof, releasing the target at the culmination of the instantaneous independent impulse, which imparts additional force both in projection and rotation. This feature of my invention may be independently used with traps adapted to targets either with or without tongues."

The first two claims made by Marqua were as follows:

"(1) In a trap or sending apparatus for flying targets, a sending arm provided with a pivoted extension constituting the target carrier, which, by the motion and arrest of the sending arm, is independently rotated upon its pivot by centrifugal force into a position elongating the main arm, and projects the target by a sudden rotary impulse, substantially as set forth.

"(2) In a trap or sending apparatus for flying targets, a sending arm provided with a pivoted extension carrying the target, and having an independent rotation by centrifugal force, in combination with target holding and releasing mechanism automatically actuated to release the target at the moment of extreme tension of the sending arm, substantially as set forth."

The specifications and the new claims in Stock's reissued patent were drawn by Taylor E. Brown, the solicitor of Stock, and of Moore, his administrator, and of the plaintiff company herein, after he had read the specifications and claims, in July, 1884, of the foregoing Marqua patent. On October 13, 1884, Stock filed an application for a patent trap for throwing targets, which afterwards resulted in the issue of letters patent 322,020, on July 14, 1885. This patent showed a pivoted carrier which released the target automatically by the use of a cam in the holding apparatus. The two claims in the original specifications were:

"(1) In a trap for sending or throwing targets, a clamping device, pivotally secured to the end of the sending arm, provided with mechanism to automatically release the target, substantially as specified.

"(2) In a trap for sending or throwing targets, a clamping device, pivotally secured to the end of the throwing arm, provided with mechanism to automatically release the target, and also with means for imparting to said target a positive axial rotation as it leaves the trap, substantially as specified."

These claims were rejected on the ground that they had been anticipated by the Marqua patent, just referred to, and their rejection was finally acquiesced in by the administrator of Stock, and this claim accepted instead: "In a trap for throwing targets, the target-clamping device herein shown and described, pivoted at or near the end of the throwing arm of a trap, in combination with

a double or two-faced cam formed on the end of said arm, and a depending projection or pin on the clamping device, which bears against the cam during the swing of the clamping device, releasing the same by its escape from the cam, and thereby allowing the target to escape, substantially as set forth." As already stated, this application was made on the 13th of October, 1884. This was rejected on the 28th of October, 1884, on the ground that claims 1 and 2 were functional, and, in substance, were anticipated by the Marqua patent. An amendment was filed on the 20th of February, 1885, which amendment was rejected on the 24th of that month. An amendment was filed on the 2d of March of claims 1 and 2, which was rejected on the 10th of March, 1885. On the 17th day of March, 1885, the application for the reissue with the new claims under the old patent of Stock was filed.

The defendant's target trap was based on the patent of Albert H. Hebbard, of Knoxville, Tenn., letters patent 322,714, patent granted July 21, 1885, and the application for which was filed May 19, 1885. The character of the patent may be seen from the following drawings, which are taken from Hebbard's specifications:

Fig 1.

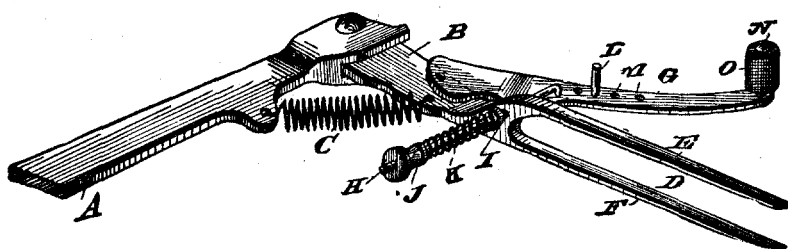


Fig. 2.

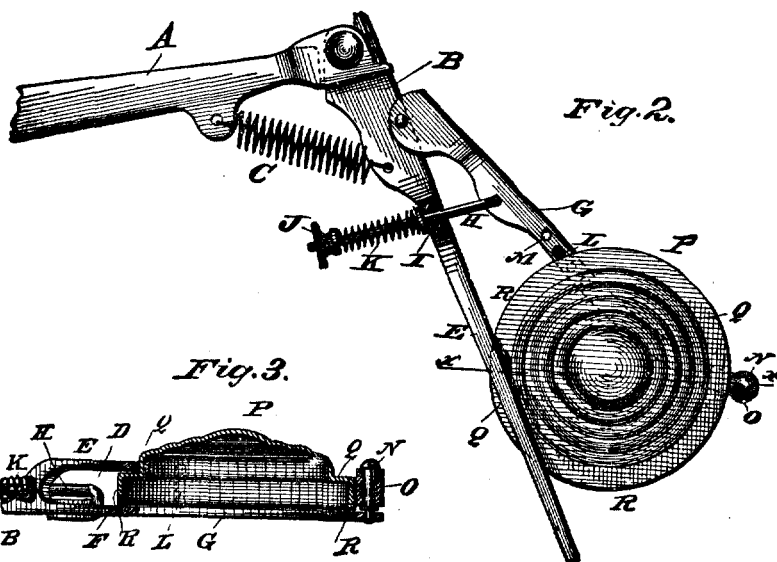
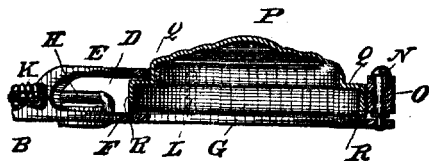


Fig. 3.



"B is an arm pivoted at the outer end of the arm, A, and connected with the latter by means of a spring, C, which enables the arm, B, to swing from its normal position at an angle of ninety degrees (more or less) to the said

arm, A, to a position of one hundred and eighty degrees (more or less) to the latter. The end of the arm, B, is bifurcated, as shown at D, forming an upper and a lower prong, denoted, respectively, by letters E and F. To the said arm, B, is also hinged or pivoted a third arm, G, having a pivoted rod, H, extending through a transverse perforation, I, in the arm, B, and the outer end of which is provided with a nut, J, between which and the said arm, B, is arranged a coiled spring, K, whereby the said arm, G, is automatically drawn toward the arm, B, as will be seen in Fig. 2 of the drawings. The arm, G, is provided with a vertical pin or stud, L, which may be adjusted in any one of a series of perforations, M, M, in the said arm; and it is also provided at its outer end with an additional pin or stud, N, either stationary or arranged to revolve in its bearing, and having a sleeve or covering of rubber, leather, or other suitable material, as shown at O. P. designates a target adapted to be used in connection with a trap having my improved arm. The same consists of a concavo-convex or saucer-shaped disk, having an annular shoulder, Q, and an annular rim or flange, R." The operation of the trap is as follows: "The arms, B, G, are drawn apart against the tension of the spring, K, and the target is then inserted between the said arms in such a manner that its under side or edge shall rest upon the arm, G, and the lower prong, F, of the arm, B, the upper prong, E, of said arm being fitted in the shoulder, Q, of the target, while the rim, R, of said target will bear against the pins or studs, L, N, of the arm, G. When, in the act of discharging the trap, a swing motion is imparted with great force to the arm, A, the target will, by the centrifugal force thus generated, be discharged by its periphery rolling, as it were, upon or around the stud or stop, N, while the opposite side of its periphery slides between the prongs, E, F, of arm, B, thereby imparting the desired axial rotation to the target."

Lysander Hill and Poole & Brown, for appellant.

E. A. Angell, (J. H. Webster, on the brief,) for appellees.

Before TAFT, Circuit Judge, and BARR and SAGE, District Judges.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The reissue of the patent to the administrator of Stock is based on the ground that Stock intended to claim as the chief feature of his patent a pivoted carrier, without regard to any particular releasing device, so arranged that the rotary motion of the carrier, independent of the rotary motion of the swinging arm, would give to the target an additional axial rotation, which would prevent the target from "wobbling" in the air, and give it a sailing movement, like that of a bird.

The first question is, therefore, what must have appeared to the commissioner before he had authority to enlarge the claims in a reissue so as to include in them this feature? The mechanical parts of the device, as shown in the drawings, were not changed in the reissue. The change consisted in explanations in the specifications of the advantages of this pivotal connection between the carrier and the swinging arm, by which an independent, rotary motion was imparted to the target. The reissued patent also introduced new claims, embracing, in broad terms, such pivotal connection between the target carrier and the throwing arm. Section 4916 of the Revised Statutes provides:

"Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own in-

vention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in case of his death or an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent.

* * *

The supreme court of the United States has held that while this section, literally construed, would only authorize reissues to correct specifications or claims defective or inoperative because too broad, it would construe the section liberally to give the commissioner of patents power to grant a reissue to expand claims which had been made too narrow by reason of accident, inadvertence, or mistake, without fraud. But it has been held in a number of cases that the commissioner is without power to grant a reissue unless it shall clearly appear that the patent, as originally issued, was defective and inoperative for the invention intended; that this defect and inoperativeness arose through inadvertence and mistake; and, finally, that the patentee had not, by lapse of time and laches, abandoned his right to have the correction made. With respect to the proof of inadvertence, accident, or mistake, the action of the commissioner is conclusive, if there is any evidence before him tending to show such accident, inadvertence, and mistake as will, in law, warrant a reissue. With respect to whether the original patent is inoperative and defective, the court has always reserved the right to review the action of the commissioner. If it shall appear from an examination of the new and old patents that the old patent was not defective or inoperative, but was for a complete invention, and that the reissue was taken out to secure another and different invention lurking in the mechanical arrangement of parts, the supreme court has always held the reissue void. *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. Rep. 38. Again, if an examination of the patent-office record discloses that there was no evidence before the commissioner of accident, inadvertence, or mistake, such as to warrant him in reissuing the patent, or that there was record evidence, of a conclusive character, showing that there could have been no accident, inadvertence, or mistake, the supreme court has not hesitated to hold a reissue void. This is manifest from an examination of the decisions of that court. In the case of *Huber v. Manufacturing Co.*,—the last case in which the supreme court has had occasion to consider the question of reissues,—148 U. S. 270, 13 Sup. Ct. Rep. 603, the supreme court expressly approved the language of Judge Thayer in the court below, to be found in *Huber v. Manufacturing Co.*, 38 Fed. Rep. 836, where, considering the question of his power to review the action of the commissioner in granting a reissue, he said:

"All of the evidence that was before the commissioner, tending to show inadvertence and mistake, (such as the affidavit of the inventor and his solicitor, and other documents) was offered by the complainant in the present case, and

was supplemented by some additional testimony. Under such circumstances, I understand the law to be that the court may review the finding of the commissioner on the point that the original patent was inoperative by reason of inadvertence or mistake; at least, to the extent of determining whether, as a matter of law, what was described and alleged to be a mistake is such a mistake as will warrant a reissue."

Justice Bradley, in *Mahn v. Harwood*, 112 U. S. 354-362, 5 Sup. Ct. Rep. 174, and 6 Sup. Ct. Rep. 451, said that—

"Whenever it is manifest from the patent itself, compared with the original patent and cognate documents of record, or from the facts developed in the case, that the commissioner must have disregarded the rules of law by which his authority to grant a reissue in such cases is governed, the patent will be considered as void to the extent of such illegality. It is then a question of law, not a question of fact."

The fact which the commissioner of patents must have found, and which there must have been some evidence before him tending to show, was that when Stock filed his first specifications, knowing the additional advantage that would be obtained from the pivotal connection of the carrier with the swinging arm, because of the additional axial rotation of the target caused thereby, he intended to claim broadly such pivotal connection. If all that he had in mind as to the good result of the pivotal connection was the automatic releasing of the target at a particular time, and all that he intended to claim was the use of that pivotal joint between the carrier and the swinging arm, in connection with the other parts of the releasing device, because it was necessary to make operative his releasing device, then he was not entitled to a reissue to broaden his claims so as to include any pivotal connection between the carrier and the swinging arm, uncombined with his releasing device.

Therefore, the question now to be determined is whether there was any evidence before the commissioner of patents which justified him in holding that Stock, at the time he filed his original application, intended to claim, broadly, the device of a pivotal connection between the carrier and the swinging arm, without regard to the releasing device, which should give the target an additional axial rotation.

In the first place, the original patent shows no defect or inoperativeness on its face. The drawings, the specifications, and the claims show nothing but an improved device for releasing the target. The pivoted connection of the carrier with the swinging arm manifestly plays an important part in the releasing device, and there is not the slightest suggestion in the specifications or claims that it has any other function than that. It admits of serious doubt whether we ought not to hold that the reissue is so plainly for an invention different from that described and covered in the original that the reissue is void. *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. Rep. 38. It might be forcibly argued that the first patent was for a releasing device and the reissue was for a throwing device. The argument would be supported by the omission in the reissue of the word "gradually," found in the old

specification, where the movement of the carrier on the pivot is described. A gradual movement of the carrier would seem to be necessary to make the releasing device in Figs. 6 and 7 of the drawings work at all, whereas the independent pivotal movement of the carrier must be rapid to give any perceptible addition to the axial rotation of the target.

But we prefer to put our conclusion in this case on the absence of any evidence before the commissioner, upon which he could base a finding of an accident, inadvertence, or mistake in the required respects. It will be noted from what we have said that the original patent suggested nothing of the mistake claimed, on its face. What other evidence was there? There was first the oath of the administrator, who spoke on information and belief, and with no personal knowledge on the subject; and then there was the oath of Kimball, who was present with Stock in New York. Neither states that Stock intended to claim what was claimed in the reissue. This was indispensable. The fact that Stock was sick when he made his application, and the fact that he was not satisfied with the patent when issued, do not show that he intended to describe or claim that which was contained in the new specifications and claims, nor is there anything in the original application to show it. The evidence before the commissioner, as a matter of law, therefore, was insufficient to show the mistake or accident upon which, alone, he was entitled to reissue the patent.

If Stock had intended to claim what is now contained in the reissue, the failure of the first patent to include it must have been apparent to him, on inspection, and it is inconceivable that he should have delayed action in procuring a reissue. It is attempted to explain his delay by his illness, but it appears that after he received the original patent he made three different applications for other patents, with respect to which he consulted Munn & Co., in New York, and Taylor E. Brown, his patent solicitor, in Chicago. When he applied for the patent, and when he received it, there were others pecuniarily interested with him in it, whose interest would have prompted an immediate application for reissue, if the mistake was so apparent to him, and so easy of explanation. There was evidence adduced to the court below that Stock was disappointed in his patent, but there is an almost total absence of evidence tending to show that his disappointment arose from a failure to claim, broadly, a pivoted carrier, with a resulting addition to the target's axial rotation.

In his examination in chief in the court below, Kimball, the president of the Peoria Target Company, who went with Stock to New York for the purpose of obtaining the original patent, and who was interested in the patent when Stock was making his application for it, testifies that, after Stock received the patent from the patent office, he "heard him make a great fuss about it; seemed to be disgusted. He said the patent didn't amount to anything. I think I heard him say it was not worth going to New York after, or words to that effect. He talked with Mr. Jack, Mr. Walker, and myself on two or three occasions. He made a good many com-

plaints about his patent. * * * Question. I understand, then, that what Mr. Stock thought he was achieving by his machine was to throw targets without tongues? Answer. I guess that is about it. Q. Did he have any other effects produced by his machine? A. Not that I know of. Q. Did you ever discuss with him the question in what respect, or in what particular, the original patent was defective? A. If I did, I don't remember what was said at the time."

Frank Jack, the secretary of the Peoria Target Company, stated that Stock returned from New York in July, 1883, and said he had a scheme to throw targets without a tongue; that he delayed until December because there was no tongueless target on the market; that he saw Stock after he received the patent; that he expressed himself forcibly, and somewhat profanely, about the way the claims read; said it was not what he wanted at all; that there were other ways of releasing the target, which others could use, and which Munn & Co. should have prevented.

Damm, witness for defendants, testified that he heard Stock make complaints about his patent after he returned home, and said that he ought to have a patent that would cover everything that would drop below its plane. He did not think the patent sufficiently broad to cover all manner of dropping devices.

West, the solicitor, in the employ of Munn & Co., who prepared Stock's original application, called for the defendant, testifies emphatically that the principal feature of the patent, as explained to him, was the dropping movement of the clip for discharging the target at the proper interval of time, and Stock did not disclose to him that the turning of the clip produced any rotary movement of the target itself; that Stock seemed well, and looked well; that he was clear in his mind, and described to him clearly his invention; that he saw Stock twice thereafter with reference to other patents.

West's credibility is attacked because he accepted \$50 for services rendered by him in making searches of Munn & Co.'s record, and a report to defendant's counsel, with reference to facts important in connection with his own evidence. While it might have shown more delicacy on his part to have declined the employment, under the circumstances, we do not think it impeaches his credibility. The fact may make him a partisan witness, but nothing more.

In rebuttal, Kimball, the president of the Peoria Target Company, took the stand, and then, for the first time, testified that, when he heard Stock describe his invention to West, Stock explained the necessity for the target revolving in the air, in order to fly; that he distinctly remembers hearing him say that, unless the target spins fast enough, it will not go fast enough; and that he did not lay any great stress on the dropping motion of his trap.

It also appears from the record evidence of the patent office that in one of the patents, application for which was made by Brown on behalf of Stock, he claimed the advantage derivable from a pivotal carrier in adding axial rotation to the target. The application for this patent was made as late as October 13, 1884, and this application was made after Brown, as the patent solicitor for Stock, had seen and examined the specifications and patent

issued to Marqua in May, 1884, in which a pivoted carrier was shown, and the advantage of an additional axial rotation was dwelt upon in the specifications, and the pivoted feature was claimed in the patent claims, and allowed by the patent office. The claim made in Stock's application of October 13, 1884, was rejected by the patent office because it was anticipated by Marqua's patent, issued in July. This rejection was acquiesced in by Stock's administrator on the application of October 13, 1884, and a patent thereafter accepted, which did not include it. The petition for the reissue in the original patent 295,302 was not made until March 27, 1885, after it had become certain that Marqua's patent stood in the way of any patent for a pivoted carrier which should not antedate his.

Taylor E. Brown, one of the solicitors in the present case, testified that Stock called upon him, and consulted him about obtaining a reissue of the patent of March 18, 1884; that he said to him (Brown) that the letters patent did not express his invention, and thought he could have it corrected by simply returning it to the commissioner with a request to that effect; that, with some difficulty, it was explained to him that in order to correct his patent a reissue must be had, and to accomplish that a new application must be made out and filed. The next day Stock left for home, without deciding what he would do about a reissue, and said he would write about the matter. In the mean time, Brown examined the original letters patent, and came to the conclusion that he had sufficient ground for the application for a reissue. Brown recollects that he saw the Marqua patent of July 15, 1884, in the Official Gazette, about that time, and it seemed to him it would interfere with the Stock patent.

If it were true that Stock had intended to make the claims which were contained in the reissue, why did not Brown say so in his evidence? His silence upon that point is the strongest evidence to this court that it was not until after he himself had examined Stock's original patent, and had seen the patent issued to Marqua, that he discovered that in the original patent was a device upon which Stock might have made the claim which appears in the reissued patent; that is, that Stock might have made the claim, if, in fact, he intended to make the claim, and had realized the value of a pivotal carrier in its effect upon the axial rotation of the target. Brown says that he advised him (Stock) that he would have to make an application for a reissue in order to correct the patent and secure the claims, and yet Brown himself made an application for Stock on another patent, in which he set up this claim with reference to a pivoted carrier, in October, 1884, and thereafter, as solicitor for the administrator, acquiesced in its rejection. Learned counsel advance the theory that Brown made a mistake of law in this, but there is no evidence to support the theory. Brown does not say he made any such mistake. Brown's advice to Stock that his objections to the original patent could be cured by reissue, only, and his subsequent conduct in including the broad claim for a pivoted carrier in an application for another

patent, can only be reconciled on the hypothesis, which is sustained by everything else in the case, that Stock's objections to his original patent were based on some other ground than that it failed to claim, broadly, the pivoted carrier. Except an indefinite statement of Kimball, president of complainant, that Stock told West that it was important to have the target spin in the air, there is nothing in the case tending to show that Stock intended to claim a pivoted carrier, broadly, as in the reissue. Kimball's statement is weakened by the fact that though he made an affidavit for the reissue, and testified in chief, he said nothing of what Stock told West until rebuttal, and this, to meet West's evidence. On the other hand, everything in the case tends, convincingly, to establish the fact to be that the advantage of the pivotal connection of the carrier, in giving the target additional axial rotation, was an afterthought, not in Stock's mind at the time he made his original application, and acquired months after the patent was issued, after consulting with his solicitor, and after learning of Marqua's patent. We fully agree with the court below that the evidence shows that the reissue to Stock's administrator, with its new claims, plainly copied from Marqua's claims, was applied for and obtained for the purpose of "overreaching" Marqua's patent, and without any just ground therefor.

We are therefore of opinion that, as there was no evidence before the commissioner tending to show the inadvertence, mistake, or accident required by the statute, which would warrant the reissue in the form in which the commissioner issued it, and as the additional evidence adduced only confirms us in the opinion that no such inadvertence, accident, or mistake actually existed, the new and additional claims in the reissued patent are void.

Our conclusion upon the evidence makes it unnecessary for us to consider the objection made to the validity of the reissue, based on the ground that by the acquiescence of Stock's administrator in the rejection of the broad claim for a pivoted carrier, in the application for a patent filed October 13, 1884, he was estopped from subsequently making the same claim in an application for a reissue of the patent applied for December 23, 1883.

2. The second question is whether defendant's device is an infringement of the first claim of complainant's original and reissued patent. The first claim is:

"(1) The combination with the throwing arm of a target-throwing device of a clip for holding the target, arranged to automatically drop below the upper surface of the throwing arm for releasing the target, substantially as described."

The various devices shown in Fig. 2, Fig. 3, Fig. 4, Fig. 5, Fig. 6, and Fig. 7 of the original and reissued Stock patent leave no doubt that the one thing which was present in every one of the devices was the holding of the target by a piece rising above and at right angles to the plane of the throwing arm, in front of the outer edge or rim of the saucer-shaped target, thereby holding the target, and releasing it when it dropped automatically below the plane, and away from in front of the rim. In Fig. 2 the automatic

dropping of the piece is accomplished by the centrifugal force of the carrier or swinging arm in overcoming the resistance of a yielding spring. In Fig. 3 the target is held in a slightly different way, but the operation is much the same. The dropping of the plate that holds the target drops the button out of the way of the target at the end of the sweep of the swinging arm. Fig. 4 operates much in the same way. In each case the piece which holds the target drops below its shoulder by reason of the action of the centrifugal force on the yielding power of the spring. In Fig. 5 the button drops into a slot as it turns with the movement of the swinging arm. In Fig. 6 there is no spring, but the target is held to the throwing arm, A, by the block of rubber, B, held to the bent plate, O, and hinged to the plate, P, which is pivoted upon the upper side of the arm, A. To the under side of the arm, A, is secured the slotted plate, q, the slot of which coincides with the slot, d, made in the arm, A. The edge of the plate, q, is rounded, and projects beyond the sides and end of the arm, A, as shown at q', and the under side of the plate, o, is formed or provided with the toe, o', which, as the throwing arm swings about, moves the plate, q, until it reaches the slot, when working upon the hinge, it falls into the slot carrying the bent plate, o, and the rubber, b, below the plane, and thus releases the target. Fig. 7 is substantially the same device.

In the Hebbard carrier, the target is held in the carrier by two fingers, one of which is pronged, and the other of which is kept pressed against the side of the target by the tension of a spring. The holding force of the spring-head finger is overcome by the centrifugal force generated by the swinging of the carrier and that of the throwing arm, and the target is released from between the fingers. Devices 1, 2, 3, and 4 of the Stock patent, and the defendant's device, do resemble each other in this, namely, that the centrifugal force overcomes the retaining force of a spring to release the target. But the claim in the Stock patent is limited to a device by which there shall be a positive release of the target, by a dropping away of the piece which holds it, and not by the gradual overcoming of a spring directly applied to the side of the target. In several of the devices, the dropping of the holding piece is secured without the aid of a spring. The one feature that is common to the Stock devices is the dropping of the piece out of the way of the target. The claim is for this, and not for the overcoming of a spring which holds the target by direct pressure. It is very doubtful whether a broad claim for the release of a target by the opposition of the centrifugal force to the retaining power of a spring was novel when Stock applied for his patent in December, 1883, because, under the much earlier Ligowsky patent, the target was held by a tongue inserted between two jaws held together by a spring, and was released by the centrifugal force overcoming the retaining power of the spring operating upon the jaws. Stock, in his original and in his reissued patent, adhered to the positive dropping out of the way of the target of the piece which held it in front of its outer rim. Now, it is true, if the target

were rested on its convex side, and a piece were inserted against the outer rim downwards, and there were an arrangement for the lifting of the piece by the use of a spring, with the result that there were an upward movement, instead of a downward one, out of the plane of the target, such a device would be the same device as the one described in Stock's patent; and the same might be true of a device for moving the obstacle away from in front of the target in a sideway direction. But the difficulty with the complainant's case is that the difference between Stock's releasing device and Hebbard's is not confined to the difference between a sideway and a dropping motion of a holding piece. The difference is between the sudden releasing of a target by the positive dropping of a piece from in front of it and the gradual release of a target by a gradual reduction of the friction or pressure force which holds it.

For that reason, we do not think that the first claim of the Stock patent was infringed. We are of opinion that the court below was right in dismissing the bill, and the decree of that court is affirmed.

CONVERSE v. MATTHEWS.

(Circuit Court, D. Massachusetts. August 22, 1893.)

No. 2,921.

1. PATENTS FOR INVENTIONS—INVENTION—STOVE KNOBS.

Letters patent No. 432,583, issued July 22, 1890, to Edmund Converse, as assignee of William A. Turner, for a hollow sheet-metal stove knob, having a bell-shaped base, so arranged that the abutting edges of the blank, when formed into the knob, constitute a self-supporting circle, show patentable novelty, and are valid.

2. SAME—INFRINGEMENT.

The patent is infringed by a knob of the same construction, except that the abutting edges are serrated so that they do not make the extreme outer circumference of the base continuous.

3. SAME—PRIOR USE—MEASURE OF PROOF.

In order to defeat a patent by evidence of a prior use, the proof must be clear, satisfactory, and beyond a reasonable doubt. The Barbed Wire Patent, 12 Sup. Ct. Rep. 443, 450, 143 U. S. 275, followed.

In Equity. Suit for the infringement of letters patent No. 432,583, issued July 22, 1890, to Edmund Converse, as assignee of William A. Turner, for a stove knob. Decree for complainant.

The article in controversy is a stove knob, which is a hollow sheet-metal knob or handle, particularly adapted to be attached to the door of a cooking stove or range, to be grasped when opening and closing the door. Claims 1 and 2 of the patent, which are alleged to be infringed, read as follows: "(1) A sheet-metal knob having a flaring or bell-shaped base, provided with holes or apertures in its sides to allow a circulation of air within the knob, and having the abutting edges, a, a', forming a continuous edge, G, substantially as set forth. (2) A sheet-metal knob having a base formed from a sheet-metal blank substantially circular in form, but having pieces removed therefrom, forming openings in the edge of the blank, and provided with the projections, f, f', having the edges, a, a', arranged to form in the completed base a continuous edge, G, substantially as described."

It is alleged as a defense that in the summer of 1887 one of the defendants,

Ambrose T. Matthews, invented, disclosed to others, and, in partnership with the complainant, Converse, made, publicly used, and sold two or three thousand knobs of a structure similar to that described in claims 1 and 2 of the patent in suit. It appears that in 1887 the complainant, Converse, and the defendant, Matthews, were in business together in Worcester, Mass., under the firm name and style of the Worcester Ferrule Company. Mr. Matthews had charge of the shop, and Mr. Converse devoted what time he could spare from a trucking business, which he also carried on at this time, and which took more than half of his time, to the business of the ferrule company. Mr. Matthews was the inventor of a split-bottom base for knobs, which invention was covered by a patent issued to him in 1886, being No. 354,607. In the spring of 1887, Mr. Matthews had made a lot of small knobs with four-leaf split bases. It is contended that this first lot of small knobs contained the exact construction of the two claims in suit.

Fish, Richardson & Storrow and William S. Rogers, for complainant.

Alexander P. Browne and Louis W. Southgate, for defendant.

PUTNAM, Circuit Judge. The device in this case does not suggest a very high degree of inventive power; but it relates to one of that class of useful domestic articles, to encourage and support the improvement of which is within the purpose of the constitution, and of the statutes touching patents. The questions involved are entirely issues of fact, which can hardly be repeated in any other case, and which, therefore, it is to the advantage of no one to elaborate.

On the point of patentability, the court has felt no difficulty, the novelty being especially in so arranging the abutting edges of the upper or outer portion of the bell or base of the knob that they constitute a self-supporting circle. It is enough for the court to say that this, in connection with the other elements of the combination, is undoubtedly useful and novel, and contains the suggestion of something more than mere mechanical skill. Some further observations on this point will be made in connection with the next proposition.

Neither does the court doubt that the respondent has infringed. The mere fact that the abutting edges are serrated by him, so that they do not make the extreme outer circumference continuous, does not constitute a defense, under the other facts of this case. It is true that this style of construction will always raise a question of degree, and may go to such an extent that the useful feature of the complainant's patent, of mutually supporting edges, will disappear; but the court does not find that the characteristics, in this respect, of his device are substantially lacking in the alleged infringing knob.

The defense touching infringement connects itself, to some extent, with that touching patentability. It is claimed that no man can now have a valid patent for merely locating the holes at any particular point in the abutting edges of the leaves of a split-base knob. This is undoubtedly true, and, if that was the pith of the complainant's alleged invention, the patent would be void for want of novelty. But, as already stated, the substantial novelty is not involved at all in the matter of locating the holes, but it relates to combining with them and other matters a self-supporting outer

circumference of the bell or base of the knob; and in the opinion of the court the respondent does not avoid that characteristic by contending that the claim is so broad that there is a mere change of location of the parts, without a different or additional function. It is true, as already suggested, that the alleged improvement is apparently of a minute character, and comes rather close to the dividing line between what is patentable and what is the mere product of mechanical skill; but on the whole it appears to the court that this device was the last step which—although, perhaps, a short one—had been for some time sought after, and was necessary in order to complete the art with reference to use, and perhaps more particularly with reference to the cheapness and ease of production. The improvement falls within that class of cases where facts subsequent to the application for the patent have been allowed by the courts to come to its support. In this class are *Watson v. Stevens*, (decided by the circuit court of appeals in this circuit,) 2 C. C. A. 500, 51 Fed. Rep. 757, and a number of late cases in the supreme court, conveniently grouped by Judge Coxe in *American Cable Ry. Co. v. Mayor, etc., of City of New York*, 56 Fed. Rep. 149.

The principal difficulty arises from the alleged anticipatory use and sale by the respondent, Matthews. On this point this court must be guided by the rules stated in the *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. Rep. 443, 450; and it need not go beyond the opinion in that case for the law applicable to the point now under consideration. The court has there emphatically given the caution that the proof of alleged prior use must be "clear, satisfactory, and beyond a reasonable doubt," and that the burden of proof rests on the party setting it up. The methods in which the court in that case disposed of the alleged instances of anticipatory use illustrate the general principles applicable, aside from the mere question of clearness of proof. It is, of course, not always a sufficient answer that the prior use may be said to have been an experiment; but, if it combines failure with experiment, it is clearly ineffectual, of itself, to defeat a subsequent patent.

The patent in this case covers the product; and therefore, if the like of the product "known or used by others in this country" before the patented invention or discovery was practically a success, it would be of no importance that the method of production was unsatisfactory; although the result might be otherwise if the anticipatory matter was a prior patent or publication, as to which the rule is well-settled that it must show, not only a perfected product, but a practical method of obtaining it. Notwithstanding this, we think the respondent fails to maintain his proposition touching this matter by a clear preponderance of evidence at any point; and we go even further than this, and to the extent of saying that the balance of proof carries with it a strong presumption that whatever was put on the market, as claimed by the respondent, failed to reach a practical and successful standard. On this proposition the concurrence of the fact that the party who claims to have anticipated is the respondent in this case, with the other facts which will be referred to, is of very considerable weight against him. The alleged

anticipatory product was said to have been put on the market before January 1, 1888; and from that time until January, 1890, the respondent was continuously engaged with the complainant in making stove knobs, the respondent having immediate charge of the business. At the latter date the respondent withdrew, and commenced a like business on his own account in May, 1890. The patent in dispute was taken out on the application of Mr. Turner, the original patentee, filed March 20, 1890, and issued to the complainant, as Turner's assignee, July 22, 1890. The case shows that respondent, although he had active charge of the business, as already said, did not follow up the alleged anticipatory product, and that he never manufactured, or caused to be manufactured, any knobs of that type, until a year after he commenced business for himself. These facts form a practical verdict by the respondent in favor of the complainant, on the question of the alleged anticipatory use, of great weight, and afford a strong presumption against him. This presumption is all the more weighty, because the respondent does not undertake to connect his infringing manufactures in 1890 or 1891 with the alleged anticipatory product, or show that the former in any way reverted to the latter.

With our rapid progress in mechanical improvements, what an ingenious man fails to accomplish to-day, with the appliances now at hand, another ingenious man may accomplish to-morrow, with the better appliances which he then finds; and, if the latter acts from his own resources, he is not to be deprived of the fruits of his ingenuity by reason of the prior failure of to-day, although, without taking into account the change in appliances, it may be difficult to understand why and wherein one failed, and the other succeeded. There is no equity or public policy which requires that one should be deprived of his just reward who revives a lost art, whether buried for ages, or for only a few years, although with the latter there is, of course, more necessity for making sure that the revival was not suggested by the knowledge of what had apparently disappeared. Nothing, however, to this effect has been brought to our attention in this record.

On the whole, this part of the case seems to the court to be fully within the spirit of the closing paragraphs of the Barbed Wire Patent, 143 U. S. 292, 12 Sup. Ct. Rep. 443, 450.

Decree for an injunction and an account, with reference to the first and second claims only; complainant to file draft decree on or before rule day in September, and respondent to file corrections of the decree on or before the 16th day of September.

DETWILER v. BOSLER.

(Circuit Court, E. D. Pennsylvania. July 6, 1893.)

No. 16.

PATENTS FOR INVENTIONS—INFRINGEMENT—GRINDING MILLS.

Letters patent No. 188,783, issued March 7, 1877, to John S. Detwiler, for an improvement in grinding mills, claims the "combination of a pair of stones set to grind coarse, with a second pair of stones, of larger

diameter, set to grind fine, and run at a lower speed than the upper and smaller pair;" the partially ground grain falling from the upper to the lower pair. *Held*, that the claim was not infringed by the use of rollers revolving in a vertical plane, instead of stones revolving in a horizontal plane. 55 Fed. Rep. 660, overruled on rehearing.

In Equity. On rehearing. Suit by John S. Detwiler against Joseph Bosler for infringement of letters patent No. 188,783, issued March 27, 1877, to complainant, for an improvement in grinding mills. On May 9, 1893, a decree was ordered for complainant, but a rehearing was subsequently granted. Bill dismissed.

Charles B. Collier, for complainant.

Horace Pettit, for respondent.

DALLAS, Circuit Judge. Upon May 9, 1893, I filed an opinion in this case, in which the conclusion was reached that the plaintiff was entitled to a decree. Before any decree was entered, however, and with sufficient promptitude, a motion for a rehearing was made on behalf of the defendant. After argument and consideration of that motion, I was of opinion that perhaps I had fallen into error upon a single but essential question, which, being one of fact, it was especially incumbent upon me to reconsider. Accordingly, the motion for rehearing was granted, and the case has since been reargued, but only upon one point, viz. as to whether "the court had misunderstood or misconstrued the testimony regarding the construction of defendant's mill." In my former opinion I said: "The defendant's expert (Hollingsworth) has testified that, irrespective of scalpers and assuming that rollers are the equivalents of millstones, the two processes are in his opinion exactly the same." I now perceive that as to this, I did misunderstand the evidence. The witness Hollingsworth had testified, it is true, precisely as I stated; but it should be observed (as I failed to do) that the portion of his testimony to which I especially referred related exclusively to "the two processes," and not to the two organized mechanisms of the complainant and of the defendant respectively; and the patent in suit is not for a process, but for a combination of mechanism by which a designated process is carried on. My attention has now been directed to the fact that Mr. Hollingsworth, himself, very pointedly made this distinction, and testified, in effect, that the "machine" of the defendant was different from that of the complainant. My misapprehension of the evidence in this particular led me to attribute undue force to the argument of complainant's counsel in aid of the construction which he contended should be given to the testimony of Mr. Collins and of Mr. Berger with reference to the diameter and speed of defendant's rolls. That the second pair of stones shall be of larger diameter, and run at a lower speed, than the upper and smaller pair of stones, are essential features of the claim. These elements I now find, after a careful review of the evidence, have not been shown to be present in the defendant's construction; and the very ingenious argument of complainant's counsel, not having (as I had supposed it had) the support of the defendant's own expert, seems to me, upon re-examination,

to be too conjectural and inferential for acceptance. The burden of proving infringement was upon the complainant. To discharge himself of this burden, he might, and should, have established with reasonable clearness, if it existed, the substantial identity of the organized mechanism of the defendant with that of the patent. This he has not done with respect to the two elements which I have particularly mentioned, and therefore the direction of May 9, 1893, for the preparation of a decree in favor of the complainant is revoked; and it is now ordered that the bill of complaint be dismissed with costs.

THE E. A. PACKER.

SCULLY v. NEW JERSEY LIGHTERAGE CO.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

No. 87.

1. ADMIRALTY APPEALS—SUPREME COURT—CIRCUIT COURT OF APPEALS.

An expression of opinion on the merits by the supreme court in reversing and remanding an admiralty cause, which was again tried in the circuit court after the passage of the judiciary act of March 3, 1891, is not binding on the circuit court of appeals when, according to its practice, the case is brought before it on all the evidence, which shows an additional material fact not in the record before the supreme court, and the absence of which that court expressly recognized.

2. COLLISION—DAMAGE TO TOW.

A vessel guilty of fault contributing to a collision with a tow, which is free of fault, is liable therefor, although the tug in charge of the tow was also in fault, and is not a party to the suit.

3. SAME—INSPECTION RULES—NEW YORK HARBOR.

A tug rounding the Battery in New York harbor from the North river into the East river with a tow is subject to rule 2 of the supervising inspectors, providing that, when vessels approach each other obliquely, the one having the other on her starboard hand and being herself on the other's port hand shall put her helm to port, and pass under the other's stern; and she is not excused from obedience thereto by the fact that, as the other vessel is approaching obliquely across the East river, the maneuver will throw her out into the ebb tide, and cause her great inconvenience and delay. 49 Fed. Rep. 92, affirmed.

4. SAME—CUSTOM.

The mere fact that vessels in rounding the Battery often agree with each other to depart from the inspectors' rule, so as to allow the vessel going against the tide to keep next the piers, is not sufficient to excuse a vessel for disregarding the rule without any agreement.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel for collision filed by the New Jersey Lighterage Company against the steam tug E. A. Packer, John Scully, claimant. There was a decree for libellant in the court below, (49 Fed. Rep. 92,) and the claimant appeals. Affirmed.

E. D. McCarthy, for appellant.

R. D. Benedict, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The libel in this case was filed to recover damages for the loss of the barge *Atlanta*, which was sunk in a collision with a barge in tow of the *E. A. Packer*, upon her port side, at about 4 o'clock in the afternoon of October 25, 1880, off piers 1 or 2 in the East river. The *Atlanta* was in tow of the tug *Wolverton*, on a hawser of about 20 fathoms, and was bound from Roberts' stores, Brooklyn, up the North river. The *Packer* had come down the North river, and rounded the Battery, being bound up the East river, to Sixty-First street. After sighting each other, the *Packer* starboarded and the *Wolverton* ported, with the result above indicated. The *Wolverton*, after the collision, betook herself out of the jurisdiction. A libel filed against her in the eastern district of Pennsylvania by the master of the *Packer's* tow was dismissed, (13 Fed. Rep. 44,) but, being out of this jurisdiction, she was not made a party to the suit at bar.

The peculiar history of this suit makes it unnecessary to rehearse the facts in detail; to do so would be but needless repetition, as they will be found stated at great length in the various opinions hereinafter referred to.

The district court held the *Wolverton* in fault for "persisting in an unauthorized and dangerous attempt * * * to run into the eddy between the *Packer* and the shore." It exonerated the *Packer* principally because, in its judgment, the evidence showed a "prevailing custom in navigating around the Battery on the ebb tide," which gave it the right to rely on the *Wolverton's* "observing that usage," and permitted the *Packer*, notwithstanding rule 2 of the supervising inspectors, (quoted post,) to go to the left, giving the appropriate signal of two whistles, and to require the *Wolverton* to navigate accordingly. 20 Fed. Rep. 327. An appeal was taken to the circuit court, which reversed the decree of the district court, holding that upon the proof "no practice is shown prevailing with that uniformity which is requisite to a usage applicable to the situation between the vessels here, or which justified the *Packer* in insisting upon the right of keeping inside." That court held the *Packer* in fault, because, when the vessels "saw each other, the *Packer* had the *Wolverton* on her starboard bow, and the *Wolverton* had the *Packer* on her port bow. The vessels were then on courses crossing each other and converging towards the New York shore, and it was the duty of the *Packer*, under the nineteenth rule of navigation, to keep out of the way," which she should have done "by [porting] her wheel and [stopping] and [reversing] her engine in time to avoid the collision." The opinion of the circuit court, filed July, 1886, is not reported, but its findings are incorporated in the opinion of the supreme court, 140 U. S. 360, 11 Sup. Ct. Rep. 794.

The claimant thereupon appealed to the supreme court. After an elaborate discussion of the practice and procedure upon appeals under the act of February 16, 1875, (18 Stat. 315,) that court held that the appellant was "entitled to a finding" of the circuit court touching a proposition which he had submitted to that court, as follows:

"Sixth. The porting of the *Wolverton's* wheel when she was about 200 feet from the *Packer* was a change of four or five points

from her course." The supreme court therefore reversed the decree, and remanded the case to the circuit court, "with directions to proceed therein in conformity with the opinion of [the supreme] court."

The circuit court thereupon found the fact as to the Wolverton's change of course in accordance with the request, but refused to find that the Wolverton was solely in fault, and again decreed in favor of the libellant against the Packer. 49 Fed. Rep. 92. From that decree this appeal is taken.

Meanwhile the practice in admiralty was materially changed by the passage of the act of March 3, 1891, establishing United States circuit courts of appeals, and the case now presented for review by this court differs from that considered by the supreme court, not only by reason of the additional finding, but because, the provisions of the act of 1875 not applying to appeals to the United States circuit court of appeals, (*The Havilah*, [2d circuit] 1 U. S. App. 1, 1 C. C. A. 77, 48 Fed. Rep. 684,) all the evidence in the case is brought up for consideration. Comparatively little of it was before the supreme court.

The opinion of the supreme court contains the following:

"From this statement of their respective headings it is quite evident, and the court [meaning the circuit court] also finds as a fact that they were upon crossing courses; that the Packer had the Wolverton on her starboard side, and was bound, under the nineteenth rule of section 4233 to keep out of her way. In fulfilling this obligation, however, she was entitled to act, within the limitations imposed by the requirements of good seamanship, upon the judgment of her master, and to put her helm to port or starboard; and there was a correlative duty, no less imperative, on the part of the Wolverton 'to keep her course.' Rule 23, [citing cases.] While this duty of avoidance is ordinarily performed by porting and passing under the stern of the other vessel, and while this is evidently, under ordinary circumstances, the safer and more prudent course, cases not infrequently occur where good seamanship sanctions, if it does not require, that the maneuver shall be executed by starboarding and crossing the bows of the approaching vessel. Of course in doing this the steamer takes the risk that the approaching vessel, while fulfilling her own obligations of keeping her course, may reach the point of intersection before she has passed it herself; and hence at night, or in thick weather, the maneuver would be likely to be attended with great danger. In the present case, however, there were circumstances which indicate that the selection of this course may have been such an exercise of discretion upon the part of the master as was not inconsistent with sound judgment and good seamanship. It was broad daylight, the weather was clear, and a careful lookout could not fail to hear the signals of an approaching vessel, and to estimate properly her course, her bearings, and her distance. There was a strong tide ebbing out of the East river, and the Packer was making her way slowly and with some apparent difficulty against it. It was obviously to her advantage to keep as near to the piers, heading as she was, directly against the tide, as it was possible to do, since such a decided porting as would be necessary to avoid the Wolverton and her tow would have compelled her to take the full force of the tide upon her port side, and exposed her to a strong outward drift, as well as to the probability of the Atlanta sagging down upon her. Whether the starboarding of the Packer was a fault or not would depend largely upon the question whether, assuming that the Wolverton kept her course and maintained her then rate of speed, either vessel would pass the point of intersection before the other reached it. If it were clear that no collision would have occurred had the Wolverton kept her course, then the starboarding of the Packer was not a fault, since the point of intersection would be either ahead or astern of the Packer; but, if

such starboarding was likely to involve risk of a collision, then, of course, it was a fault.

"It was suggested upon the argument that there was a rule of the supervising inspectors making it obligatory upon a crossing steamer to avoid the one having the right of way by porting her helm in all cases. But no such rule is incorporated in the record or the briefs, and it is not a regulation of which we can take judicial notice. But, even if such rule were proved, it is by no means clear that the circumstances of this case would not bring it within the exception contained in the twenty-fourth rule of 'Special Circumstances' requiring a departure from the general regulations."

The appellant contends that this declaration of opinion is such a disposition of the merits of the controversy that, the additional finding of fact being made as he prayed, the only thing left for the circuit court to do was to dismiss the libel. Had the old practice remained undisturbed, and were the case again presented to the supreme court with nothing added to the old record but the new finding, it is probable that court would make such a disposition of the suit. But the situation is wholly different. All the testimony in the case came before the circuit court on the second hearing and by the appeal is brought before this court, and the existence of the very rule of the supervising inspectors, which the supreme court refused to consider because it was not proved, is now a fact in evidence. Under these circumstances it was clearly the duty of the circuit court to pass upon the whole case, and in disposing of this appeal we are not constrained by the expressed opinion of the supreme court upon the incomplete case which that tribunal had before it; and, indeed, the supreme court itself most carefully avoids passing finally upon the rights of the parties.

The rule of the supervising inspectors which has been referred to is as follows:

"Rule 2. When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other, as if meeting 'head to head' or nearly so, and the signals by whistle shall be given and answered as in that case specified."

And in directions accompanying the diagram referred to it is provided that:

"A. [the vessel having the other, B., on her starboard hand, and being herself on the port hand of B.] should put his helm to port and pass astern of B., while B. should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam whistle, as required by the rules when passing to the right."

That when they sighted each other the Packer had the Wolverton on her starboard hand seems not to be seriously disputed. After a careful consideration of the testimony, we are satisfied that she was herself on the port bow of the Wolverton. Such is the concurrent testimony of all libellant's witnesses, and the Packer's pilot at first so stated, although he afterwards insisted that the Wolverton was head on, and later that he was on her starboard side. The vessels were therefore in the situation where the inspectors' rule required a vessel situated as the Packer was to "put his helm to port and pass astern" of the other, "having previously given one blast of the steam whistle." The Packer did not do so, nor did she even hold her course, which her counsel contends

was sufficient to insure safety, provided the Wolverton made no change. She was under a starboard wheel when she saw the Wolverton; at once blew two whistles, and, although no answer was received, immediately starboarded still more. So far as her liability is concerned, the only question is, was this violation of the rule, excusable, or, if not excusable, it is plain that it did not contribute to the catastrophe? That the Wolverton was also in fault would not warrant a reversal in this case. The Atlanta was free from fault, and is entitled to a judgment against either vessel which it libels and shows to be guilty of a fault contributing to the collision.

The opinion of the supreme court discussed the question solely from the point of view of a vessel obliged to fulfill the requirements of the nineteenth rule of section 4233, (the starboard-hand rule,) which directed her to keep out of the way, but yet left her the choice of thus keeping out of the way either by porting or starboarding, although ordinarily that duty of avoidance is performed by porting, and passing under the stern of the other vessel. The utmost that is held by the supreme court in this case is that upon the facts before it there might be found sufficient excuse for the Packer's undertaking to perform that duty by crossing the bows of the approaching vessel. But one most important fact was not before that court. By reason of the circumstance that the record contained no proof of the rules of the supervising inspectors, it was constrained to ignore the fact that, besides the considerations of light and weather, courses, bearing, speed, and distances, there was another element of the situation, essential to a correct decision, to be taken into account by the master of the Packer, namely, that he was navigating in waters where a local rule directed his choice of maneuvers, and advised the approaching vessel what that choice would be. If an effort by starboarding to cross the bows of an approaching vessel would have been "attended with great danger" if attempted at night or in thick weather, it would seem to be equally dangerous when attempted in the light of a controlling rule of navigation which clearly advised such approaching vessel that such effort was precisely the one thing which would not be attempted, and directed that vessel not only to keep her course, but even to assist a diametrically opposite maneuver by herself porting. That the supervising inspectors have made rules applying to navigation in the waters where these vessels were is now proved. That one of those rules covers the situation in which they found themselves at sighting is plain. Their authority to make such rules was not disputed on the argument; nor on the point involved here is there any apparent inconsistency between them and the rules of section 4233. The rules prescribed by authority, so far as they apply, constitute the law by which courts must test the navigation of vessels when brought in question before them. One of the witnesses, an experienced tugboat pilot, ingenuously remarked that "the law is against our rules of navigation around here;" that "there is no law in this world ever can be made, in my opinion, to regulate the towing or sailing around the harbor of New York;" and that "the law,

as I understand it, is made by men that don't understand it." All this may or may not be so, but a rule regulating the movement of a boat situated as the Packer was has been made, and violation of such rule is a fault, unless the vessel violating it can show some excuse, such as the twenty-fourth rule of section 4233 contemplates, for her disobedience.

The supreme court held that it was "by no means clear that the circumstances of this case would not bring it within the exception contained in the twenty-fourth rule of 'Special Circumstances,' requiring a departure from the general regulations." But the whole case was not before that court, and we concur with both the district and the circuit court in the conclusion that the Packer might, on first seeing the Wolverton, have gone right out from the eddy into the East river tide, and thus have got around the Atlanta in the way prescribed by the inspectors' rules; that there was no "immediate danger" in such a maneuver, and no condition in the situation which would have rendered it unsafe for her to take her course to starboard. It would undoubtedly have been inconvenient for the Packer to do so. The tide would have swept her round, and far astern of her course. She would have had to make up her lost ground with a heavy tow against an ebb tide. But mere inconvenience will not excuse her departure from the rules. Such departure must be "necessary to avoid immediate danger." Rule 24. It may have been proper for the Packer to suggest to the Wolverton, as she did by her two-whistle signal, that they should agree to courses, which would enable them to pass each other otherwise than as rule 2 required, thereby making her own navigation easier, and not seriously inconveniencing the Wolverton,—a maneuver which, if co-operated in by the Wolverton, would seemingly have been free from any risk of collision; but she had no right to depart from the rule, in the absence of an expressed assent on the part of the Wolverton, simply for her own convenience.

The district judge exonerated the Packer on the ground that a "prevailing custom in navigating around the Battery on an ebb tide" gave her the right to insist on keeping near the piers, notwithstanding the inspectors' rule. There may be such a custom, but in the record before us there is not sufficient evidence to prove it. Three witnesses testify to its existence, but twice that number—of equal experience in harbor navigation—swear that, though vessels do frequently pass each other in that way, there is no rule or general custom as to which side of each other they shall go. The mere fact that vessels often agree with each other to depart from the rule when rounding the Battery is not sufficient to excuse the vessel which, without securing assent to such an agreement, takes upon herself the responsibility of departing from it, merely for her own convenience. We are unable to find that the failure of the Packer to obey the rule did not contribute to the collision, and therefore concur with the circuit court.

As to the navigation of the Wolverton, it is unnecessary for us to express an opinion, as she is not before the court.

Decree of circuit court affirmed, with interest and costs.

FARMERS' LOAN & TRUST CO. et al. v. NORTHERN PAC. R. CO.,
(WISCONSIN CENT. CO. et al., Interveners.)

(Circuit Court, E. D. Wisconsin. September 30, 1893.)

1. RAILROAD COMPANIES—RECEIVERS—LEASED LINES—ADOPTION OF LEASE—WHAT CONSTITUTES.

The appointment of receivers for a railroad system, and their taking possession of a leased line, does not of itself work an assignment or adoption of the lease so as to make the receivers liable for the stipulated rental. They have, as a general rule, a reasonable time to determine whether they will adopt the lease, or will merely pay to the lessor the net earnings of its road, subject always to the lessor's right to re-enter for condition broken. But where the lessor immediately demands of the receivers and of the court either an adoption of the lease or a surrender of the road, and against its protest a decision is delayed for several months, in order to determine which policy is expedient, then the receivers should equitably pay the full rental during the time of their possession. Especially is this true when the receivers were appointed at the request of the mortgagees, and upon their allegations that, in order to prevent ruinous sacrifices, the system must be held together, and operated as a unit. *Railroad Co. v. Humphreys*, 12 Sup. Ct. Rep. 787, 145 U. S. 82, distinguished.¹

2. SAME—RENTALS—SET-OFF BY RECEIVERS.

The receivers of a railroad system cannot set off as against a claim for rentals accruing to a leased line during the receivership any cross demands alleged to have accrued to the lessee prior to the receivership, since the two claims arose in different rights.

3. SAME—INSOLVENCY OF LESSOR—PROVISIONS OF LEASE.

In such case it is immaterial that the lessor is insolvent, when the lease provides for an arbitration of the matters claimed as a set-off, and expressly declares that the pendency of such arbitration shall not interfere with the operation of the lease, and that all payments and transactions under the lease shall continue exactly as if no controversy had arisen.

In Equity. Bill by P. B. Winston, the Farmers' Loan & Trust Company, and others, against the Northern Pacific Railroad Company, for the appointment of receivers, etc. Heard on the intervening petition of the Wisconsin Central Company and the Wisconsin Central Railroad Company for payment of rental during the receivership and other relief. Petition granted.

Geo. P. Miller, for complainants.

L. D. Brandeis and Howard Morris, for interveners.

John C. Spooner, for the receivers of the Northern Pac. R. Co.

JENKINS, Circuit Judge, (orally.) On the 26th of September an order or decree was entered directing the receivers of the Northern Pacific Railroad Company to surrender the possession of the leased lines to the lessors, the Wisconsin Central Company and the Wisconsin Central Railroad Company, based upon the original petition of the lessors of the 18th of August, and their supplemental petition of the 11th of September.

The Wisconsin Central Company and the Wisconsin Central Railroad Company, the lessors, now move the court for a further order

¹Compare *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. Rep. 268.

or direction upon the footing of the order of September 26th, requiring the receivers to account to and pay to the lessors rental for the leased lines during the time of their occupancy by the receivers, upon the basis of the stipulated rental in the contract.

This application is opposed by the receivers upon two grounds: First, that compensation for use is to be measured either by the net earnings during the period of use or by the value of the use to be ascertained, and not by the stipulated rental of the contract; and, second, that whereas the Northern Pacific Railroad Company has an unadjusted and disputed claim for betterments and otherwise in excess of all previously accrued rentals due from that company to the lessors, which claim is now, under order of the court, before a master for adjustment, any order of payment should be withheld until such adjustment, and the ascertained amount over and above the amount of rentals accrued before the receivership should be allowed to be set off against the amount to be allowed for the use of the leased lines during the possession by the receivers.

That we may readily ascertain the principles of law which apply to and must govern the ruling upon these questions, it is important to accurately understand the relative positions of the parties interested, and the facts upon which the contention rests.

The bill was filed by the Farmers' Loan & Trust Company as trustee for the holders of the bonds issued under various mortgages specified in the bill upon the main and branch lines of the Northern Pacific Road west of St. Paul and Ashland, and also as trustee under the collateral trust indenture of May 1, 1893, by which the floating indebtedness was to be funded upon certain personal securities lodged in trust with the trustee; and by the firm of William C. Sheldon & Co. and P. B. Winston, as stockholders and creditors of the Northern Pacific Railroad Company. The bill was filed in behalf of all other stockholders and creditors of the company who might choose to become parties thereto.

The bill declared that the Northern Pacific Railroad Company constructed and maintained its various lines of railroad, with branches and feeders, from the city of Ashland, Wis., to Tacoma, in the state of Washington, and to Portland, in the state of Oregon. It also asserts the lease from the Wisconsin Central Company and the Wisconsin Central Railroad Company under which the Northern Pacific Company operated the Central lines and the Chicago terminals of the Chicago & Northern Pacific Railroad Company, whereby, says the bill—

"The defendant, the Northern Pacific Railroad Company, has acquired important terminal facilities for freight and passenger traffic in the city of Chicago, and the ownership and control of important belt lines of railroad, furnishing connections with every trunk line entering the city of Chicago, and with the largest and most important industries located in and about that city."

The bill also informed the court that—

"All of said lines of railroad, telegraph lines, and property have been, and are now being, operated by the defendant as a unit, forming one vast rail-

way system, known as the Northern Pacific System, the maintenance of every part of which is essential to the proper operation of the remainder."

It also declares to the court its ownership of the stock of the Chicago & Northern Pacific Railroad Company to the extent of \$15,100,000, being the majority amount thereof; and that to preserve valuable railway connections and terminal facilities at Chicago, acquired under the lease, and the ownership of the stock, it was essential that the interest on the bonds issued by the Chicago & Northern Pacific road, amounting to \$26,180,000, should be promptly paid, the terms of the lease complied with, and that no default in either of said obligations be permitted to occur. It also appeared that the Northern Pacific Company was the owner of at least some three million of the Chicago & Northern Pacific bonds, and of the entire issue, six million, of the Chicago & Calumet Terminal Railway Company's bonds.

The bill further gave the court to understand that—

"The said railroads and property, as now held and controlled by the defendant as aforesaid, form an important trunk line, which constitute one of the most important ingredients of its value, and that its severance would result in a ruinous sacrifice to every interest in the property; and that unless this court, in view of the impending and inevitable defaults as aforesaid, will deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors will assert their remedies in different courts in said several counties; that a race of diligence will result, and judgments and priorities will be attempted; that levies and attachments will be laid upon engines and cars of the defendant, which will greatly interfere with and ultimately prevent the defendant from the proper discharge of its duties as a public carrier; that the United States mails will be stopped; that the defendant will be unable to fulfill its charter duties to the government of the United States and to connecting railroads; that commerce between the several states will be interfered with; that communication between many cities, towns, and places which are wholly dependent upon said railroads will be interrupted; that serious and irreparable injury to their trade and commerce and their general prosperity will result; that divers of the lessors of the railroads now operated by the defendant as aforesaid will enforce the re-entry covenants of their leases; that the continued default of the mortgage debts will, by the terms of the various mortgages, produce the immediate maturity of all the bonds secured by the said mortgages; that a vast and unnecessary multiplicity of suits will result, and a most important and valuable property will be dismembered by the clashing decrees of many courts at the suits of separate creditors; that said property may be shielded and preserved as a valuable single trust property by adequate judicial protection, and the sums due and to become due to the defendant's bondholders and creditors secured and ultimately paid in full. But your orators aver that unless such a course is pursued, to wit, the taking of the property into judicial custody, said property will be dismantled, dissipated, and dismembered, and vast sums of money will be lost to the various creditors and stockholders of said company, and the public interests seriously affected. And your orators aver that the unity of the property and its integrity as a whole, as now held and operated, constitute one of the most important elements of its value, and that to permit its severance will result in ruinous sacrifice of every interest in said property."

It was further charged that "part of the said Northern Pacific Railroad is located in the district embraced within the jurisdiction of this court." That, of course, refers to the eastern district of Wisconsin, and could only comprehend the Wisconsin Central

lines so leased, no other part of this road lying within this district.

The prayer of the bill asks the court, among other things, to fully administer the trust fund in which the complainants are interested, consisting, says the bill—

"Of the entire railroad system, lands, and assets of the Northern Pacific Railroad, to marshal its assets, ascertain and determine the priority of liens upon each and every part of all the said system of railway. That for the purpose of enforcing the liens and equities of the holders of the demand loans and of the floating debt of the defendant, the preferred stockholders, and of the various bond and lien holders, as well as to preserve the unity of said system as it has been for years maintained and operated, and prevent the disruption thereof by separate executions, attachments, and sequestrations, the occurrence of which will be unavoidable in view of the inevitable defaults in interest which will soon occur, your orator prays that this court will forthwith appoint one or more receivers of the entire system of railroads held and operated by the defendant, and of all the equipments, material, machinery, supplies, moneys, accounts, choses in action, shares of stock, bonds, and assets of every description, and wheresoever situated, belonging to the defendant, and of all said lands and land grants, leasehold contractual rights and property belonging to the defendant, with authority to manage and operate the same; and the officers, managers, superintendents, agents, and employes of the defendant be required forthwith to deliver up the possession of all and singular each and every part of the said property over which the receivers shall be appointed, wherever situated."

Upon the prayer of the complainants the court appointed receivers of all the property of the defendant corporation, including the railways leased by the Wisconsin Central Companies, with direction to the receivers to take possession and operate the entire system. Under this order the receivers took possession and operated the entire system, including the Wisconsin Central lines and the Chicago terminals, until possession of the lines and terminals was surrendered to the Wisconsin Central Company and the Wisconsin Central Railroad Company, the lessors, by direction of this court, on the 26th of September, 1893.

Within three days after the filing of the bill and the appointment of the receivers, the lessors, the Wisconsin Central Companies, applied to this court by intervening petition, praying—First, for payment by the receivers of rentals accruing under the lease prior to the receivership, and in accordance with the terms of the lease; and, second, that the receivers be directed to apply for leave to adopt the lease in its entirety, and, failing such election, that the companies' lessors be declared entitled to resume possession of the demised premises. Upon that petition the court directed the matter to be heard on the 23d of August. On that day, at the request of the receivers, time was allowed them until the 30th of August to file answers to such intervening petition. At the adjourned day answers were filed, by which the receivers insisted that they had not had reasonable time to determine whether the interest of the trust estate required the adoption or rejection of the lease and the operation of the leased lines, and requested further time, which was allowed, against the protest of the Wisconsin Central Companies, and the receivers were required to report their determination upon the question by the 15th of September.

On the 11th of September the Wisconsin Central Companies filed their supplemental petition, alleging defaults in the payment of rental under the lease, and a re-entry upon the demised premises, and prayed the immediate restoration to them of the possession. On the 18th of September, 1893, the receivers filed their further answer and report, asserting their conclusion that it was inexpedient to operate under the lease, and recommending that the prayer of the supplemental petition of the Wisconsin Central Companies be granted, and possession restored to them. This restoration was contested by the Chicago & Northern Pacific Railroad Company, and, after prolonged argument, the court, on the 26th of September, decreed a delivery of the possession to the Central Companies of the demised premises.

These I believe to be the essential facts with respect to the possession and operation of the leased lines by the receivers upon which the determination of the question of the measure of compensation to be awarded for such possession must be determined.

The general principle by which questions of this character are to be ruled is well stated by Mr. High in his work upon Receivers, (section 273:)

"As a rule, receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts. Receivers who have been appointed over a corporation, and who have accepted the trust, and taken possession of the assets, do not thereby become liable for the rent of the premises held by the company under a lease, nor can they be held liable until they elect to take possession of the premises, or until the doing of some act which would in law be equivalent to such an election. But when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such case being the common liability of the assignee of a lease, and not for the debts due from the corporation; and in such a case, the facts being undisputed, it is proper for the court to direct the receivers to make payment to the lessor without a reference to determine the matter."

There appears to be no dispute with reference to that general principle as announced by Mr. High. It is restated by the supreme court in perhaps stronger and more emphatic terms in the case of *Oil Co. v. Wilson*, 142 U. S. 313-322, 12 Sup. Ct. Rep. 235, in these words:

"The receiver did not simply, by virtue of his appointment, become liable upon the covenants and agreements of the railway company. Upon taking possession of the property he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it."

In other words, when the court, upon the petition and at the prayer of the complainant, appoints receivers, who are directed to take possession of the leased lines of railway operated in connection with the main line, such receivers take by order of the court, and do not, therefore, by the mere act of such possession, become assignees of the term; they having, so to speak, a breathing space to determine whether or no they will assume the cove-

nants of the lease. This is because of the necessities of the case. There is no other person to take immediate possession from an insolvent corporation in the interest of the public; and as, because of the public nature of the enterprise, the road must be kept a going concern, the performance of the duties of common carrier must not be permitted to be interrupted, the mails of the government must be transported, therefore temporary possession is allowed to be taken, and, as a general rule, compensation for such possession must be measured by the terms of the instrument under which such possession was originally acquired and held. But that possession does not ordinarily operate to render the receivers assignees of the term. Undoubtedly there are exceptions to the rule, arising because of the peculiar circumstances of the cases, which equitably require the application of a different measure of compensation. Such an exception I consider to be the case of *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. Rep. 787, which is urged upon the attention of the court as determining a different rule.

In order to ascertain whether that decision is pertinent and binding here, the facts of that case need to be carefully considered. The Wabash, St. Paul & Pacific Railroad Company, on the 27th of May, 1884, filed its bill, making defendants various parties interested in the lines of the Wabash Company as lienors, mortgagors, or trustees under deeds of trust covering the lines or portions of them, including the trustees of the general mortgage and the Quincy Railroad, lessor to the Wabash Company. The Wabash Company asked that possession should be taken of this road and these leased lines, and that they be operated by the receiver until such time, as to the leased roads, as he should elect with reference to the adoption of the leases in order to the protection of the interests of all concerned.

On the 29th of May, before the receivers took possession, and on the 26th of June following, they petitioned the court for advice with respect to the payment of interest on the bonds of the Quincy Company, which, by the terms of the lease, the insolvent company was required to pay. The receivers notified the court that the operation of the road has not sufficed to pay its operating expenses and the cost of maintenance, and interest upon the bonds. An order was made upon that petition that, until otherwise directed, the receivers should keep account of the earnings, and as to the lines which had not earned the interest, including the Quincy Company, that the receiver should make report thereof quarterly, showing the income upon each of the leased lines. On the 16th of December following, the Quincy Company intervened by petition, setting forth that it had no means to pay the interest on its mortgages; that there had been default, and that there would result foreclosure if the default should continue; that it could not obtain payment of the Wabash Company; and it prayed that that interest might be paid out of the funds of the Wabash Company in charge and under control of the court or its receivers, or that the court order that the lease be transferred to another

railroad company, which company would pay the interest coupons in arrears, and would give security to pay accruing interest.

Upon that petition it was ordered that if, within 60 days, the St. Joseph & Quincy road should pay the interest, and would assume by proper agreement the liabilities and obligations to be performed by the lease, then the lease should become assigned and vested in the St. Joseph Company free from any right of the Wabash Company. That was never done. On April 16, 1885, the receivers prayed order with respect to the future operations of the leased lines, and concerning the payment of the respective rentals which the Wabash Company had agreed to pay, upon which the court ordered that, where a subdivision earned no surplus, simply paid operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once and assert his rights. While the court will have to operate such subdivision until some application be made, yet the right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure, will be promptly recognized.

Afterwards, on the 15th of July, 1885, upon demand of the Quincy road, it obtained possession by order of the court. Subsequently a decree of foreclosure of the property of the Wabash Company was enforced, and the proceeds of the sale were paid into court. An application was then made by the Quincy road that the court should order out of the proceeds of the Wabash property the payment of the rental on the Quincy line accruing during the receivership, and according to the terms of the lease.

The court, in determining the question, referred to the case of Oil Co. v. Wilson, quoting from the opinion of the court the expression to which I have adverted, and asserted an approval of the doctrine that, as between the mortgagees invoking the interposition of the court and the lessor, the agreed rental was the proper payment to be made for the use of the rolling stock under the particular contract there in question; but say, as to the case then before them, that there was no resistance by the receivers, or impediment interposed by them to the re-entry of the Quincy Company, that the receivers did not remain in possession, nor were they authorized by the court to so remain as to render the lessor unable itself to resume possession. The lease gave the Quincy Company the option to re-enter, and put an end to it upon default in payment of rental continued for 30 days; that if the appellants, the Quincy Company, had applied to the circuit court for possession of the property earlier than they did, the court, in view of the case disclosed by the record, would not have declined to hand it over; that when the company applied for possession it did not avail itself of the order of the court; that subsequently, on a renewed application, the company retook its road, freed from any liability for the enormous preferential indebtedness of the Wabash Company, and with its public duty discharged up to that time by the receivers at a loss of more than \$20,000; and that the lease had not theretofore been canceled by the court,

because it was considered that that ought not to be done without the assent of the lessor. The court concluded upon those facts that the receivers did not become so committed to the terms of the lease as by reason thereof to be subjected to an obligation requiring the rental to be paid out of the property of the Wabash Company in preference to the payment of the mortgagees of that property; and they say that the rental was not an expense originating in the process of administration by the court, and the road was surrendered as soon as the lessor would take it. Nor did the mortgagees consent to have the claim charged upon the corpus of the property in preference to their mortgages, and therefore there were no equitable grounds upon which the Quincy road was entitled to a preference in the distribution of the proceeds of the sale of the mortgaged property.

There is, I think, a manifest distinction between that case and the one at bar. There the lessor—the inactive lessor—sought to obtain preference over a mortgagee not applying for the receiver, a lessor who sought to obtain rental pursuant to the terms of the lease, when he was a party to the suit, and could have asked and would have received possession, but allowed the road for a long time to be operated by the receivers, knowingly at a loss. Here possession of these leased lines was asked for by the trustee of the mortgages. The court was asked by the trustee to take possession of this leased line, and operate it in connection with the main line of the defendant company, as a unit, and to keep and maintain in its integrity and operate the entire system of roads from Chicago to the Pacific. In other words, as plainly as language could state it, the trustee, the Farmers' Loan & Trust Company, asked the court to adopt this lease, and to enter into possession and operate it in the interest of the bondholders.

In the Quincy Case the bill was filed by the insolvent company. It was unable longer to continue the operation of the road, and petitioned the court, in the interest of every one interested, as well as in its own interest, to take possession of the leased lines; and the lessors were parties to that suit. And the lessors, under those circumstances, without application to the court for possession, allowed the road to be operated from May 29, 1884, to July 15, 1885, by the receivers, at a loss to its knowledge, and without the slightest attempt to obtain possession. It could well have been held in that case that such action or nonaction of the lessor would be held in equity to be an assent to the operation of that line by the receivers.

But here possession was not only taken at the request of the trustee of the mortgage, upon the assertion that the severance of the trunk line to Chicago would result in ruinous sacrifice, but it has been continued against the continued protest of the lessors, who almost from the date of the filing of the bill have sought to compel the receivers to determine whether or no they will maintain possession, adopting the lease, and, if not, that possession should be surrendered to the lessors; and also, when delay became inevitable, by the demand and act of re-entry they put themselves in the legal

position where they could lawfully require the surrender of the premises, unless the court should, upon principles of equity, remove the forfeiture, and allow the possession to continue in the receivers, adopting the lease and paying all past due rentals.

So that here the lessors have been continuously knocking at the door of the court demanding possession of the demised premises, and possession has been withheld from them against their consent, and against their protest.

It appears to the court that under such circumstances it would be inequitable to say that the court or its receivers should hold possession of the demised premises, refusing to pay rent accruing before the receivership, taking from the lessor their estate without their consent, express or implied, and saying to them: "While we take and withhold that possession until it shall be satisfactorily determined whether it is profitable or not to operate the road, you, the lessee, shall not have your rental pending that determination according to the stipulation of the lease under which possession was taken." This possession was held that it might be resolved whether, in the interest of the bondholders and creditors of the Northern Pacific road, it would be expedient to operate the leased line. It was so taken at the request of the trustee representing the bondholders, and at the request of the creditors of the road. Under those circumstances, I perceive no reason why the general rule should not prevail, and no equity to take it from without that rule. I see no reason, if this leased road has been operated at a loss, as was asserted in general terms by the receivers, that that loss should not be visited upon those at whose request possession was taken, rather than that they should be permitted to experiment with the property of another, without paying that other the stipulated rental of the lease under which their insolvent debtor had possession, and through whom, and through whom alone, the trustee and the general mortgagees could have obtained possession.

The court therefore holds, upon the facts here disclosed, for the occupation of this road by the receivers, compensation must be paid, measured by the stipulations of the lease.

As to the second question:

The Central Companies, under the stipulations of the lease, were entitled to receive from the Northern Pacific Railroad, for unpaid rental of the Central lines up to the time of the receivership, about \$475,000. The receivers concede substantially that this is so, but they have alleged an offset against that rental to an amount somewhat near a million of dollars. That claim and offset is denied, and the matter was heretofore referred to a master to determine it, and is now pending before him. The receivers now ask to set off so much of that claim as will satisfy the sum that may be due for compensation by reason of their possession of the premises. Of the amount of offset claimed, about \$156,000 is for equipment under article 11 of the lease; about \$33,000 is for rentals under article 16 of the lease; and about \$414,000 is for betterments and improvements under article 19 of the lease. If those amounts should be deducted from the claim in offset, there would not exist more than

enough, if the claim should be sustained, to satisfy the amount of rentals accruing prior to the receivership.

The principle upon which courts of equity act in respect to the matter of offset is perhaps well stated by Mr. Justice Story in *Dade v. Irwin's Ex'r*, 2 How. 383. "It is clear," he says, "that courts of equity do not act upon the subject of set-off in respect to distinct and unconnected debts, unless some other peculiar equity has intervened calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other." See, also, *Greene v. Darling*, 5 Mason, 201; *Gordon v. Lewis*, 2 Sum. 628; *Id.* 143; *Manufacturing Co. v. Armstrong*, 34 Fed. Rep. 94. There have been many adjudications to the like effect, and establishing the same principle. It has been held that in equity a debt cannot be set off against another if they are in different rights, as, for example, a demand in the character of a trustee or executor cannot be set off against a debt due from the trustee or executor personally, although the executor gives evidence to show that he is in fact personally benefited and entitled to the amount which is due to him in the character of executor.

In one case A. was the executor and trustee of a fund as to a moiety of which he was entitled beneficially. The fund was in the hands of B., who died insolvent. It was held that A. could not set off the debt to the trustee against a debt due to B.; in other words, that the claim and offset must exist in the same right. It could not be permitted that a receiver of a railroad who had purchased supplies for the purpose of operating the road should be allowed, when called upon for payment, to set off against that obligation a debt due from the seller of the supplies to the company of which he was receiver. It would be manifestly inequitable, especially if that claimed debt were disputed and unliquidated.

"The mere existence of cross demands," says the vice chancellor in *Dodd v. Lydall*, 1 Hare, 337, "does not of necessity give a right of equitable set-off; and certainly the mere pendency of an account out of which a cross demand may arise will not confer such a right."

It was decided in *Rawson v. Samuel*, Craig & P. 178, that in a case of cross demands arising out of transactions not necessarily connected with each other, a court of equity is bound to look into all the circumstances of the case, and see whether an equity is made out for blending the two matters together at the expense of possible delay in concluding one of these matters. That was where the claim arose under the same right; but the equitable claim of set-off here asserted arose in favor of the Northern Pacific road against the Central Companies, and is sought to be set off against an acknowledged claim of the Central Companies against the receivers for the use and occupation of its property by the receivers under order of the court. There is a decision in *Osgood v. Ogden*, 3 Abb. Dec. 425, which perhaps throws some light upon the principles by which the question is to be determined. A receiver of an insolvent corporation, suing on a cause of action on which the company itself

could not have sued, to set aside a transfer, or recover back payments made in fraud of the creditors of a corporation, represents the creditors, and not the corporation, and the defendants were not permitted to interpose as a set-off a claim against the corporation.

Treating this as a suit by the Central Companies against the receivers for use and occupation, the receivers represent, not the Northern Pacific Railroad Company, but the creditors of that company, and, under that authority, could not be permitted to set off a claim in favor of the Northern Pacific Company against the Central Companies. In *Otis v. Shantz*, 55 Hun, 603, 8 N. Y. Supp. 293, —and the same principle is asserted by *James v. McPhee*, 9 Colo. 486, 13 Pac. Rep. 535, and *Beeler v. Turnpike Co.*, 14 Pa. St. 162,—it was ruled that a creditor who purchases goods from an assignee for the benefit of creditors cannot set up in the way of counterclaim, in action for the price, any matters which accrued against the debt, or before its assignment. So, in the case of *Cook v. Cole*, 55 Iowa, 70,¹ one who had rendered legal services to the corporation, been employed by its officers during the pendency of an action for the appointment of a receiver of its property, and before the property passed under control of the receiver, was held to be entitled to set off the value of such services against an account due by him to the corporation, and which so accrued prior to the receivership, but not against a further account which accrued during the administration of the receiver. In other words, underlying all these cases is the principle of equitable set-off, that it must exist and arise out of the same right, and not out of the right of another. *Duncan v. Lyon*, 3 Johns. Ch. 351. One would not be permitted to set off against a claim arising between one in a representative capacity and himself the debt due by the estate represented to himself. Nor would an executor, or other trustee, be permitted, as against a claim which he had originated, and owed to another, to offset a debt due by that other to his *cestui que trust*. They arise out of different rights, and are not the subject of equitable set-off, unless there be circumstances which control the general rule, and equitably require such set-off. It is stated here, and it may be assumed, perhaps, from the petition filed, that the Central Companies are insolvent. It at all events appears that they are insolvent in the sense that they are unable to meet their obligations as they mature. Whether they are or are not insolvent in the sense of being bankrupt is a question upon which the court has no information. But is the fact of insolvency of itself a sufficient equity to authorize the court to exercise its equitable powers to compel a set-off? *Lockwood v. Beckwith*, 6 Mich. 168. It is here asserted that one-half part of the claim sought to be set off arose under and in execution of the provisions of the lease. The twenty-eighth article of that lease contemplates that any claim arising under the lease should be determined in a particular way. But it was expressly stipulated in the instrument that no controversy with respect to any matter arising under the contract should be allowed to interfere with the operation of the lease pending the arbitration which the contract

provided should be had, and until an award should be made by the arbitrators upon the controversy. All settlements and business and payments to be transacted or made under the terms of the lease should continue to be transacted and made in manner and form existing prior to the arising of such questions, and as if no such controversy had arisen. The Northern Pacific Railroad, continuing in possession of its property and of these leased lines, could not, as against the rentals, have set off the unarbitrated and disputed claims here asserted. It was expressly provided that they should not be considered or deemed as set-offs while unliquidated and undetermined. The case is therefore withdrawn from that equitable consideration that sometimes prevails where the one party has incurred indebtedness upon the faith of, and in dependence upon the offsetting of, the claim against the other.

These receivers, with respect to their use of this road, can stand in no better plight than the Northern Pacific Railway Company. If they have the right to offset any claim of the Northern Pacific road, they can only offset it under the terms and provisions of this lease; and that lease denies the right so to offset against rentals disputed and unadjusted claims.

It appears to me, therefore, that the offset claimed ought not to be permitted to interfere with the payment for use and occupation by the receivers. By the terms of the lease, the rentals are not payable until 60 days after they have accrued. It is reported to the court that the receivers have set aside, under a previous order of the court, the percentage of gross earnings required by the lease as rental to the lessors, and that a portion of the earnings has not been collected, and cannot be for some time to come.

The order will therefore be, with respect to compensation for use of the Wisconsin Central lines proper, that compensation for such occupancy by the receivers be measured by the stipulated percentage of gross earnings stated in the lease; that the set-off be not allowed; and that the receivers of the Northern Pacific Railroad from time to time pay to the receivers of the Wisconsin Central Companies the proportion of gross earnings which under the lease is reserved as compensation, less a rebate of interest at the rate of 6 per cent. per annum from the time of the payment until maturity, as stipulated in the lease.

Any question under the lease with respect to the possession and operation of the Chicago & Northern Pacific road is reserved.

NOTE. See *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. —, 14 Sup. Ct. Rep. 86, decided November 20, 1893.

NEW YORK, P. & O. R. CO. v. NEW YORK, L. E. & W. R. CO. et al.

(Circuit Court, N. D. Ohio, E. D. October 21, 1893.)

1. RAILROAD COMPANIES—RECEIVERS—LEASED LINES—ABROGATION OF LEASE.

The receivers of a railroad company have no power to abrogate a valid lease of railroad property, made to it by another company; and, as between lessor and lessee, the lease must stand until abrogated under some of the conditions contained therein.

2. SAME—ADOPTION OF LEASE.

The mere appointment of receivers for a railroad system, and their taking possession of a leased road, does not, even if the bill shows that receivership was brought about for the purpose of preventing a disintegration of the system, render them assignees of the lease, or require their adoption thereof, so as to make the rental a preferred claim which they are bound to discharge; nor does the fact that they continued to operate the leased line for some time work an adoption of the lease when the lessor has never demanded a surrender of its road, although entitled to do so because of breach of condition by nonpayment of rent.¹

3. SAME—RENTALS ACCRUING PRIOR TO RECEIVERSHIP—PRIORITIES.

Rental accruing under a railroad lease prior to the appointment of receivers for the lessee is an unsecured liability entitled to no priority.

4. SAME—CHARACTER OF LEASE.

It is immaterial in such case that the lease provides that when the annual gross earnings of the demised road are less than or equal to a fixed sum, the lessee shall retain a certain percentage thereof, and pay over the remainder to the lessor, for this merely measures the rental by the earnings, and the lessor has no right to any specific money.

5. SAME—EXTENSION OF RECEIVERSHIP—ANCILLARY AND INDEPENDENT SUITS—COMITY.

Where a railroad receivership has been extended by ancillary appointment over the property of the company in another jurisdiction, the court in the latter jurisdiction will not, even if it has the power, extend the receivership to, or appoint additional receivers in, another independent and original suit, brought by a corporation which has leased its road to the insolvent company, upon unsupported allegations that the original receivership was brought about by fraud and collusion, and that the receivers are hostile to the lease; for the rule of comity, as well as the interests of all concerned, require that the road should be operated under one management, and as an entirety.

In Equity. Bill by the New York, Pennsylvania & Ohio Railroad Company against the New York, Lake Erie & Western Railroad Company and John King and John G. McCullough, receivers. Heard on rule to show cause, etc. Rule discharged.

Statement by LURTON, Circuit Judge:

This cause came on to be heard at a term of the United States circuit court for the northern district of Ohio, held at Cleveland, October 9, 1893, when, after argument by counsel for complainant and for the defendants, it was ordered that the defendants appear and show cause at chambers in the city of Cincinnati, on the 14th October, 1893:

"(1) Why it should not be adjudged and decreed that the said indenture of lease has not been abrogated or annulled, but continues to exist, and that all the provisions and covenants therein contained have continued and still continue to be obligatory upon the defendant company, its property and franchises, now in possession of this and other courts, in the suit and suits of the said Park, and in which receivers have been appointed.

"(2) Why it should not be ordered that the receivership aforesaid of the property and franchises of the defendant company granted and established by this court in the said suit of the said Trenor Luther Park be granted, extended, and established in this suit, and that a suitable person or suitable persons may be appointed receivers of the said property and franchises in this suit.

"(3) Why it should not be ordered and decreed therein that the receivers so appointed do continue to operate the complainant's said leased lines of railroad and property in all respects according to the terms and provisions of the said lease, and perform all the covenants therein contained and speci-

¹ Compare *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 58 Fed. Rep. 257.

fled to be performed by the defendant company; and that the said receivers keep a separate account of all the earnings of the said leased railroads and property, and file such accounts in this court at the end of each month, and the said receivers pay the rent accruing under the said lease when and as it becomes due and payable according to the terms thereof."

Upon the argument of this rule to show cause the original bill and exhibits of the complainant, filed October 8, 1893, and certain affidavits in support of its allegations of fact, were read in behalf of the complainant. In answer to the rule the defendants read the original bill of Trenor Luther Park, filed in the circuit court of the United States for the southern district of New York, and now there pending against the defendant corporation the New York, Lake Erie & Western Railroad Company, and the answer of said corporation to said bill, and the decree appointing the defendants King and McCullough receivers for the property and franchises of said corporation. There was also read the intervening petition of the complainant corporation, filed in that cause, praying for a direction to the said receivers to pay to the complainant company the past-due rents, and the rents which should accrue thereafter under a certain lease for 99 years of the railroad owned or leased by the complainant corporation to the New York, Lake Erie & Western Railroad Company; also the decree of the said court on said petition refusing the relief asked. There were also read certain affidavits controverting many of the allegations of fact contained in the bill of complaint touching breaches of the covenant in said lease concerning the preservation of the property of the lessor company by the lessee company during the continuance of the lease.

From the pleadings in the general cause mentioned and the decrees thereon, and from the affidavits thus submitted, the following facts appeared:

First. That the defendant corporation is a New York corporation, owning a line of railroad extending from Jersey City, in the state of New Jersey, to Salamanca, in the state of New York, with certain branches to Dunkirk and Buffalo. That it also operated under contracts or leases various other lines extending to the coal fields of Pennsylvania; and that it held, controlled, and operated, under a lease for 99 years, the entire line of railroad owned by the complainant company, a corporation of the state of Ohio, extending from Salamanca, in the state of New York, to Marion and Dayton, in the state of Ohio, together with certain other lines in the state of Ohio, leased by the corporations owning them to the complainant corporation. This lease by the Ohio corporation to the New York corporation was made in 1883, and was for a period of 99 years, subject to an annual rental, and subject to forfeiture upon failure to pay the stipulated rents, or upon breach of certain covenants concerning the maintenance and operation of the leased lines.

Second. In July, 1893, one Trenor Luther Park, a citizen of the state of Vermont, filed his original bill in the circuit court of the United States for the southern district of New York, "in behalf of himself and all other creditors who should join in the prosecution of his suit," and who were creditors, with or without security, of the New York, Lake Erie & Western Railroad Company, alleging that he was a creditor of said company, as follows:

(1) Three of said first consolidated mortgage bonds of the par value of \$1,000 each, interest upon which will become due September 1, 1893.

(2) One hundred of said second consolidated mortgage bonds of the par value of \$1,000 each, interest upon which will become due December 1, 1893.

(3) One hundred of the funded coupon 5 per cent. bonds of 1885 of the par value of \$1,000 each, interest upon which will become due December 1, 1893.

(4) The promissory note of said corporation, made December 1, 1892, for \$34,000, payable on demand, bearing interest at the rate of 6 per cent. per annum, payment of which note has been demanded and wholly refused, and the same is now wholly due and unpaid.

And that complainant further alleged that the sum of \$34,000 for which the note last mentioned was executed and delivered was advanced by him to the said corporation on December 1, 1892, and that the said amount, with other amounts advanced by others at or about the same time, were specially

advanced as an emergency fund to meet the immediate and pressing necessities of the said corporation, with the understanding and agreement by said corporation that the said advances should be repaid within a short time thereafter out of the earning and income of said corporation in preference to all other claims whatsoever, and that the said earning and income were and are in effect pledged for the security of such special advances; that the said corporation has not paid any part of said advances, and that it is unable to do so, but that there has been a large amount of net earnings realized, which should have been used to pay said special advances, but the same have been used by the said corporation for other purposes; "that accordingly the condition of the agreement and pledge upon which said advance was made has been broken, and remains in default, and that the complainant and others who made similar advances are entitled to a lien upon the earnings and income of the said corporation for the amount thereof."

Said bill so filed by said Park also alleged that the property of the said corporation was subject to a number of mortgages securing several series of negotiable bonds. That, in addition to its bonded debt, a large floating or unsecured debt, aggregating upwards of \$5,000,000, had been created, and that many creditors of this class were pressing for immediate payment, and about to bring suit therefor, and levy attachments on the rolling stock, material, and supplies and other property of the said corporation on hand and kept by the said corporation for necessary use in operating its railroad. Among other facts stated in order to secure a receiver and procure the administration of the property of the said company by a court of equity for the benefit of all its creditors, were these:

"That the only means whereby the said New York, Lake Erie & Western Railroad Company can pay the interest upon its mortgage bonds, including that due upon the bonds held by the complainant, or can pay its floating debts and discharge its current obligations, is by the continued maintenance and operation of its railroad system, and by the friendly interchange of business with all connecting roads, and by the prompt collection of the revenues accruing from time to time by the operation of said railroad, and by the uninterrupted use of all its railroads, rolling stock, and property whatsoever; and that any suits or attachments levied upon such revenues and property would seriously embarrass and cripple it, and diminish, if not destroy, its power successfully to operate the said road in the exercise of its railroad franchises.

"That the said New York, Lake Erie & Western Railroad Company is engaged in operating a certain railroad running from Salamanca, in the state of New York, to Marion and Dayton, in the state of Ohio, and forming an important part of its main line, by virtue of a certain lease heretofore executed between the New York, Pennsylvania & Ohio Railroad Company and the said New York, Lake Erie & Western Railroad Company, to which, and the amendments thereof, begs leave to refer for the particulars thereof. That, in order to maintain its rights under the lease, and to continue the use and enjoyment of the said leasehold property, it will be necessary, under the terms of the said lease, for the New York, Lake Erie & Western Railroad Company to make a payment of \$240,000, due to the said New York, Pennsylvania & Ohio Railroad Company on the 31st day of August, 1893, and that, unless the said payment is promptly made, it will be a cause of forfeiture of the said lease, whereby the said lessor company can terminate the same, and that the forfeiture of the said lease would be an irreparable injury to the said New York, Lake Erie & Western Railroad Company, and to the complainant as a creditor thereof.

"That the said New York, Lake Erie & Western Railroad Company is engaged in operating certain other railroads in the said states, which form important parts of its general system of railroad, and are essential to the successful operation of its main line, and that under said leases it is required from time to time to make payments of the amounts of rentals provided for thereby, in order to maintain its rights thereunder, and to continue the use and enjoyment of the said leasehold property; and that, unless the said corporation is protected from the floating debt which is now pressing, it will be unable to pay the amounts of rentals provided for by the said leases,

and will be in great danger of forfeiting its rights thereunder, and that the forfeiture of the said leases would be an irreparable injury to the said New York, Lake Erie & Western Railroad Company, and to the complainant as a creditor thereof."

The bill concluded with the following prayer for equitable relief:

"That the rights of the complainant and of the other creditors of the defendant, including all holders of its first and second consolidated mortgage bonds, in or to the property, real or personal, of the said railroad company, may be ascertained and protected, and that the court will fully administer the fund in which complainant is interested, constituting the entire railroad and assets of said corporation, and will for such purpose marshal all its assets, and ascertain the several and respective liens and priorities existing upon each and every part of the said system of railways, and the amounts due upon each and every of such mortgages or other liens, and enforce and decree the rights, liens, and equities of each and all of the creditors of said New York, Lake Erie and Western Railroad Company as the same may be finally ascertained and decreed by the court upon respective interventions or applications of each or every such creditor or lienor in and to not only said lines of said railroad, its appurtenances and equipments, but also to and upon each and every portion of the assets and property of the said corporation.

"That for the purpose of preserving the unity of said system as it has been for many years maintained and operated, and preventing the disruption thereof by separate executions, attachments, or sequestrations, the occurrence of which will be inevitable in view of the unavoidable defaults in payments of interest and other obligations which will presently occur, a receiver or receivers be appointed of the New York, Lake Erie and Western Railroad Company, and all and singular the railroads, rolling stock, franchises, rights, and property, real and personal, belonging to said company, with full power and authority to demand, sue for, collect, receive, and take into his or their possession the goods, chattels, rights, credits, moneys, and effects, lands, tenements, books, papers, and property of every description belonging to the said company, and with all the incidental powers ordinarily vested in receivers in like cases, and with full power and authority to run and operate the said railroads, mines, estates, and property owned or controlled by the said company, or in which the said company has any right or interest, and to collect and receive all the rents, issues, profits, and incomes thereof, and to apply the said income and receipts thereof under the decree of the court until such time as the trustee under the first or second consolidated mortgage shall come into possession of the said property, or for such period as the court shall order, to protect and preserve the corporate franchises, privileges, and property, and to preserve the corporate existence of the said company, and to protect and preserve the said railroads, mines, estates, and property, real and personal, from being sacrificed under any proceedings which can or may be taken and likely to prejudice or sacrifice the same."

The New York, Lake Erie & Western Railroad Company at once answered the said bill, and admitted all of its allegations, and joined in the prayer for the appointment of receivers.

Upon the filing of this bill and the answer of the corporation, the defendant King, who was at the time president of the said corporation, and McCullough, its vice president, were appointed and duly qualified as receivers of the property and franchises of the said debtor company. Bills of like character were subsequently filed in the courts of the United States for the several jurisdictions within which the line of said road extended, including the northern district of Ohio, within which was situated the leasehold interest of the New York, Lake Erie & Western Railroad Company in the line of road owned or leased by the New York, Pennsylvania & Ohio Railroad Company; and in those several jurisdictions a like order was made, appointing King and McCullough receivers for the property of said corporation within such jurisdiction. Under these several appointments said receivers have since July 25, 1893, been in entire and exclusive possession of the entire system of roads owned or leased by the New York, Lake Erie & Western Railroad Company, including the lines owned or leased by the New

York, Pennsylvania & Ohio Railroad Company, and included in the lease of 1883, as before stated.

Third. After the proceedings above stated, the complainant, the New York, Pennsylvania & Ohio Railroad Company, filed its petition in the suit of Park v. The New York, Lake Erie & Western Railroad Company, pending in the southern district of the state of New York, setting out the lease under which its road was controlled and operated by the said New York corporation, and praying that the receivers be directed to pay certain arrearages of rent alleged to have existed at date of the receivership, and that they be required to pay future rents as they should accrue, and in accordance with the stipulations of the lease. The receivers answered the petition, and insisted, among other things:

(1) That the contract between the New York, Pennsylvania & Ohio Railroad Company and the New York, Lake Erie & Western Railroad Company was not in fact a lease for a fixed stipulated rent, "but was in legal effect a contract between the two roads for the joint operation of their roads as one line for their mutual benefit, and upon a just division of profits."

(2) That the lessor company had received out of the joint earnings of the line about \$1,400 more than the actual earnings of the leased line.

(3) That the petitioner has never claimed from them as receivers, nor does it now claim in its petition, the repossession of its railroad, or the dissolution of the arrangement between them.

(4) That the receivers were not assignees of the so-called "lease," "have never assumed or been authorized to assume its obligations, but are in possession of the whole line as receivers only, and as a part of the receivership property placed in their hands to be operated and managed under the order of the court for the just and equal benefit of all parties concerned as their respective rights and priorities may be hereafter determined; and they desire only in the matter of said petition to execute such orders as the court may think proper to make upon full knowledge and consideration of the material facts and existing equities."

(5) That, in view of the many interests involved, and the insolvency of the Erie Company, and the insufficiency of the assets to pay all the just demands maturing, they ought not "to be required to pay the petitioner any more than the actual net earnings of that portion of the line in their possession which is the property of the petitioner." That any payment in excess of such earnings would necessarily come out of the earnings of other portions of the insolvent system, "and therefore directly out of the pockets of other just creditors who must, to that extent, remain unpaid." That in the judgment of the receivers they could not, in justice "to the lessors of other portions of its line which are operated at a profit, take the earnings which result from the operation of such portions to pay to the petitioner a surplus in excess of the earnings of its property, and if they do so it will result in leaving the receivers without funds to pay the rentals and interest due such other lessors and creditors."

(6) The receivers firmly insist that they were not bound to pay any sums accruing to the petitioner under the terms of the lease prior to their appointment as such receivers, "but the same constitutes a debt against the Erie Company, subject to such future adjustment as may be found equitable," and that since their appointment they had already paid as much as the net earnings of the petitioner's road amounted to, and that "they believe they will be able to continue to make such payments with reasonable promptness and in such way as to enable the petitioner to meet its necessary payments and obligations as they accrue."

This answer was supported by certain affidavits. Upon the hearing it was ordered that the prayers of the petition be refused and denied.

Upon this result being announced, the present bill was filed. Its allegations, so far as necessary to be stated are substantially these:

That the filing of the bill by Park was collusive, he having been procured to do so for the purpose of preventing the creditors of said Erie road from resorting to their usual and appropriate legal remedies. That no default had been made in the payment of the interest upon any of the bonds held by him, and that as a holder of such bonds he was not entitled to seek any

relief whatever. That as an unsecured creditor by promissory note for \$34,000 he was not entitled to represent any other creditors than himself. That the receivers appointed were the executive officers of the Erie Company, and that their appointment was wrongful and collusive. That they are the same officers who had "violated and disregarded the covenants of the lease, * * * the same persons who have committed and permitted the great waste and spoliation of the complainant's leased property hereinbefore described, and the same persons who now, in their character as receivers, repudiate the lease altogether, insisting that the indenture aforesaid is not a lease, and refuse to pay the rents and perform the covenants of the indenture."

The bill continues as follows:

(1) "These so-called 'receivers,' in their actions, intentions, and purposes, are still in effect merely the executive officers of the defendant company, still continuing their hostile and wrongful course of conduct in respect to the said lease and the complainant's railroads and interests, but under the name of receivers claiming that this title and office gives them license to repudiate the lease openly, whereas, before, they were obliged to do so covertly. The facts being as above set forth, it is necessary, in order to maintain and preserve what remains of the complainant's railroads and their appurtenances, and to protect their large interest therein, both public and private, that the complainant should have redress for the violations and breaches of the said lease already committed, and protection against further acts of the same character; that the covenants of the lease should in the future be strictly enforced and performed; that the rent already due should be paid, and that payment should be made hereafter promptly as rent becomes due by the provisions of the lease. To insure these just and equitable ends and objects, it is, for the reasons above stated, necessary that the said receivers, King and McCullough, should be removed, and other impartial persons appointed in their places, or that some other person or persons not hostile to the plaintiff's rights and interests as above set forth should be associated with them; and further that the said receivership be extended to and established in this suit as hereafter prayed for in order that the fund now in the possession of this court in the suit of the said Park, consisting of all the property and franchises of the defendant company, may be made responsible and answerable for the performance of all the obligations of the said lease; otherwise the complainant will suffer, and all the interests, both public and private, involved in its property and franchises, will suffer irreparable loss, injury, and damage."

(2) That neither Park nor the receivers appointed under his bill, and at his procurement, should be permitted to repudiate the obligations of the lease concerning the payment of rentals out of any fund in the receivers' hands in view of the thirteenth paragraph of his bill, heretofore quoted. "That the rights of the complainant under the said lease have not and could not be destroyed, impaired, or in any manner affected by any proceedings on the part of the said plaintiff in collusion with the defendant company or otherwise. But nevertheless, as hereinbefore mentioned, and as will hereafter more fully appear, one of the main objects sought to be accomplished indirectly and fraudulently by means of the said suit, was and is the abrogation of the lease, and the destruction of the plaintiff's rights thereunder by judicial assistance obtained by fraudulent and collusive contrivances and devices."

(3) That the covenants concerning the maintenance of the roadway, station houses, rolling stock, engines, and tools, in quality and quantity up to the standard and condition in which they were when the lease took effect had been breached, and that great dilapidation had been suffered, the property being in such condition that large sums of money would be necessary to put it in the condition, as to quantity and quality, as when leased.

(4) That prior to the receivership rents had accrued under the lease aggregating some \$307,250; that upon application of the Erie Company an extension had been granted, and acceptances payable October 16 and November 16, 1893, taken, which had been indorsed and negotiated by the Ohio Company to meet its own fixed obligations; that since that time rents had accrued aggregating, after deducting certain payments and offsets, the sum of \$216,256.25, which was now due and unpaid.

(5) The provisions of the lease concerning the payment of rentals were substantially as follows:

"As rental for the said demised premises the Erie Company agrees that whenever the annual gross earnings of the demised premises, ascertained as herein provided, are less than or equal to six million of dollars, (\$6,000,000,) the Erie Company shall retain sixty-eight (68) per centum thereof, and pay to the Ohio Company the remaining thirty-two (32) per centum thereof."

"If under the provisions of this lease the total rental due the Ohio Company as aforesaid shall for any year amount to less than the sum of one million seven hundred and fifty-seven thousand and fifty-four dollars and eighty-nine cents, (\$1,757,054.89,) (the said sum being the amount of the ascertained actual net income of the property hereby demised for the twelve months ending the 31st of December, 1882, being the last fiscal year of the Ohio Company, as ascertained and certified by the auditors, respectively, of the parties hereto, as will appear by their audit attached hereto, and made part of this indenture,) the difference and deficiency shall be made up and paid by the Erie Company, and the sum so paid to make up such deficiency shall be retained by the Erie Company out of subsequent annual earnings which may be in excess of the minimum sum last above specified."

"In order to enable the Ohio Company to meet its obligations the Erie Company will make payments of said rental as follows, that is to say: On the tenth day of August, eighteen hundred and eighty-three, there shall be paid the sum of one hundred and twenty thousand dollars, and thereafter periodically, commencing on the tenth day of February, 1884, there shall be paid half-yearly,—that is to say, on each fifteenth day of February and each fifteenth day of August,—to the order of the treasurer of the Ohio Company, the sum of two hundred and forty thousand dollars, and, in addition thereto, there shall be paid on the first of each month in every year the sum of one hundred thousand dollars, beginning on the first of July, eighteen hundred and eighty-seven."

There were certain other provisions providing for deductions in certain contingencies and for an increase in certain others, unnecessary to be fully set out.

(6) The bill "further provides that while the said lease continues and remains in force the entire amount of gross earnings of the leased premises constitutes as against the defendant company, and those claiming under it, a fund which, raised and produced by the performance by the defendant company of all of the covenants of the lease, must in justice and equity be first applied, so far as necessary, to satisfying all the requirements of the lease, and that it is only in the surplus, if any, that may remain after such application, that the defendant company or any of its creditors have any right, title, or interest; that, in effect, the complainant has an equitable lien upon such earnings, which in equity entitles the complainant to such application thereof. The complainant avers that it is an inequitable and unlawful diversion of such earnings to apply the same, or any part thereof, to the defendant company's own use and general purposes, either by that company or its receivers, while the requirements of the lease remain unfulfilled and unperformed, and that to the extent that such diversion has already taken place the amount thereof should be replaced out of the fund consisting of the defendant company's property and franchises now in this court."

The defendants King and McCullough filed their joint affidavit denying all fraud and collusion in the filing of the bill by Park, or in their appointment as receivers, and denied any purpose hostile to the lease or to the interest of the complainant company. They deny that they represent any particular interest, but insist that they are the mere custodians of the property under order of the court in the interest of all concerned therein. They say that they have "never claimed the right to retain possession of complainant's road should it demand possession of it, but only that so long as they remained in possession by consent of complainant they should pay only what the property was worth, and not the amount called for by the terms of the contract with the Erie Company, * * *" and that since their appointment they had paid over the full amount of the net earnings of the complainant's said road, "except about seventy thousand dollars, which they are now prepared and willing to pay."

L. A. Russell, H. C. Ranney, Stevenson Burke, and W. W. MacFarland, for complainant.

Mr. Phelps, Wayne McVeagh, Williamson & Cushing, and Jennings & Russell, for defendants.

Before LURTON and TAFT, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, (after stating the facts.) Complainant's bill must be treated as an independent original bill having as its object the appointment of receivers for so much of the property of the Erie road as consists of its leasehold estate in the roads owned or leased by the complainant corporation and to enforce the covenants and contracts of that lease against the Erie Company and its receivers. The fact that receivers have been heretofore appointed under another bill by a creditor of that company, filed primarily in the jurisdiction of the residence of that company, and under like bills filed by the same creditor in this and other jurisdictions, is recognized, and the difficulty met by asking that the receivership under the former bill be extended to this, and that other and additional receivers be appointed to act in conjunction with them, within this jurisdiction. To justify this independent proceeding many averments are made charging that the receivers heretofore appointed were the executive officers of the lessee company; that as such they are not impartial custodians, but hostile to the interests of the complainant, and inimical to the lease; that their appointment was secured by collusion between the Erie Company and Trenor Luther Park, the creditor whose name and debt was used to secure the receivership; that "one of the main objects sought to be accomplished indirectly and fraudulently by means of the said suit was and is the abrogation of the lease, and the destruction of the plaintiff's rights thereunder by judicial assistance obtained by fraudulent and collusive contrivances and devices."

The relief now asked under the rule to show cause is:

(1) The extension of the receivership of King and McCullough to this suit.

(2) The appointment of one or more additional receivers.

(3) A direction to the receivers to comply with the covenants and contracts of the lease by paying out of the gross earnings of complainant's road the rentals due and unpaid, and to pay in future the rentals as they shall accrue and be payable by the terms of the lease.

The averments of the bill that the appointment of the defendants King and McCullough was collusive; that the filing of the bill by Trenor Luther Park, and the appointment of the executive officers of the Erie Company as receivers, was part of a plan and purpose hostile to the complainant, and having as an end the destruction and abrogation of the lease, is a conclusion of law drawn by the pleader, and dependent upon the legal effect of the facts stated in the bill, and chiefly upon those concerning the conduct of the receivers in regard to this lease after their appointment.

As matter of law, the receivers could not abrogate a lease which was valid and binding between the Ohio corporation and its lessee, the New York corporation. Between lessor and lessee the lease must stand until it is abrogated by a resort to some one of the conditions contained therein. Whether or not the receivers have an option to adopt the lease, and make its terms and conditions obligatory upon them as receivers, and a charge upon the trust fund in their hands, presents quite another question. If they have this option, under direction of the court controlling their conduct, then their refusal to adopt the lease cannot tend to support the averment that their object is to abrogate it. If the interests of those concerned in the property of the Erie Company, considered as a trust fund in the custody of a court of equity for administration and ultimate distribution according to the rights and equities of each as fixed when the property was seized by the court, be that a forfeiture of this lease should be guarded against by preventing any default in rents, then the receivers should pay the rents and adopt the lease.

If, however, the receivers are unable to do this, looking to all the other burdens which rest upon them, and having regard to the best interests of the whole trust committed to their charge, then they should not adopt the lease, if they have such option. They should compare the advantages and disadvantages in the light of the whole situation, and as business men give their judgment to the court under whose direction they act. The interest of the lessor company is not, and should not be, a controlling factor in reaching a conclusion. They stand for and represent every interest. If complainant's interest demands that they shall adopt the lease, and the general interest of those interested as creditors is that it shall not be adopted, then the latter and wider interest should control. Whether they have an option in the matter will be considered further along, as well as the kindred question as to whether, by their possession, they have in fact elected to adopt the lease.

No case is made for the removal of the defendants as receivers, even if we were disposed to consider such an application before the court originally appointing them had been applied to. Neither does any sufficient reason now appear for extending their appointment to this bill, nor justifying this court in intruding other persons upon them as coreceivers of a part of the property committed to their management. Whatever rights the complainant has as a creditor or under the lease it can set up as against the receivers without any extension of the receivership. Such extension would complicate accounts, and result in conflicting directions. There are stronger reasons for the refusal to appoint additional receivers. The Erie system is a vast and extended one. Its lines extend into several states, and as many independent jurisdictions. The preservation of this system as a whole, its harmonious management as a unit, gives it its greatest value and power, and anything which tends to dismember it or to disrupt its management as an entirety should be avoided if possible. While it is a "system," and while it remains a great "trunk line," its management under order and direction of the court should be committed to one set of receivers having like

authority in each jurisdiction, and controlling each and every part of its property. Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and directions of the courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads, as public carriers, are charged with great public duties, and the public are interested that their operation shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line. These considerations have developed the present well-settled proposition that such receivers are the mere custodians of the property, and hold for and as mere agents of the court. Speaking of the character of such trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice Waite said:

"The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place." *Fosdick v. Schall*, 99 U. S. 251; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. Rep. 787, et seq.

A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession or its effect upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class, and, a fortiori, they should not be appointed to represent one interest out of a class of interests.

The receivers in this case are mere custodians of the property of the Erie Company. That company is a New York corporation. Its domicile was and is in the southern district of New York. That district was the appropriate district in which creditors should have instituted a proceeding looking to a receivership of all its property. Mr. Park's bill was properly filed in the district of the residence of the debtor corporation, and receivers were properly appointed by the jurisdiction of residence for the property within the jurisdiction. Inasmuch, however, as the line of road extended into other jurisdictions, it was necessary to the due administration of the property that similar proceedings should be had in each independent jurisdiction. That step was taken, and a like bill filed in this court, and the receivers who had been selected in the original jurisdiction appointed as receivers of the property within this jurisdiction. Two considerations demanded the appointment of the same persons: First, the interest of the owner and creditors of such a system of roads required unity in the custody and management; second, courtesy and comity between courts of equal

and co-ordinate jurisdiction required that a court of quasi ancillary jurisdiction should in such a matter conform, under ordinary circumstances, to the selection of receivers theretofore made by the court of primary jurisdiction. The appointment of different sets of receivers, in each separate jurisdiction would tend most manifestly to the disintegration of this railroad system. Its maintenance as a system, and its harmonious management as an entirety, are nowhere more clearly shown to be essential to the interest of all concerned, including the complainant, than by its own pleadings in this cause. We are not prepared to say that circumstances might not arise which would justify and demand independent action in the appointment of receivers by each court of independent jurisdiction, and even the removal of receivers once appointed. But the respect due by courts of co-ordinate power and jurisdiction to each other, and especially that due by a court whose jurisdiction in a large part is in some sense ancillary to the court of primary jurisdiction,—the court where the rights and equities of all must finally be aggregated, and the accounts of the receivership be adjusted,—demands that a strong case should be made before independent and divergent orders should be made tending to bring on conflict between courts endeavoring to administer the same property in such manner as will best subserve the interest of all interested in it. If we should appoint additional receivers, their jurisdiction would not extend beyond the borders of Ohio. They could not be placed in joint possession of even the whole of the complainant's road, for a part of its line is in the state of New York and another in the state of Pennsylvania. We could not hope that receivers intruded under such circumstances would be appointed by the court of primary jurisdiction. Such an appointment would be useless, vexatious, and injurious. It would lead to conflict in regard to management, and great complexity of accounts. There is every reason why it should not be done, and none why it should. The defendants, as receivers, have not, in our judgment, done or omitted to do anything which was not within the scope of their duty, and which has not been approved by the court originally appointing them. The charge that their appointment was part of a scheme hostile to the complainant company is not supported by the facts stated in complainant's bill, or any conduct of the receivers, and as a vague and general charge is highly improbable, and wholly and fully denied by the affidavits filed in opposition to this rule.

There is nothing in the opinion of Justice Harlan in *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 39 Fed. Rep. 337, which conflicts with the views here expressed. The bill of Park, filed in this court, was an original bill, properly framed to obtain the appointment of a receiver. The bill dismissed by Justice Harlan was not framed to obtain any original relief, and was only intended to obtain a ratification of what had been done and should be done under a bill pending in another jurisdiction. The power of this court under the bill filed by Park in this court is that of an independent court, authorized to deal with the property of

the Erie Company within its jurisdiction. What we have said as to primary and ancillary jurisdiction has reference not to the power and authority of this court under that bill, but as to the manifest necessity of harmony in the administration of a line of railroad extending into several jurisdictions. This was fully recognized by the learned justice, who said:

"A good deal was said at the argument about the injury that might possibly ensue to mortgagors, mortgagees, creditors, and the public if an interstate railroad, covered by one mortgage, be placed under the management of different receivers, each acting under the orders of the court appointing him, and sold under separate decrees, rendered in distinct foreclosure suits brought in different circuit courts of the United States. Undoubtedly railroad property of that kind could be very materially injured in value, and the general public put to serious inconvenience, if the courts in which such separate suits are brought decline to act in harmony, or according to some fixed plan, in the administration and sale of the property. It is not, however, to be assumed that this court, if its jurisdiction is properly invoked in reference to this railroad, so far as it lies in West Virginia, will fail in any duty imposed upon it by law, or the comity prevailing between courts of equal dignity and authority." 39 Fed. Rep. 340.

The view we have taken finds support in the following cognate cases: *Wabash Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 272; *Central Trust Co. v. Wabash Ry. Co.*, 25 Fed. Rep. 693; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773.

2. What is the relation of the receivers of the Erie road towards the lease executed to the Erie Company? It has been very earnestly contended that the receivers, being in possession of the leased property, have adopted the lease, and that they are bound by all the covenants of the lease, and must pay rent according to its terms. This is a total misconception, as we have already indicated, of the relations of a receiver, in cases of this kind, towards the property of an insolvent railroad. Receivers are not assignees. They did not take the lease in question by assignment, and the effect of taking possession of a leasehold interest belonging to the company is totally unlike that resulting from one who takes a lease by assignment. They took possession by and under order of the court, and not by act of any party or under any assignment. Receivers are not bound to adopt a lease, and have the option, under the direction of the court, to do so or not. This is well settled. *Fosdick v. Schall*, 99 U. S. 251; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 96, 12 Sup. Ct. Rep. 787; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 113, 12 Sup. Ct. Rep. 795. As we have already seen, it is not in the power of such receivers to annul or abrogate such a lease as between the lessor and lessee company. No such power has been claimed or pretended by the defendants King and McCullough. Their opinion as to whether it was a lease or not cuts no figure. Their attitude before the circuit court of New York, upon the petition of the complainant company for a direction requiring them to hold under the lease and comply with its stipulations, and their attitude here through counsel, and by their affidavit filed on this motion, has been consistent, and is one of distinct refusal to adopt the lease for the trust, and of readiness to return complainant's road to it upon de-

mand. Then and now they say that it is not to the interest of the trust that the lease should be adopted; but that they are able and willing to manage the road, and pay over all of its net earnings, so long as complainant is content to leave possession with them. Complainant's right to declare a forfeiture and recover possession is clear. If, however, it is content to receive the net earnings, and look to the Erie Company as an unsecured creditor for all rents due at inception of receivership, and all unpaid while in possession of the receivers, then it should not complain. This was the view taken by Judge Lacombe upon the former application of complainant, and meets our full approval. Its claim for rent accruing before the receivership, by the refusal of the receivers to adopt the lease, is not entitled to any priority. It is an unsecured liability, and must rank along with all other claims of the same class on final distribution of the assets of the lessor company. *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Fosdick v. Schall*, Id. 235; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 470, 6 Sup. Ct. Rep. 809; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. Rep. 824.

But the complainant insists that the case is taken out of the general rule under which receivers are not bound to adopt a lease, by reason of the character and objects of the bill under which the receivers were appointed. Its counsel have cited and relied upon *Jones, Mortg.* § 483; *Brown v. Railroad Co.*, 35 Fed. Rep. 444. The case last cited is the case cited by Mr. Jones to support his view of this question. That case is clearly not in accord with the later decisions of the supreme court of the United States already cited. The doctrine laid down by Judge Gresham that receivers take as assignees when appointed to prevent the disintegration of a system of road partly consisting of leased lines, is not sustained by the cases we have cited. In the case of *Central Trust Co. v. Wabash Ry. Co.*, Judge Woods states that a rehearing had been granted in that case. As to the doctrine of the *Brown Case*, he said:

"It is true that in *Brown v. Railroad Co.*, 33 Fed. Rep. 444, it was held that these receivers, by taking possession of a leased line under the order of the court, 'became assignees of the lease, and, as such, liable for the rent,' but a rehearing has been granted in that case since the report of the master in this was filed, and, while the doctrine of it is, perhaps, the established rule of cases which involve only private rights, the reported decisions show that it has seldom, if ever, been deemed applicable to receivers of railroads who had taken possession of leased roads, or of leased rolling stock found in use upon or in connection with the main or trunk lines over which they were appointed; for the reason, I suppose, that the taking possession of the leased property ordinarily is not a purely voluntary act, amounting to an election on the part of the receiver or the court appointing him, but is compelled by that public policy which requires a railroad of established use to be kept in operation. Indeed, it is sometimes a physical necessity. In this case, for instance, an immediate separation of the leased lines from the Wabash roads proper, or from each other, for the purpose of surrendering any of them, with its rolling stock, to its owner, was manifestly impracticable, even if it appeared, as it does not, that the owner was ready and willing to resume possession and to discharge the duty to the public in keeping the road in operation." 46 Fed. Rep. 32.

The allegations relied upon from the Park bill as indicating the object of the bill as intended to preserve the unity of the system by preventing a forfeiture of the lease from complainant is not an estoppel. It is only one of many purposes stated in that bill as making a receivership necessary, and like statements are made as to all the leases held by the Erie Company. The bill was the usual creditors' bill, and the receivers were appointed for the general purpose of holding, managing, and preserving the property as far as possible for the best interest of all. The receivers, when appointed, deemed that the best interests of the trust did not require or justify an adoption of this lease. The court of primary jurisdiction has, upon full consideration of an application like the one now at bar, held that the lease had not been adopted, and refused to direct its adoption. Without considering the legal effect of that action as a bar, we have reached a like conclusion,—that the legal effect of the possession by the receivers up to this time has not operated as an adoption of this lease.

Complainant further contends that this contract of lease is peculiar, that under it a fixed per cent. of the gross earnings of its road belongs specifically to it, and the receivers are bound to account for that proportion. There is nothing in this contention. The rental is determined by the amount of gross earnings. These earnings belong to the lessee company. The complainant has no right to any specific dollar or part of a dollar. The rent is simply measured by the earnings. But, if it were otherwise, the receivers are no more bound by that provision of the lease than any other. They have not adopted the lease, and are only liable for what in equity and justice they should pay. The net earnings of complainant's road are its entire contribution to the fund in the receivers' hands. This they are willing to pay over. The circuit court of New York was unwilling to direct that any greater sum should be paid, and we are of like judgment.

The rule must be discharged.

WICKERSHAM et al. v. RICKER.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 11.

SPECIFIC PERFORMANCE—SALE BY TRUSTEE—ADEQUACY OF PRICE—EVIDENCE.

In determining whether a sale by a trustee was fair, and free from collusion, a subsequent offer by the purchaser's disappointed competitors, who formerly offered a much smaller amount, and absolutely refused to give more, is no true criterion of value; and no weight should be attached to their statements of a secret purpose to give a much larger sum, rather than lose the property.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit by Edward P. Ricker against Annie T. Wickersham and the Guarantee Trust & Safe-Deposit Company, adminis-

trators, for specific performance of a contract. There was a decree for complainant, and defendants appeal. Affirmed.

Thomas A. Fahy, for appellants.

Richard C. Dale, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. The bill of complaint here set out that on November 1, 1892, the plaintiff made a contract in writing with the defendants, Annie T. Wickersham and the Guarantee Trust & Safe-Deposit Company, administrators cum testamento annexo of the estate of John B. Wickersham, deceased, and authorized, by virtue of his will, to sell and convey all or any part of the real estate late of the decedent, whereby the defendants agreed to sell and convey, and the plaintiff to buy, all the interest which was of the said John B. Wickersham, and now is of his estate, in the water and springs known as "Poland Silica Water," situate on the Colomy farm, in Poland, in the state of Maine, for the price of \$2,000; the title to be made in a reasonable time; the sale to include the rights of trade-mark in the water, if any, and also the assignment of a certain agreement between one Colomy and Wickersham dated November 13, 1883; that when the contract was signed the plaintiff paid to the defendants, on account of the purchase price, \$150; that the plaintiff caused to be prepared a proper deed of conveyance, which the defendants executed, but that, since the execution of the deed, the defendant Annie T. Wickersham, being instigated by persons having rival interests, had notified the other defendant not to deliver the deed; that the plaintiff was ready, and had offered, to pay the balance of the purchase price, but the defendants had refused to deliver the deed; and the bill prayed that the defendants be decreed, upon the payment of the balance of the purchase money, to deliver to the plaintiff a deed of conveyance for the property embraced in the contract.

The answer of the Guarantee Trust & Safe-Deposit Company, admitting the material averments of the bill, stated that its refusal to deliver the deed was because of a notice in writing from its codefendant, forbidding the consummation of the sale. The answer of Annie T. Wickersham, after admitting the material allegations of the bill, set up as a defense, and charged, a fraudulent combination between the plaintiff and Somers S. Pearson, the agent of the defendants for the sale of the property, whereby the contract of sale had been made at an undervalue at a time when not less than \$4,000 could have been obtained from H. K. Wampole & Co., rival bidders, and owners of the land out of which the springs flowed, and of the undivided interest in the water. The court below found that this charge of fraud was not sustained by the proofs. We have considered the case with great care, and entirely concur in that conclusion. In our judgment, there is no evidence in this record to warrant the charge of fraud. The specific defense to the bill set up in the answer of Mrs. Wickersham

altogether failed. But the court below, not keeping strictly within the pleadings, very properly investigated the merits of the case upon the whole proofs, and considered the question whether the sale was a conscionable one,—such as a court of equity should enforce,—reaching a conclusion favorable to the plaintiff in the bill. That question we have fully considered, with the same result.

The material facts disclosed by the proofs are these: In the summer of 1892, H. K. Wampole & Co., manufacturing chemists in the city of Philadelphia, purchased the Colomy farm, subject to the Wickersham rights in the springs, for the sum of \$6,000. The Wickersham estate owned the undivided one-half of the springs. Shortly after their purchase, in September, 1892, H. K. Wampole & Co. had an interview at Poland with Mr. Pancoast, the attorney of the Wickersham estate, with reference to the purchase by them of the Wickersham interest. They represented to Mr. Pancoast that the land, with its improvements, exclusive of the water rights, was worth \$5,000; and they submitted figures to show that the Wickersham interest was not worth more than \$1,000, and this they offered to give for it. Mr. Pancoast testifies (and no doubt truly) that Mr. Wampole said "that if we did not take this offer of one thousand dollars they were going on to establish their own trade-mark, and sell the water, and that they did not care what we did with our interest." Upon his return to Philadelphia, Mr. Pancoast communicated this offer to those beneficially interested in the Wickersham estate; and, among themselves, they all agreed to accept from \$2,000 to \$2,500 for the property. Mr. Pancoast then employed Mr. Pearson to find a purchaser, and directed him to notify H. K. Wampole & Co. This Mr. Pearson did, by letter. Mr. Wampole, in company with Mr. Koch, another member of the firm, then called on Mr. Pearson, and, after some conversation, they withdrew their offer of \$1,000. Afterwards, Mr. Pearson, with the approval of Mr. Pancoast, by letter dated October 27, 1892, informed the plaintiff, who owned a tract of land adjoining the Colomy farm, that the Wickersham interest in the Colomy springs had been put into his hands for sale, and inviting him to become a purchaser. Thereupon, the plaintiff came to Philadelphia, and negotiations took place between him and Mr. Pearson, Mr. Pancoast, and one or more officers of the Guarantee Trust & Safe-Deposit Company. Eventually, the plaintiff offered \$2,000, which was accepted, subject to the approval of Mrs. Annie T. Wickersham, the widow and coadministrator, who at the time could not personally be seen. The contract of sale was then signed by the plaintiff and the trust company, and the plaintiff paid \$150 on account. Subsequently, Mrs. Wickersham signed the contract of sale, and also executed the deed of conveyance. There is some conflict of testimony as to what was said at the interview between Mr. Pearson and Mrs. Wickersham before she signed the contract; but we are entirely satisfied that no misrepresentation was made to her, and that she acted deliberately, and of her free will, exercising her own independent judgment.

It appears that, while the negotiations between the plaintiff and those representing the Wickersham estate were pending, Mr. Wampole was in the place of business of the Guarantee Trust & Safe-Deposit Company, and there learned that the plaintiff was in Philadelphia, negotiating for this purchase. Yet H. K. Wampole & Co. refrained from increasing their offer, and did not do so until after the contract with the plaintiff had been signed by all parties. Then they put themselves in communication with Mrs. Wickersham, and offered \$4,000. Mr. Wampole and Mr. Campbell, another member of the firm, now testify that they always would have given \$6,000 for the Wickersham interest. But it is more than probable that they would have acquired it upon their own terms, had it not possessed special value to the plaintiff, as the adjoining proprietor.

It is said that, when the offer of \$1,000 was withdrawn, there was an understanding that Mr. Pearson was to get from the Wickersham heirs their lowest price, and report it to H. K. Wampole & Co. But Mr. Pearson had no such understanding. He entered into no such engagement, and H. K. Wampole & Co. had no good reason to expect any further communication from him. In fact they had succeeded in thoroughly persuading both Mr. Pearson and Mr. Pancoast that \$1,000 was their ultimatum. Mr. Pearson was under no obligation to report to H. K. Wampole & Co. the plaintiff's offer, and it is very doubtful whether it would have been good policy for him to do so. It was well said by the learned judge below that, had Mr. Pearson ventured upon such a course of dealing with the plaintiff, he might have driven him off altogether, and then the defendants would have been left at the mercy of H. K. Wampole & Co.

There is no satisfactory evidence that the sum of \$2,000 was an inadequate price. The subsequent offer made by disappointed competitors, who doubtless were particularly chagrined that the property had fallen into the plaintiff's hands, does not afford any true criterion of value. Nor, under the circumstances, is any weight to be given to what these persons now say it was their secret purpose to give, rather than lose the property. It has been declared not to be a good ground, in equity, for setting aside a private sale made by a trustee, that a higher price has been offered. *Harper v. Hayes*, 2 De Gex, F. & J. 542. And in *Goodwin v. Fielding*, 4 De Gex, M. & G. 90, an agreement for the sale of a leasehold by an executrix was specifically enforced against her, notwithstanding she was subsequently offered, and had accepted, a price nearly double that which the plaintiff was to give. Lord Justice Knight Bruce there said:

"I think that it would be wrong and mischievous to create or encourage such a notion as that a trustee for sale may avoid a fair and unobjectionable contract by entering into a subsequent contract for a higher price."

We are quite convinced of the plaintiff's perfect integrity in the transaction, and of the entire fairness of the contract he seeks to have enforced.

Upon the facts proved, we are clearly of the opinion that the circuit court was right in specifically enforcing the contract which was the foundation of the bill, and therefore its decree is affirmed.

BROWN et al. v. GRAND RAPIDS PARLOR FURNITURE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1893.)

No. 83.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS — WHAT CONSTITUTES — CHATTEL MORTGAGES.

Chattel mortgages by an insolvent corporation to secure a portion of its debts are not common-law assignments with preferences, as between creditors, within 2 How. St. Mich. § 8739, declaring such assignments void. *Sheldon v. Mann*, 48 N. W. Rep. 573, 85 Mich. 265; *Warner v. Littlefield*, 50 N. W. Rep. 721, 89 Mich. 329; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 51 N. W. Rep. 512, 90 Mich. 345,—followed.

2. SAME.

Nor is a chattel mortgage an assignment, within the statute, although, in view of the impossibility that the corporation can ever redeem, its effect, necessarily, is to transfer the property to the trustee named in the mortgage, who thereunder may sell and distribute the proceeds in the same manner as an assignee under such an assignment, for the right of redemption by the corporation or attaching creditors would nevertheless exist. *Warner v. Littlefield*, 50 N. W. Rep. 721, 89 Mich. 329, distinguished.

3. CHATTEL MORTGAGES—DEFEASANCE.

A defeasance clause of a mortgage, providing that, if the debts be paid at maturity, the mortgage and the notes secured thereby shall be void, and containing an agreement to pay the same accordingly, is not rendered nugatory by the fact that one of such notes was due when the mortgage was made, but should rather be construed to require a demand for payment of the note subsequent to the giving of the mortgage, and a refusal to pay, before the mortgage will become absolute.

4. CORPORATIONS—CHATTEL MORTGAGES.

Under a resolution by the directors of a corporation reciting an agreement by a creditor to advance to the corporation \$3,000, and a further sum of \$1,000 if required, and authorizing the secretary and treasurer to secure the total indebtedness by chattel mortgage, such creditor, having advanced the \$3,000,—the additional \$1,000 not being required by the corporation,—is entitled to the mortgage.

5. SAME.

A further authorization in such resolution, to the officers named, to secure "any and all other creditors" by subsequent mortgages, does not require a mortgage to secure all other creditors, as "and," in that connection, has the meaning of "or."

6. SAME—MORTGAGE SECURING OBLIGATIONS OF DIRECTORS AND STOCKHOLDERS.

Such mortgages are not invalidated by the fact that some of the directors and stockholders, who, as such, voted for the resolution authorizing the mortgages, were also guarantors and indorsers upon most of the secured notes. *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 51 N. W. Rep. 512, 90 Mich. 345, followed.

7. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Whether a chattel mortgage is void under a state statute, as being a common-law assignment for benefit of creditors, with preferences, being purely a question of local law, should be decided in accordance with the latest exposition of the law by the highest tribunal of the state.

8. SAME.

Where the federal court is in doubt as to a doctrine of general law, it is its duty to lean towards the decision of the state court.

Appeal from the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

In Equity. Bill by Willard S. Brown and others against the Grand Rapids Parlor Furniture Company and others to set aside certain chattel mortgages. Decree dismissing the bill. Complainants appeal. Affirmed.

Statement by TAFT, Circuit Judge:

This was an appeal from a decree of the circuit court for the western district of Michigan, southern division. The bill was filed by Willard S. Brown, Jacob G. De Turk, and John T. Brown, citizens of the state of Pennsylvania, against the Grand Rapids Parlor Furniture Company, a corporation of Michigan, and other defendants, the beneficiaries of certain mortgages made by the furniture company to secure debts owing to them. The bill was for the purpose of setting aside these mortgages, as made by the furniture company to hinder, delay, and defraud creditors, and also as being assignments in violation of the assignment law of Michigan, and, further, as invalid because made by the directors of the furniture company to secure debts, in the payment of which the directors had a personal interest. The Grand Rapids Parlor Furniture Company had been organized in April, 1886, in the name of the Strahan & Long Furniture Company, with a capital stock of about \$10,000. The company was organized by Harry W. Long, defendant herein, and others. Long's share of the stock was \$5,000, to pay for which he borrowed money of his wife, Margaret, another defendant, to whom he gave his note for the amount. In January, 1889, the name of the company was changed to the Grand Rapids Parlor Furniture Company. The capital of the company was increased so that the paid-up capital amounted to \$21,500. Harry Long presented his wife with 128 shares. She became the owner of 40 other shares, making her the holder of 168 shares. Her husband, then, was the owner of 282 shares; she held 168; W. J. Long, Jr., brother of Harry, held 189 shares; James M. Pierce, 200 shares; Harry Hubbard, 20 shares; and John E. Moore, 1 share. The Long brothers and Thomas M. Pierce were directors. At various times, Harry Long had loaned the company money, so that in March, 1891, he held its notes for \$6,800. In that month, Mrs. Long, who held separate property of her own, received from her father and her uncle, and managed by J. W. Champlin, became nervous lest the ownership of the stock might subject her to a liability, under the statutes of Michigan, to the payment of labor claims against the corporation, and she therefore desired to part with her stock. Her husband purchased the stock, and paid off an obligation of his own, owing to his wife, by transferring all the notes which he held against the corporation, for \$6,800. A day or two after, a bank in Grand Rapids having refused to renew a note of the company for \$3,000, upon which Harry Long was indorser, Mrs. Long was induced to give to the company some street-railway stock which she owned, valued at \$3,000, to enable the company to renew the notes with the collateral, and, further, to agree to let the company have \$1,000 additional when needed, on condition that it would give her security, whenever she might demand it, for the entire debt, including the \$6,800 as well as the new loans. At a stockholders' meeting a resolution was passed, authorizing the directors to comply with this condition, and the \$3,000 of street-railway stock was delivered in March, 1891. The other \$1,000 was never called for. In July, 1891, the company was asked to pay a \$1,000 note held by Clara M. Pierce, wife of Thomas M. Pierce, one of the directors. Legal proceedings were threatened, to collect the note. The company had no money to pay it. Harry Long notified his wife, who was at Mackinac, that she ought to demand security, and she at once made such demand. Judge Champlin, also, was advised, and he superintended the obtaining of the security. The mortgage was drawn by Moore & Wilson, and covered all the merchandise and assets of the company, with the exception of the bills receivable. On the same day, somewhat later, Harry Long directed Moore & Wilson to make a mortgage to Charles M. Wilson, trustee, to secure labor debts; a note to the Fifth National Bank for \$1,000; a note to the Fourth National Bank for

\$5,000; Clara M. Pierce, \$1,000; Asa Denison, \$1,000; Northwestern Trimming Company, \$383; J. V. Farwell Company, \$307; W. and J. Sloan, \$667. Harry Long was indorser on the notes for \$6,800 held by his wife, and also upon the notes held by the Fifth and Fourth National Banks; and upon those held by Denison, the Northwestern Trimming Company, J. V. Farwell Company, and by Sloans. W. J. Long was indorser on the paper at the Fourth National Bank. All the stockholders, as has been already stated, were personally liable for the labor debts. The two mortgages were executed July 18th, and were filed July 20th; the one at 9:25 A. M., and the other at 9:28 A. M. July 21st, Judge Champlin, as the agent for Mrs. Long, and Wilson, as the trustee for the creditors named in the mortgage to him, took possession, jointly. On the 28th of July the complainants filed this bill on behalf of themselves, and other creditors similarly situated. Wilson, the trustee, was appointed receiver, and has brought into court \$21,500 as the fund realized from the assets of the defunct corporation. The debts of the corporation amount to about \$37,000. If both mortgages are sustained as valid, they will more than consume the assets of the corporation. The circuit court held that the mortgages were valid, and entered a decree dismissing the bill.

Edward Taggard and Arthur C. Denison, for appellants.

John E. More and Kingsley & Kleinhaus, for appellees.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, (after stating the facts.) It is not contended on behalf of the complainants that the debts which the mortgages in question were given to secure are not valid debts of the company, with the exception of the note held by Clara M. Pierce for \$1,000. Whether the Pierce note is a valid obligation is not material on this issue, because the other secured debts, if the mortgages are held valid, are more than enough to consume the fund in court. There is no charge of actual bad faith made with reference to the giving of these mortgages. The contention of the complainants is that these mortgages should be held to be invalid—First, because they are, in effect, common-law assignments, with preferences, as between creditors, and are therefore void under the statute of Michigan (2 How. St. § 8739) which provides that "all assignments commonly called common-law assignments for the benefit of creditors shall be void unless the same shall be without preference as between such creditors, and shall be of all the property of the assignor not exempt from execution;" second, because the mortgages were given by an insolvent corporation to secure debts in which the stockholders and directors, whose votes made the mortgages the act of the corporation, had a personal interest in them, as grantors thereof.

1. The question whether these chattel mortgages are void, as common-law assignments giving preference to creditors, under the statute of Michigan, is a question purely of local law. This is expressly decided by the supreme court of the United States in the case of *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. Rep. 565. Mr. Justice Brewer, speaking for the court, said in that case:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily, at least, a matter

of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

There can be no doubt that, under the decisions of the supreme court of Michigan, the mortgages in question here are not violations of the statute forbidding preferences in common-law assignments. It is said that at the time these mortgages were executed, under the then last decision of the supreme court of Michigan, in *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. Rep. 645, these mortgages would have been invalid, and that the law of the state, which this court should follow with respect to the mortgages, is the law which was in force as then expounded by the supreme court. Conceding, for the purposes of the argument, that under the case of *Kendall v. Bishop*, supra, these mortgages must be held invalid, we are of opinion that, if subsequent decisions of the supreme court have reversed the principle announced in that case, we should follow those subsequent decisions. The right of the complainants and their general creditors to take the mortgages was a remedy, and not a contractual right; and there is nothing in this case to show, or justify a presumption, that the debts represented by the complainants and other unsecured general creditors were contracted on the faith of the inability of the corporation to prefer creditors by chattel mortgage. Certainly, it would not impair their contracts of indebtedness if the legislature of Michigan had repealed the statute making common-law assignments with preferences void. If so, the law of the state of Michigan, which we are to administer, is the law of the state, as expounded by its highest tribunal, when the remedy comes to us for our enforcement. It was decided in *Warner v. Littlefield* that a debtor, though insolvent, might secure a creditor, for the payment of a pre-existing debt, by a mortgage upon all his property, although he should have numerous creditors who were unsecured, and that neither the fact of the debtor's insolvency, nor the knowledge of the creditor of that fact, would defeat or impair a mortgage security taken for an honest debt; that the fact that the mortgagee was not the creditor of the mortgagor, and that the mortgage was executed in trust to secure certain specified creditors the amounts of their several claims, did not tend, in any degree, to give the instrument the character of a common-law assignment; that if the instrument was a conveyance given upon condition, as a security for a pre-existing debt, and contained no trust in its body, whereby the property was withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such right in cases of chattel mortgages, or whereby the title of the property was placed beyond the reach of execution as to any surplus, then the instrument was a chattel mortgage, but if it conveyed the absolute title to a trustee for the benefit of creditors, and thus placed the property and surplus beyond the reach of creditors, it was a common-law assignment; that the question whether the instrument was a chattel mort-

gage, or an assignment for the benefit of creditors, must, in all cases, be determined as a question of law, upon the contents of such instrument, and not from any outside testimony; and that unless the conveyance, upon its face, purported to convey all of the debtor's property to secure certain preferred creditors, by an absolute title, the court was not at liberty to declare it a common-law assignment. The case of *Warner v. Littlefield* only followed the case of *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. Rep. 573, and was followed by the supreme court in *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. Rep. 512.

It is not disputed that the mortgages in this case have the ordinary form of a chattel mortgage under the statutes of Michigan. They have the defeasance clause, and the necessary legal import of their language is that the absolute title does not pass to the person named as mortgagee, but only a title on condition; leaving in the mortgagor the right to redeem the same, and in the general creditors the right to levy upon the equity of redemption. Reliance is had on the fact that one of the notes under the second mortgage was due at the time the mortgage was given. The language of the defeasance clause of that mortgage was as follows:

"To have and to hold the same forever: provided, always, and the condition of these presents is such, that if the said party of the first part shall pay or cause to be paid the debts above mentioned, with interest thereon, at maturity, then this instrument and said notes shall be void and of no effect, and said party of the first part agrees to pay the same accordingly."

We do not think the defeasance clause is rendered null and void by reason of the fact that one of the debts secured by the mortgage was due at the time the mortgage was given. The sensible construction of the defeasance clause would seem to be that the mortgage would not become absolute until after demand for the payment of the note subsequent to the giving of the mortgage and a refusal to pay. Reliance is had by the complainants on certain language of the supreme court of Michigan in the case of *Warner v. Littlefield*, already referred to, as follows:

"The question as to whether the instrument is a chattel mortgage, or an assignment for the benefit of creditors, must, in all cases, be determined as a question of law upon the contents of such instrument, and not upon any testimony which appears outside of such instrument; and unless the conveyance, upon its face, purports to convey all of the debtor's property to secure some creditors, in preference to others, by an absolute title, the court is not at liberty to declare it a common-law assignment; and if the facts appear outside of the instrument itself, and tend to prove that the instrument was made with the intention of having the effect of a common-law assignment, or with the intention of evading the statute, then it becomes a question of fact, for the jury to decide, and not for the court."

It is said here that the facts dehors the instrument show that it was intended by the parties to be a common-law assignment, though on its face it was only a chattel mortgage. That the effect of a mortgage which conveys all the property of an insolvent debtor to a trustee, with power to sell, and distribute the proceeds among the preferred creditors, whose claims exceed the value of the property conveyed, is practically the same as a common-law

assignment, was, of course, obvious to the court rendering the above opinion. It cannot, therefore, be construed to mean that because a chattel mortgage has the effect of a common-law assignment, in that it disposes of all the property of the debtor, with preference to certain creditors, the debtor himself intended a common-law assignment. It may be a little difficult to say what distinction the court did have in mind, in the above language. It was probably referring to a case where there is some secret agreement between the debtor and the mortgage creditors, dispensing with the obligation of the defeasance clause, so that the mortgage, on its face, does not express the real agreement between the parties. There is nothing in this case to show that the mortgage was not a bona fide attempt to secure pre-existing indebtedness. Its effect, in view of the impossibility and improbability that the corporation could ever redeem the property, was necessarily to transfer the property to a trustee, who should sell it, and distribute the proceeds as an assignee under a common-law assignment would. But it is not shown, and we cannot infer, that, if the corporation or any attaching creditor had seen fit to redeem the property by paying the debts secured by the mortgage, there would have been resistance on the part of any secured creditors to an enforcement of this right secured by the mortgage. We are very clear, under the cases cited, that in Michigan the mortgages are valid.

Objection is made that the mortgages were not authorized by the directors and stockholders, as given. It seems to us that they are quite within the resolution passed by the stockholders. The recital in the resolution made the consideration for giving the mortgage the advancing of the additional \$3,000 by Mrs. Long, to assist the corporation, and the agreement to advance \$1,000 more, when required. The other \$1,000 was not required by any one connected with the corporation, and it cannot be said, therefore, that she did not comply with her full contract, entitling her to the mortgage. The resolution authorized the secretary and treasurer to secure any and all other creditors by mortgages subject to, and subsequent to, the mortgage to Mrs. Long. It is said that this required a mortgage which should secure all other creditors. We do not think so. It was evidently the intention to give the right to secure any other creditors, the word "and" having the meaning of "or," in that connection.

2. We now come to the question whether the fact that Harry and W. J. Long, directors, were interested as guarantors and indorsers upon most of the notes secured by the mortgages, and were directors and stockholders in the corporation, and as such voted to give the mortgages, renders the mortgages invalid. The question has been directly decided by the supreme court of Michigan against the contention of the complainants. In the case of *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. Rep. 512, mortgages which secured directors, given by an insolvent corporation, were held to be valid. Said the supreme court, (*Montgomery, J.*.)

"Nor is the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the directors or stockholders. We are aware that the decisions of the various states are not uniform as to this question, and that a number of very eminent text writers have deprecated a state of the law which admits of such preferences. But, to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, this condition of the law 'may constitute a good legislative reason for giving priority to outside creditors, but the legislature must furnish the remedy.' In the case referred to, it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of diligence with them. See, also, *Hallma v. Hotel Co.*, 56 Iowa, 179, 9 N. W. Rep. 111; *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395; *Smith v. Skeary*, 47 Conn. 54; *Catlin v. Bank*, 6 Conn. 233; *Banking Co. v. Claghorn*, 1 Speer, Eq. 545; *Bank v. Whittle*, 78 Va. 739; *Leavitt v. Mining Co.*, 3 Utah, 265, 1 Pac. Rep. 356; *Whitwell v. Warner*, 20 Vt. 444; *Holt v. Bennett*, 146 Mass. 437, 16 N. E. Rep. 5; *Oil Co. v. Marbury*, 91 U. S. 587; *Wilkinson v. Bauerle*, (N. J. Err. & App.) 7 Atl. Rep. 514."

To the cases cited in the above opinion may be also added *Hills v. Furniture Co.*, 23 Fed. Rep. 432; *County Court v. Baltimore & O. R. Co.*, 35 Fed. Rep. 161; *Gould v. Railroad Co.*, 52 Fed. Rep. 680; *Stratton v. Allen*, 16 N. J. Eq. 233; *Duncomb v. Railroad Co.*, 84 N. Y. 190.

Several cases have been cited, some of them decisions of circuit courts of the United States, in which it has been held that, while it is lawful for a corporation to prefer creditors, it is not equitable or permissible for directors of a corporation to prefer themselves, even if they are bona fide creditors, because they are trustees. It may be conceded that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends.

There are, as has been said, several decisions in the federal courts upholding the opposite doctrine, but no such decision has been rendered by the supreme court of the United States. The supreme court of the United States, in several cases, has held that the subscriptions of its stockholders are a trust fund for the payment of its creditors, in so far that the corporation may not release stockholders from payment thereof, (*Scovill v. Thayer*, 105 U. S. 143;) but it has as yet not announced the doctrine that the assets of a corporation are a trust fund for equal distribution among its creditors. For a full review of the cases, see the opinion of Mr. Justice Brewer in *Hollins v. Iron Co.*, 14 Sup. Ct. Rep. 127, (decided by the supreme court of the United States, November 20, 1893.) That court has not announced the doctrine that a corporation may not prefer one of its creditors, and it has not announced the doctrine that a corporation may not prefer as a creditor one of its directors. In

the case of *Purifier Co. v. McGroarty*, 136 U. S. 237, 10 Sup. Ct. Rep. 1017, the supreme court of the United States followed the supreme court of Ohio in holding that the assets of an insolvent corporation were a trust fund for equal distribution among its creditors; but they did so expressly on the ground that this was the decision of the supreme court of Ohio, founded on the constitution and statute law of that state with reference to corporations. The opinion of Mr. Justice Gray contains a very broad intimation that there is no general equitable principle requiring such equal distribution among the creditors of the corporation. All the decisions of the supreme court of the United States relied on and referred to as sustaining the view that the bona fide debt of a director of a corporation may not be paid in preference to the debt of some other creditor are cases where the directors were guilty of fraud in procuring the payment of their own debts by fraudulent wasting of the assets to accomplish the preference. Such were the cases of *Drury v. Cross*, 7 Wall. 299; *Koehler v. Iron Co.*, 2 Black, 715; *Jackson v. Ludeling*, 21 Wall. 616. There is no such element in this case.

It has been argued that upon this question the court should reach a conclusion as upon a doctrine of general law, and not be governed by the decisions of the supreme court of Michigan. Whether this be true or not, it is the duty of the court, where the matter is one of doubt, to lean towards the decision of the state court.

The decree of the court below is affirmed, at the costs of the appellants.

OSCAMP v. CRYSTAL RIVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 212.

1. MINES AND MINING—OVERLAPPING LOCATIONS—ABANDONMENT.

Mere failure during one year to perform the annual development work required by Rev. St. § 2324, does not divest title to a Colorado mining claim in favor of a junior overlapping location, which is not thereafter relocated in the manner prescribed by the Colorado statutes, (sections 3160, 3162;) and the resumption of development works on the senior claim in the succeeding years restores to its owner all his original rights. *Belk v. Meagher*, 104 U. S. 279, applied.

2. SAME—INTERSECTING VEINS.

The position of the junior locator in such case is not aided by the fact that his location rests upon the discovery of a vein which crosses the vein of the senior location; for, while he may be entitled to work his vein into the senior location, and up to the point of crossing, this does not affect the senior locator's right to the possession of the entire surface of his claim.

3. EJECTMENT—PLEADING—QUANTITY OF LAND RECOVERABLE.

In an ejectment suit plaintiff is not ordinarily limited in his recovery to the precise amount specified in his declaration, but may recover a less quantity.

In Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejectment brought by Alfred Oscamp against the Crystal River Mining Company. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

L. C. Rockwell, for plaintiff in error.

Charles J. Hughes, Jr., for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. The question presented by this record appears to be one of first impression, and arises out of the following facts: The plaintiff in error is the owner of an undivided one-third part of the Excelsior No. 1 lode mining claim, hereafter called the "Excelsior Claim," situated in the Elk Mountain mining district, Gunnison county, Colo. The defendant in error is the owner of the Black Queen lode mining claim, hereafter termed the "Black Queen," which is situated in the same district, county, and state. Of these claims the Excelsior is founded upon the earlier location. Both claims are rectangular in shape, and, as originally laid upon the surface of the earth, the north side line of the Black Queen runs diagonally across the southwest corner of the Excelsior claim, and cuts off from the latter claim a small, triangular piece of ground having an area, as it is said, of about three-quarters of an acre. A suit was brought by the plaintiff in error on July 7, 1890, against the defendant in error in the circuit court for the district of Colorado, to recover the triangular parcel of land aforesaid, on the ground that the owners of the Excelsior claim had the superior title thereto by reason of their older location, and that they had been wrongfully ousted from the possession thereof by the defendant in error. On the trial in the circuit court it appeared from an admission made by counsel for the plaintiff that after the Excelsior claim was located the requisite amount of development work under section 2324 of the Revised Statutes of the United States (to wit, \$100 worth of work per year, the claim having been located after May 10, 1872) was done during each of the years 1882 and 1883, that no work was done on the claim during the year 1884, but that the owners re-entered and resumed development work in 1885. When this admission was made, the circuit court charged, in substance, that the failure of the owners of the Excelsior claim to do any development work thereon during the year 1884 made the Black Queen location good as to all of the lands within its side lines and end lines, including the triangular piece heretofore mentioned, notwithstanding the fact that the owners of the Excelsior claim had originally had the superior title to the triangle in question by virtue of their older location. The theory of the circuit court seems to have been that, as the owners of the Black Queen continued in possession and at work on their claim during and after the year 1884, while operations on the Excelsior claim were suspended, and that as the two claims conflicted and overlapped in the manner before indicated, the failure of the owners of the Excelsior claim to do

any work during the year 1884 was an abandonment of their superior right to the space where the claims overlapped, and that as to such territory the title of the Black Queen became paramount without any affirmative action on the part of its owners, from and after January 1, 1885, and that the relative status was not altered when the Excelsior claimants resumed work during that year. The soundness of that view is challenged by the plaintiff in error, and the action of the circuit court in enforcing it in its charge is the error that we have to review.

In *Belk v. Meagher*, 104 U. S. 279, 283, it was held, after much consideration, that a mining location, when perfected according to the statutes of the United States and local laws and regulations, "is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent," and that there is nothing in the law under which such property is acquired "which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for the protection of any other grant from the United States." It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights, if he enters without force, and resumes work, before a relocation is perfected by any third party.

It should be further observed that the laws of the state of Colorado contain provisions relative to the relocation in whole or in part of abandoned lodes, and also as to the making and filing of amended location certificates under certain circumstances. These several provisions of the Colorado statutes (Mills' Ann. St.) are as follows:

"Sec. 3162. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocater may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new, or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property."

"Sec. 3160. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate subject to the provisions of this act. * * *

In view of the rights that are thus acquired under the laws of the United States by the owner of a mining claim who has made a valid location, and in view of the foregoing provisions of the Colorado statutes, we are constrained to hold that the owners of the Black

Queen did not acquire a superior right to the triangular parcel of land which is the subject of controversy, merely because the owners of the Excelsior claim failed to do the requisite amount of development work during the year 1884, they having resumed work in the year 1885 prior to the alleged ouster. We are unable to see upon what principle the failure to do such work operated to extinguish the title of the owners of the Excelsior claim, and to transfer it to the owners of the Black Queen. In the early days of mining, before the adoption of any laws on the subject of mining locations, there may have been such a thing as a title to a mining claim that was so entirely dependent upon possession that it ceased to exist when actual possession of the claim ceased; but at the present time the title to a well-located mining claim is not of that precarious character, for the reason that it is not exclusively dependent upon possession, but rests upon a statutory grant. As was said in *Belk v. Meagher*, *supra*, actual possession is no more necessary to protect the title to a mining claim than it is to protect the title to property acquired under any other grant from the United States. The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws, and, as the statutes of Colorado prescribe the mode in which third parties may divest the title of the original owner by a relocation, if the statutes in that respect are not pursued, the status of all persons remains unaltered, barring the possible effect of limitations or laches; and if at any time the original owner re-enters, and resumes work, the right of relocation is then lost.

It is not denied, as we understand, that the views last expressed would be sound if the defendant in error was an ordinary third party seeking to appropriate the plaintiff's claim, but it is suggested that it is not an ordinary third party, against whom the above views would be clearly tenable, for the reason that the Black Queen location rests upon the discovery of a lode which crosses the vein on which the Excelsior location is founded, so that, in any event, and notwithstanding its later location, the owner of the Black Queen could hold its vein within the disputed triangle, except at the very point of intersection of the two lodes. We are not disposed to controvert the proposition last stated, as it is supported by repeated decisions of the supreme court of the state of Colorado. *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. Rep. 669; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. Rep. 77; *Id.*, 13 Colo. 174, 22 Pac. Rep. 436. But we fail to see that the circumstance thus invoked places the defendant company in any more favorable attitude with respect to the existing controversy than would be occupied by any third party. The plaintiff in this case is endeavoring to assert his superior right to the surface ground included within the small triangle. He is not seeking, apparently, to recover and to hold the defendant's lode or vein; and, even if he should prevail in this action, the defendant would still retain its cross vein within the triangle, except at the

point of intersection of the two veins, together with such right of way for the purpose of taking out mineral as is now accorded to the owners of a cross vein when it passes through an older location. As it is the right to the surface ground lying within the triangle that is now in dispute, we are unable to see that the defendant company can acquire a paramount right thereto as against the owner of the Excelsior claim, except by taking the same action under existing laws that other persons would be required to take if they desired to appropriate it as abandoned property.

It is further insisted by the plaintiff that the circuit court committed another error, to his prejudice, in instructing the jury, in substance, that the plaintiff ought not to recover if it appeared that he was not entitled to the possession of the full quantity of land described in his declaration, to wit, 752-1000 of an acre, although it did appear that he was entitled to recover a triangular piece containing a less area. This assignment of error on the facts disclosed by the present record would seem to be well taken. In a suit in ejectment a plaintiff is not ordinarily limited in his recovery to the precise quantity of land specified in his declaration, but may recover a less quantity. We would not, however, be understood as expressing a definite opinion on the last assignment, for the reason that considerations may have been present to the mind of the trial judge which are not disclosed to us by the present record or by the briefs of counsel, which, in the present case, fully justified the instruction complained of. This is a matter which is accordingly left open for reconsideration on a second trial.

For the error in the charge first above indicated the judgment of the circuit court is hereby reversed, and the cause is remanded, with directions to award a new trial.

SAGE v. WINONA & ST. P. R. Co. et al.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 224.

1. LACHES—RAILROAD LAND GRANTS.

A land-grant railroad company, having both actual and constructive notice, is guilty of laches in delaying 14 years to assert title to lands lying within its grant limits, which have been selected as indemnity lands by another land-grant company, certified as such to the state, and by it conveyed to the company, and large portions of which have been openly sold by the latter to purchasers and settlers; especially when, by such delay, documentary evidence has been lost which would probably render unavailable defendant's title to a large portion of the disputed lands. *Railway Co. v. Sage*, 1 C. C. A. 256, 49 Fed. Rep. 315, 4 U. S. App. 160, followed.

2. SAME—QUIETING TITLE—PLAINTIFF OUT OF POSSESSION.

The rule that neither limitations nor laches is available as a defense to a bill to remove a cloud from title is applicable only when complainant is in possession.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The federal courts in Minnesota will follow the rule of the local courts permitting suits to remove cloud from title to be brought by one out of possession.

Appeal from the Circuit Court of the United States for the District of Minnesota. Affirmed.

Statement by THAYER, District Judge:

This was a suit brought by the Hastings & Dakota Railway Company, hereafter termed the "Hastings Company," against the Winona & St. Peter Railroad Company, hereafter termed the "Winona Company," and the Winona & St. Peter Land Company, to settle the title to a large quantity of land situated in the state of Minnesota, which was claimed by the railway companies, respectively, under different overlapping land grants. Before the suit was brought to a final hearing, Russell Sage, the appellant, became vested with all of the rights of the Hastings Company, and was thereupon substituted as complainant.

The bill of complaint contained the following allegations, in substance: That by an act of congress approved on July 4, 1866, (14 Stat. 87, 88,) there was granted to the state of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, in the state of Minnesota, through the counties of Dakota, Scott, Carver, and McLeod, in said state, to such point on the western boundary of the state as its legislature might determine, every alternate section of land designated by odd numbers to the amount of five full sections per mile on each side of said road; that by an act of the legislature of the state of Minnesota, of date March 7, 1867, the aforesaid grant was accepted by the state, and all of the lands, interests, rights, powers, and privileges granted thereby to the state were conferred upon the Hastings Company, and the western terminus of its road was fixed by the terms of said legislative act at any point on the western boundary of the state of Minnesota between the Big Stone lake and the third standard parallel; that the Hastings Company thereupon surveyed a line of railroad on the route above indicated, and caused a map of definite location to be filed in the general land office of the United States on June 26, 1867, and subsequently constructed and completed said line of road in full accordance with said act of congress, and thereby became entitled to all of the odd numbered sections of land lying within 10 miles of its located line, to which no homestead or pre-emption claims had attached prior to June 26, 1867, when its map of definite location was filed. The bill further showed that under and by virtue of certain acts passed by the legislature of the territory of Minnesota, and by the legislature of the state of Minnesota, the Winona Company was duly incorporated, and became entitled to such lands as were granted to the territory of Minnesota by an act of congress approved March 3, 1857, (11 Stat. 195, 197,) in aid of building a line of railroad from Winona, Minn., via St. Peter, to a point on the Big Sioux river south of the forty-fifth parallel, and also to such additional lands as were granted to the state of Minnesota in aid of building the same line of road by a subsequent act of congress, approved March 3, 1865, (13 Stat. 526, § 1;) that the Winona Company thus became entitled to all of the odd-numbered sections of land lying within 10 miles of its road, to which no homestead or pre-emption claims had attached at the date of its definite location, with the right to make up for any deficiency that might be occasioned by locations under the homestead and pre-emption laws, by selecting other odd-numbered sections lying within 20 miles of its road. It was further alleged that, to make up for losses within the granted limits of the Winona Company, there was selected in its behalf certain odd-numbered sections of land (the same being the sections now in controversy) which lay within 10 miles of the located line of the Hastings Company, and were thus within its granted limits; that the said lands so selected for the Winona Company were each and all selected subsequent to June 26, 1867, after the road of the Hastings Company was definitely located; and that said lands of right belonged to the Hastings Company. It was further shown by the bill that the lands now in controversy, which were selected for the Winona Company to make up for losses within its granted limits, all lay within 20 miles of the road of the Winona Company; that they were certified to the state of Minnesota by the secretary of the interior for the benefit of the Winona Company as lands properly belonging to it; and that the state had duly conveyed them to the Winona Company. In view

of the premises, the bill charged that the Winona Company, and all persons to whom it might have conveyed any portion of said lands, held the title thereto in trust for the Hastings Company, and it accordingly prayed that the Winona Company, and its codefendant, the Winona & St. Peter Land Company, to which, as the bill showed, some of the lands had been conveyed, might be decreed to hold the title of said lands in trust for the Hastings Company, and that they might be compelled to account for the proceeds of all of said lands which they had severally sold.

The answer of the Winona Company (so far as it is deemed material to state its contents) averred, in substance, that all of the lands in controversy in this suit were withdrawn from the market by the secretary of the interior, and were reserved for the Winona Company in aid of building its road, as early as February 12, 1867, some months before the Hastings Company filed its alleged map of definite location, and that the latter company acquired no right to any of said lands by filing said alleged map on June 26, 1867. The Winona Company further alleged that a large portion of the lands in controversy were certified to the state of Minnesota by the secretary of the interior for the benefit of the Winona Company, as early as March 11, 1868, and were conveyed by the state to the Winona Company on September 2, 1868; that the residue of the lands were thus certified to the state for the Winona Company on April 3, 1871, and were conveyed by the state to the railway company on February 26, 1872. In view of the latter facts the defendant companies pleaded laches and the statute of limitations as a bar to the action.

The circuit court on the final hearing dismissed the bill, and the complainant has appealed from such decree.

Jared How and J. M. Gilman, (Homer E. Eller, on the brief,) for appellant.

Thomas Wilson, (Lloyd W. Bowers, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The record before us discloses that the case at bar, in all of its essential features of pleading and evidence, is like the case of *Railway Co. v. Sage*, (8th Circuit,) 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. Rep. 315, which was recently decided by this court. The lands now in controversy lie within the appellant's granted limits, as defined by the act of July 4, 1866, and also within the indemnity limits of the appellee railway company. They aggregate something over 47,000 acres, are of the alleged value of \$240,000, and appear to be distributed along the line of the appellant's road from range 29 W. to and including range 42 W.

It is shown by the testimony that a portion of the lands which are claimed by the appellant were certified to the state of Minnesota by the general government, as lands which of right belonged to the Winona Company, and that they were conveyed by the state to the latter company nearly 18 years before the present bill was filed, and that the residue of said lands were so certified and conveyed to it more than 14 years before the commencement of the present proceedings. In the mean time,—that is to say, from the years 1868 and 1872, respectively, when the lands were deeded to the Winona Company,—that company has openly dealt with them

as its own, by advertising them extensively for sale, and by contracting to convey, and by conveying, a large portion thereof to its codefendant, the Winona & St. Peter Land Company, which has likewise dealt with them as its own, and by making numerous sales and conveyances of other portions of the land to actual settlers, who have entered upon and improved their several holdings. The facts disclosed by the record leave no room for doubt that the appellant's predecessor in interest, the Hastings Company, had actual as well as constructive notice, many years before the present bill was filed, that these lands had been certified to the state, that the state had deeded them to the Winona Company, and that many persons were purchasing and settling on the lands, and were making valuable improvements thereon, under deeds from the Winona Company, in the belief that such deeds conveyed to them an indefeasible title. It further appears that notwithstanding such knowledge, actual and constructive, the Hastings Company failed to assert any claim to the lands, or to take any action looking to the establishment of its alleged right, until the year 1886, when the present suit was instituted, although its road was in process of construction from and after the year 1870, and was completed past the lands now in dispute to the western boundary of the state by December 1, 1879.

Moreover, the present record shows that through lapse of time the Winona Company has lost certain documentary evidence which would probably have rendered its title unassailable to all of the lands now in dispute that lay in and east of range 38, if this suit had been more seasonably brought. It appears that a letter was written by the commissioner of the general land office on July 10, 1865, directing the register and receiver of the land office at St. Peter, Minn., to withhold from pre-emption, homestead, and private entry certain odd-numbered sections lying within the indemnity limits of the Winona Company. The original letter directing such a withdrawal in favor of the Winona Company has been lost, and on the trial below the appellees were compelled to produce what purported to be a copy of said letter, which was in fact a copy of a copy of the original letter, the original having been recorded in the office of the commissioner of the general land office. The copy, upon which the appellees are compelled at this time to rely, contains an order made on July 10, 1865, for the withdrawal of all odd-numbered sections within the 10 and 20 mile limits of the Winona Company, (the same being its indemnity limits,) "to the west line of township twenty-eight west." As there is no such township in the state of Minnesota as "number twenty-eight west," it is claimed by the appellant that the order of withdrawal was void for uncertainty, and that the subsequent grant to the Hastings Company, of July 4, 1866, took effect, even within the limits intended to be embraced by the order of withdrawal, no matter what such intended limits may have been. On the other hand, it is urged by the appellees that on July 10, 1865, all odd-numbered sections within the indemnity limits of the Winona Company were withdrawn for its benefit, to the west line of range 38 W.; that the original

letter of the commissioner of date July 10, 1865, and accompanying diagrams, would show such fact if the same had not been lost, and that a mistake was made in copying the original letter into the records of the land department, from which record the copy now in evidence was obtained. There are several circumstances which strongly support such contention on the part of the appellees, even if they do not demonstrate that all of the odd-numbered sections lying in and east of range 38 were withdrawn from entry and sale for the benefit of the Winona Company on July 10, 1865, and were for that reason beyond the reach of the grant to the Hastings Company of July 4, 1866. But we do not allude to the letter of July 10, 1865, at this time, for the purpose of deciding that it operated as an effectual withdrawal of all the lands in and east of range 38 for the benefit of the Winona Company. We refer to the loss of that letter, in this connection, simply for the purpose of showing to what extent the title of many persons to large and valuable tracts of land has been jeopardized and put in peril by the loss of documentary evidence on which that title depends, solely through the failure of the Hastings Company to assert its alleged right at an earlier day.

In view of what has already been said, and without stating the facts more in detail, we are of the opinion that the plea of laches is fully sustained by the state of facts disclosed by the present record, for reasons that were stated at considerable length in the former case of *Railway Co. v. Sage*, supra, and which we need not now repeat.

But it is urged in opposition to this view, by the appellant's counsel, that the bill shows that the grant to the Hastings Company under the act of July 4, 1866, was a grant in praesenti; that by filing its map of definite location on June 26, 1867, it became vested with the title to all of the free odd-numbered sections within 10 miles of its road; and that upon the completion of its road such title became absolute and took effect by relation as of date June 26, 1867, without the necessity of any further conveyance from the general government or the state of Minnesota. In view of these several propositions, it is further claimed that it was unnecessary for the Hastings Company to pray, as it did, for a decree divesting the Winona Company of the legal title to the lands in dispute, and vesting the same in the complainant company; that the legal title was at the time, and is now, well vested in the complainant; that the relief demanded in the bill was originally misconceived, and was unnecessary; and that notwithstanding the prayer for specific relief, and the allegation that the legal title is held in trust for the complainant, the court should now retain and treat the bill as one filed by the owner of the legal and equitable title to remove a cloud therefrom; and it is further insisted that in such an action neither the plea of laches nor limitations is available to the appellees as a defense. We shall not pause to discuss the question whether, at the time of the filing of the bill, the Hastings Company was in fact vested with the legal and equitable title to the lands, as is now claimed, or whether it misconceived the relief to which it was then

entitled. If that contention is tenable, it would necessarily lead to the consideration of the further question—whether, being out of possession and holding a perfect legal title to the lands now in dispute, the Hastings Company could in that event maintain its standing in a court of equity, where it now finds itself. We accordingly overlook these latter questions, and pass to the more important contention of appellant's counsel, on which its right to relief ultimately rests,—that neither the plea of laches nor limitations is available as a defense to a bill to remove a cloud from one's title. There is some conflict of authority touching the right of the legal and equitable owner of lands, who is out of possession, to maintain a bill to remove a cloud from the title. The right in question has been denied on several occasions by the supreme court of the United States, but from an early day such right has been conceded to an owner out of possession of the courts of Minnesota, and in a case coming from that state we would undoubtedly be justified in following the rule which obtains in the local courts. *Frost v. Spitley*, 121 U. S. 552, 556, 7 Sup. Ct. Rep. 1129; *Orton v. Smith*, 18 How. 263; *Donnelly v. Simonton*, 7 Minn. 167, (Gil. 110); *Hamilton v. Batlin*, 8 Minn. 403, (Gil. 359.)

But, while conceding to the holder of the legal and equitable title who is out of possession the right to maintain a bill to remove a cloud from the title, we are not able to concede that in such cases the defendant is disabled from pleading either laches or limitations. It is manifest, we think, that the latter doctrine can only be invoked by a complainant in a bill to remove a cloud upon his title when he is in possession, and the adjudged cases show that the doctrine has only been applied under those circumstances. *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep. 741; *Miner v. Beekman*, 50 N. Y. 337, 343.

There are obvious reasons why the holder of the legal and equitable title to lands, who is in possession of the same, should not be confronted with the plea of laches when he files a bill to cancel some void or invalid conveyance which operates as a cloud upon his title. Possession of the premises by the true owner is good and sufficient notice to the world of his rights therein, by reason of which third parties need not be prejudiced by any dealings they may have with the holder of the invalid conveyance, while the existence of the cloud is a continuing injury like a public nuisance. Under such circumstances, no harm can result in holding that no period of delay on the part of the owner in asserting his right to have the cloud removed will bar him of his remedy. But the case is far different when the person filing such a bill is out of possession and the person proceeded against is in possession, or, if not in actual possession, is the holder of a record title that is without any apparent flaw or defect. In such cases the doctrine that neither laches nor limitations can be invoked as a defense to a bill filed to remove a cloud upon a title has no just application, and, if tolerated, would frequently lead to gross injustice. It will accordingly be found that in the state of Minnesota, where the rule prevails that a person out of possession may maintain such an action, and the fact that he is out

of possession constitutes no defense, it is nevertheless held that, when such a bill is filed by a person not in actual possession of the disputed premises, the party proceeded against is at liberty to plead either laches or limitations as a defense. *Bausman v. Kelley*, 38 Minn. 197, 204, 36 N. W. Rep. 333.

We are accordingly of the opinion that the ground upon which the learned counsel for the appellant have attempted to evade the plea of laches interposed by the Winona Company, is untenable, and, so holding, the decree of the circuit court must be in all things affirmed.

EVANS v. CHARLES SCRIBNER'S SONS et al.

(Circuit Court, N. D. Georgia. October 10, 1893.)

1. SERVICE OF PROCESS—ABSENT DEFENDANTS.

Service may be had upon an absent defendant, under Rev. St. § 738, when the suit is brought to cancel for fraud a deed of lands situated within the district.

2. SAME.

But such service cannot be had when the suit is for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which are not within the district, although such company, in compliance with a state statute, has deposited bonds with the comptroller general of the state, especially when the company acknowledges its liability on the policies, and offers to pay the amount thereof into court.

3. SAME.

Where the cancellation of the deed and of the transfers of the policies is sought in the same suit, service as to the former cause of action will not draw to it jurisdiction as to the latter, as there is no connection between the two.

In Equity. Bill by Flora W. Evans, administratrix, against Charles Scribner's Sons and others. Motion to set aside service and order of service made under Rev. St. § 738. Granted in part and denied in part.

Hamilton Douglas, for complainant.

B. H. & C. D. Hill, for the insurance company.

Mayson & Hill, for Scribner's Sons.

NEWMAN, District Judge. In this case the complainant is a resident of this district, and brings her bill against Scribner's Sons, citizens and residents of the state of New York; and the Northwestern Mutual Insurance Company, a corporation of the state of Wisconsin, and citizen and resident of that state. The purpose of the bill is twofold: First, to require the defendants Scribner's Sons to bring into court and to have canceled as fraudulent a deed of conveyance to certain real estate in the city of Atlanta, and this district, which deed is alleged to have been obtained by duress and fraud. The value of the real estate, as the pleadings now stand, is alleged to be more than \$2,000. The other purpose of the bill is to set aside transfers of certain insurance policies in the Northwestern Mutual Life Insurance Company on the life of complainant's de-

ceased husband, which transfers are also said to have been obtained by duress and fraud. The Northwestern Mutual Life Insurance Company appeared by its solicitor, and filed an answer, in which it acknowledged that the policies of insurance on the life of the complainant's husband were in force at the time of his death, and acknowledged its indebtedness on said policies, and asked of the court that it might be fully protected as a disinterested holder of the funds, and that the parties claiming the same might be properly before the court, before any action against it was had; and then offered, and requested leave, when it should be so protected, to deposit the amount covered by the policies in the court. An order was granted, under section 8 of the act of March 3, 1875, (Supp. Rev. St. p. 84,) for service on Scribner's Sons. That section, so far as is material here, is as follows:

"That when any suit is commenced in any court of the United States to enforce any equitable lien or claim to, or remove any incumbrance or cloud upon the title to real or personal property, within the district where such suit is brought, and one or more of the defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, and plead, answer or demur by a certain designated day, which order shall be served," etc.

Service was made under the order. Thereupon Scribner's Sons put in a special appearance by counsel, and moved that the order granting the service and the service be set aside. In order to justify service under the statute the suit must be one to "enforce a legal or equitable lien upon or claim to, or to remove an incumbrance or lien or cloud upon, the title to real or personal property within the district where suit is brought." Now, so far as this bill seeks to set aside the deed to the real estate in question, the service seems to be entirely proper. As to the insurance policies, it appears that the policies are now in the state of New York, but the indebtedness is by a corporation of the state of Wisconsin. As to these policies, the suit does not seek to enforce "any legal or equitable lien upon or claim to any property either real or personal;" neither does it seek "to remove any incumbrance, lien, or cloud upon the title to any real or personal property." Even if the insurance policies in issue could be said to be, in any fair sense, such personal property as is contemplated by the statute, the policies are in the state of New York, and not in this district.

By an amendment to her bill complainant shows that by a statute of Georgia all insurance companies doing business in this state are required to deposit with the comptroller general of the state a certain amount of bonds for the protection of persons holding insurance policies issued by any such companies; and that the Northwestern Insurance Company has complied with this statute, and has bonds to a greater amount than the policies in question now in the hands of the comptroller general. She also alleges that notice has been given to the comptroller general against the Northwestern Mutual Life Insurance Company. From this her counsel argues that this constitutes personal property within the district, which she is seeking to recover, and that, within the language of the

statute, she has a claim to this personal property. This position cannot be sustained. The insurance company deposits here bonds in the hands of the comptroller general for the purpose of securing its policy holders, generally, in the state; and, after notice has been given to the comptroller general, and judgment obtained against the company, these bonds may be subjected to the payment of the judgment. But this is not a suit, in any sense, to recover those particular bonds, and there is no provision in the statute of the state for that, nor is there any law authorizing any such proceeding. But, in addition, in this case, the insurance company has come into court and acknowledged its indebtedness, and offers, when the court shall deem it fully protected, to pay the money into court. Therefore there is no reason whatever for the complainant to recover these bonds, or endeavor in any way to subject them to the payment of the claim. It is clear, therefore, that, so far as this suit relates to the insurance policies in question, the service, under the section of the Revised Statutes quoted, is improper. So far as it applies to the real estate, in the opinion of the court, it is good. If these two questions as to the real estate and insurance policies were so related to each other that one could not be disposed of fairly without the other, then it is probable that the retention of the case as to the real estate would hold the remainder of the case; but this is not true here. The two matters seem to be entirely separate and distinct, and the question as to whether the deed to the real estate was obtained by duress and fraud, and should be set aside or not, could be easily disposed of without considering the other question.

The conclusion is that the order for service and the service must be set aside, so far as relates to that part of the bill covering the insurance policies; and that, as to so much of the bill as refers to the real estate, the order for service should be sustained.

WESCOTT et al. v. MULVANE.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 230.

1. SPECIFIC PERFORMANCE—TENDER BY COMPLAINANT.

An agreement to sell the whole capital stock of a corporation, the first payment to be made in cash on the subsequent signing of a more formal contract, there being no stipulation as to time of delivering the stock, is not specifically enforceable when the purchaser has failed to tender the first payment as agreed, demanding that the stock should be first deposited in a bank.

2. SAME—INJUNCTION—DISSOLUTION.

Where, under a bill for specific performance of a contract of sale, complainant, after securing a temporary injunction against a sale to other parties, withdraws "so much of the bill as seeks specific performance," with the understanding that if the court finds him entitled to specific performance it shall award damages in lieu thereof, it is then proper to dissolve the injunction, since it could only be awarded as incident to the relief originally sought.

Appeal from the Circuit Court of the United States for the District of Kansas.

v.58f.no.2—20

In Equity. Suit by George P. Wescott and Samuel Hanson against Joab Mulvane for specific performance of a contract. The court below dismissed the bill, and complainants appeal. Affirmed.

W. H. Rossington and Charles Blood Smith, (E. J. Dallas, on the brief,) for appellants.

A. L. Williams, for appellee.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This was originally a bill filed by the appellants against the appellee to specifically enforce the following contract:

"Boston, December 14th, 1889.

"Gentlemen: I will sell you the entire capital stock of the Topeka Water-Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of \$100 per share, for the sum of five hundred thousand dollars, (\$500,000,) on the following terms of payment, viz.: The sum of sixty thousand dollars (\$60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars, (\$440,000,) to be paid as follows, viz.: The sum of two hundred thousand dollars (\$200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars (\$140,000) to be paid February 20th, 1890, and one hundred thousand dollars (\$100,000) to be paid March 20th, 1890; provided, that final payment of the last-named sum of one hundred thousand dollars may be paid on February 20, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

"Joab Mulvane.

"To George P. Wescott, Samuel Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water-Supply Company for the price and on the terms and conditions above stated.

Geo. P. Wescott.
"Samuel Hanson."

Other persons and corporations besides the appellee were at first made parties defendant, with whom, as the bill charged, the appellee had entered into negotiations after the execution of the foregoing contract, with a view of forming a new corporation known as the Topeka Water Company, and transferring to it the property and franchises of the Topeka Water-Supply Company, and capitalizing such new corporation at a sum largely in excess of the sum which the appellants had agreed to pay for the stock of the Topeka Water-Supply Company. A preliminary injunction against all of said original defendants was prayed for and obtained on the filing of the bill, restraining them, in substance, from carrying out the negotiations aforesaid, and from putting on the market any of the securities of the new corporation, and from canceling the stock of the Topeka Water-Supply Company, and from transferring its franchises and property to the new company. A motion to dissolve that injunction was subsequently made, and on a hearing of the same it was sustained, and the injunction was thereupon dissolved. Afterwards a stipulation was made and filed in the case whereby the bill was dismissed as to all of the defendants except the appellee. This stipulation contained, among other things, the following clauses:

"(2) Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint."

"(4) Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

"(5) Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect, the rights or remedies of complainants against Joab Mulvane in this suit, or in any other action, except as contained in paragraph 2 hereof. * * *"

The bill appears to have been thereafter retained, by consent of all parties, with the understanding that the case should be tried and that damages should be assessed by the court in lieu of a decree of specific performance, as for a breach of said contract, if the court was of the opinion that the appellants were originally entitled to specific performance. Considerable testimony was thereupon taken, and on final hearing the circuit court dismissed the complaint.

We shall indulge in no criticism of the regularity or propriety of the foregoing proceedings. The case having been argued in this court upon the evident assumption that the parties had a right to thus turn a proceeding in equity into a suit at law, and to make the damages dependent upon the question whether there was an original right to specific performance, we shall proceed to consider and treat the case upon that theory; the question being whether, in view of all of the circumstances attending the making and execution of the agreement, it was one which a court of equity would specifically enforce.

The contract was executed in the city of Boston late in the evening of Saturday, December 14, 1889, but there had been some preliminary negotiations between the parties at Topeka, Kan., on the 12th of the preceding November. The appellants resided respectively at Portland, Me., and Boston, Mass., while the appellee resided at Topeka, and was the chief executive officer and a large shareholder in the Topeka Water-Supply Company. The testimony shows that the parties had met by appointment in the city of Boston on the day the contract bears date, and that they had had a lengthy conference before it was finally signed. In the course of that interview the defendant informed the complainants that he had not as yet succeeded in obtaining control of certain shares of stock of the Topeka Water-Supply Company of the par value of \$12,000; that the residue of the stock was within his control, but that he only had shares of the par value of \$40,000 with him; that he must have \$60,000 cash in hand on signing the contract, and that a Mr. Burr, who was president of a Boston bank, would probably be willing to guaranty that the payment of the \$60,000 would be a safe thing to do under these circumstances. With this information the contract above set out was drawn and signed, and the parties separated to meet on the following Monday, December 16, 1889. When the parties met on the succeeding Monday the appellants submitted a form of contract to be signed by the appellee in pursuance of the stipulation in the preliminary contract above set out, which provided that \$60,000 should be paid to the defendant on the signing of the same, but

which also contained a provision that the defendant should "at once place in the hands of the cashier of the National Bank of North America in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water-Supply Company." They further informed the defendant that the Mr. Burr referred to had refused to give the above-mentioned guaranty, although he had given him "a high recommendation for integrity and financial ability." Thereupon a long controversy appears to have ensued, in which the complainants undoubtedly took the ground that they ought not to pay the \$60,000 unless the entire capital stock of the water-supply company was first deposited in the National Bank of North America, while the defendant contended that that was an evasion of the terms of the provisional agreement of December 14, 1889, and that the \$60,000 should be forthwith paid, and that the complainants should trust to his ability to make good his promise to deliver the stock. Not being able to come to an understanding, the parties separated, and the negotiations came to an end.

It is perfectly obvious, we think, from an inspection of this record, that the complainants at no time tendered to the defendant the sum of \$60,000 at the National Bank of North America in the city of Boston or elsewhere, or ever professed a willingness to pay him that sum until he had deposited the entire capital stock of the water-supply company in the Boston bank aforesaid, which deposit of stock, as the complainants well knew, the defendant was not prepared to make. Under these circumstances we must conclude, as the circuit court appears to have done, that the complainants were not entitled to specific performance of the contract, for the reason that they never placed the defendant in default by tendering to him the sum which he was clearly entitled to receive before the delivery of any stock. The fact seems to be that the contract of December 14, 1889, was intended as a brief statement of the more important stipulations that were to be embraced in a contract to be subsequently drawn which should cover all the details of the transaction, but when this subsequent contract was drawn and presented it was found that it did not express the intentions of one of the parties at least as to the matter of the delivery of the stock, concerning which nothing had been said in the original agreement except by implication. We are not disposed, however, to question the proposition that the contract counted upon in the bill is a complete contract, nor the further proposition that such an agreement may be specifically enforced. For present purposes both of these propositions may be conceded, but, conceding them to be well founded, we are nevertheless of the opinion that the agreement called for the payment of \$60,000 before the defendant could be required to deliver any stock, and, as no money was tendered, he is not shown to have been at any time in default.

It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say,

and we think it is all-sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn the injunction necessarily shared the same fate.

Finding no error in the record, the decree of the circuit court is in all things affirmed.

WINCHESTER REPEATING ARMS CO. v. AMERICAN BUCKLE & CARTRIDGE CO.

(Circuit Court, D. Connecticut. November 6, 1893.)

No. 677.

Opinion Granting Rehearing.

In Equity. This was a suit by the Winchester Repeating Arms Company against the American Buckle & Cartridge Company. It was tried together with two other cases between the same parties, (Nos. 676 and 678,) and a decree was entered awarding an injunction. See 54 Fed. Rep. 703. Rehearing granted as to the third claim, with liberty to introduce the file wrapper in evidence.

Charles R. Ingersoll and George D. Seymour, for plaintiff.

Henry G. Newton, for defendant.

SHIPMAN, Circuit Judge. This is a motion for a rehearing of No. 677, the bill in equity between the parties which is founded upon the alleged infringement of the third and fourth claims of letters patent No. 232,907, dated October 5, 1880, to George P. Salisbury, for an improved cartridge assembling machine, and also for leave to introduce in evidence the "file wrapper and contents" of said patent. It is thought that the history of the patent upon its way through the patent office furnishes light upon the proper construction of the claims in controversy. Objection to the opening of the case so far as to permit the file wrapper and contents to become a part of the testimony is not substantially made, as the complainant is of opinion that its theory of the patent is sustained by the patent office record. For the purpose of presenting the facts in a compact form, it is necessary to restate those which were given in the previous opinion, (54 Fed. Rep. 703,) as follows:

"The patentee says in the specification of the 'assembling machine' patent: 'Paper cartridge shells, such as are ordinarily used in shotguns, are composed usually of four parts, viz.: An open-ended tube, which constitutes the body of the shell; second, a short tube, called a "reinforce;" third, a wad to close the ends; and, fourth, a metallic cap or head. Heretofore these parts have been put together, or, as it is technically termed, "assembled," by hand, which is necessarily a slow and tedious process. The object of my present invention is to produce a machine by which this work may be done automatically by simply applying it with the parts before mentioned. The machine may be of various forms or styles, but the style shown in the accompanying drawings is one of the simplest and most convenient known to me.'"

The mode of operation of the parts of the machine which are included in claims 3 and 4 is as follows:

"Tubes, each with a wad in one end, are stuck by hand, wad end up, on vertically arranged pins carried by an intermittently rotated horizontal dial, which presents them to the action of crimpers, whereby their upper ends are contracted, and cups or heads are thrown open side up, on a horizontal friction-feed dial, which co-operates with a fixed guide or channel located just above it, to feed them in single file onto a bed or table, from which they are picked up one by one by a pair of oscillating, spring fingers, which swing them over the contracted ends of the tubes, when a punch comes down, and drives them thereupon, the tubes or shells being then automatically picked off the pins and discharged from the machine."

"The third and fourth claims are as follows:

"The crimping tools, f and g, arranged to operate consecutively on the shell or tube, b, to prepare it for the reception of the metal head, in combination with mechanism, substantially such as described, for delivering and forcing the metal head upon the shell, as set forth. (4) The combination of a shell-carrying dial, D, a friction feed dial, L, with the spring transfer jaws, m, and reciprocating punch, h, for feeding, placing, and forcing the metal head on the shell, substantially as described."

The defendant's crimper was single, and in construction was substantially the same, and in operation was the same, with the double crimper of the Salisbury machine. It was a reciprocating spindle, with a conical cavity, which was forced down upon the end of the tube, and crimped that end. The two Salisbury crimpers are constructed and operated consecutively in the same way. The difference is in the number of thimbles which are forced upon the end of the tube. Single crimpers to prepare the shell for the receipt of the metal head were old when the Salisbury automatic machine was invented. No invention existed in the substitution of two crimpers for one; although two can probably do the work more neatly and accurately, one crimper could, without invention, be made to operate upon the end of the tube twice instead of once before the "heading" operation, or two could act consecutively. The actual invention of the third claim consisted not in the double crimper, but in the combination of a tool or tools for crimping the tube with mechanisms for delivering and forcing the metal head upon the tube, the continuous operations being accomplished automatically.

Under this state of facts it is important to ascertain from the history of the patent whether the patentee so tied himself to a double crimper, the tools acting, as a matter of course, consecutively, that he limited the third claim to that construction. The claim, as originally presented, was as follows:

"(4) In combination with the shell carrying dial, D, the reciprocating crimping tools, f and g, arranged to operate substantially as described."

The patent office rejected the claim, saying:

"The use of two crimping devices of substantially the same combination for successively operating upon the shells to effect the proper degree of compression involves no novelty in view of Smoot & Hamilton, (196,545, Oct. 30, 1877)."

The machine here referred to had vertical reciprocating dies or crimpers, which acted upon the head but once. The patentee

amended his claim in the manner in which it was allowed, saying, with reference to all his amendments:

"The invention in this case does not consist in new devices, but in the combination of old devices in such a manner as to produce new results; in other words, it is a new organization of mechanical devices by which work that has heretofore been performed by hand is now performed by machinery automatically."

He therefore increased the number of elements of the combination so as to make it include not merely an automatic crimper and a carrying dial, but also mechanism for the automatic delivering of the heads and the automatic forcing of the heads upon the shells. But he also added to the claim language which was apparently intended to differentiate his crimping mechanism from pre-existing crimpers by the fact that his devices were arranged to operate consecutively on the tube. It is true that the patent office had said that mechanisms for successively operating upon the shells involved no novelty, yet the patentee changed the language of this claim with the apparent object of making a point of this supposed peculiarity in the method of operation. From this history it appears that the question of infringement does not depend in this case upon the mechanical equivalency of the element which was substituted for the omitted part of the combination, (*Meter Co. v. Desper*, 101 U. S. 332,) but it depends upon the construction of the claim, and whether the patentee has limited his invention, by the terms which he has selected, to crimpers which operated consecutively, (*McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76.) Upon this contention I think that the defendant is correct.

It is also insisted that the fourth claim was not infringed, because the defendant's machines did not contain the friction dial, L. The claim, as originally presented, was for "the combination in an assembling machine of a shell carrying dial, D, and a friction dial, L', with the spring transfer jaws, m, m, and reciprocating punch, h, all arranged to operate substantially as described for placing the metal heads upon the shells, as set forth." The claim was rejected, upon the ground that the particular combination named had been anticipated; whereupon it was amended so as to claim the automatic character of the combination to feed, place, and force the metal head upon the shell. The defendant urges that the friction dial, L, was substituted for L'. By mistake, apparently, the prime mark was omitted, for the dial, L, has no co-operative connection with the spring fingers, and has also no relation to the heads, which are the principal subject of the mechanism of the fourth claim, but its co-operative connection is with the devices which take hold of the reinforces and the wads. This clerical error is easily understood by reference to the specification. The proper construction of the claim is to regard the dial, L, as the one with which the fingers are connected, and which is called L' in the drawings and specification. As thus construed, it was infringed, and a rehearing thereon is unnecessary.

The motion for a rehearing upon the third claim, and for liberty to introduce the file wrapper and contents in evidence, is granted.

In re MEAD.

(District Court, S. D. New York. May 24, 1893.)

BANKRUPTCY—EQUITY SUIT—SALE OF REAL PROPERTY—REFERENCE ON PRIOR LIENS—DEPOSIT IN REGISTRY.

In an equity suit in the district court to recover assets belonging to a bankrupt's creditors, the court, in a decree appointing a receiver, may direct the sale of real property free from incumbrances, and thereafter order a reference to ascertain summarily the amount due in case of dispute upon a mortgage which is a prior lien, and direct sufficient proceeds of the sale to be deposited meantime in the registry, as security for the mortgage, and that the premises be conveyed free from the mortgage.

In Equity. Bankruptcy.

Nelson Smith, for complainant.

Wheeler H. Peckham, for bankrupt.

Luke A. Lockwood, for mortgagee.

BROWN, District Judge. Under the bankrupt act of 1867, the district courts, in exercising equity powers and in administering equitable relief, act as courts of bankruptcy quite as much as when administering either common-law or summary remedies. The special powers given by the various sections of the bankrupt act and the acts amendatory thereof, as incidental to the general powers of the court, are not restricted to any particular conditions of procedure, but in appropriate cases may be exercised as rightfully when giving equitable relief, as in its common law or summary procedure.

In the present case the court, under its decree in the equity suit brought by the assignee in bankruptcy, has in effect adjudged that all beneficial interest in the premises in question belongs rightfully to the assignee for the benefit of the creditors of the bankrupt, save only a certain equity to Mrs. Mead, the bankrupt's wife, which is provided for in the decree. The assignee has been put in possession of the premises, as receiver, and, under the decree of the court, has sold the premises at public sale free from all incumbrances as he was authorized and directed to do, at which sale Mrs. Mead, one of the defendants, was the highest bidder, and is entitled to the conveyance of the property on compliance with the terms of sale.

A dispute having arisen, however, as respects the amount due to Mr. Naylor upon certain second mortgages held by him upon the premises in question, and a reference having been taken for the purpose of ascertaining the amount of his actual interest and lien thereon, which is still pending and undetermined, the proceedings appropriate to be taken are evidently such as are provided by sections 5063, 5075, 4972, and 4979 of the Revised Statutes. In re Clark, 9 Blatchf. 372; In re Kirtland, 10 Blatchf. 515; In re Ellerhorst, 7 N. B. R. 49, 2 Sawy. 219. All possible rights of the mortgagee will be preserved by providing that the whole amount which can be possibly claimed under the mortgages shall be held by the assignee, or in the registry of the court, or other depository as may be agreed upon, "in place of the estate disposed of." Section 5063.

A sale of the premises free from incumbrances, duly made under the order of the court, is of itself equivalent to a transfer of the lien of the mortgages from the estate sold to the proceeds of sale. The sale already made has been a sale made by the assignee as receiver under the order of the court. For greater explicitness, however, and the satisfaction of those proposing to take new mortgages on the premises to enable Mrs. Mead to complete her purchase, there can be no objection to an additional order declaring that the sale made free from incumbrances shall be a discharge of all lien of the mortgages, upon the payment of the whole amount claimed thereon to the assignee, or to the registry of the court, or other depository as may be agreed; such payment to remain subject to the lien of said mortgages, in place of the land sold, for all such amounts as may be ultimately found due to Mr. Naylor, his representatives or assigns, and any costs accruing thereon; and that Mrs. Mead, the purchaser, complete her purchase in accordance with the terms of sale and this order.

BARNARD et al. v. ADAMS et al.

(Circuit Court, N. D. Iowa, Central Division. September 16, 1893.)

No. 136.

1. CHARITABLE TRUSTS—CY-PRES—REVERTER.

An individual vested a fund in the trustees of a church, in trust to appropriate one-half the income to the support of the church, and the other half to a designated college, for the purpose of educating poor young men desiring to enter the ministry, without regard to denomination; the church trustees to select the beneficiaries. After said fund had vested, the college, through lack of money, entirely suspended the exercise of its functions. *Held*, that this did not cause a reverter of one-half the fund to the grantor's heirs, or authorize the appropriation of the income thereof to the support of the church, but that equity would cause it to be applied through another college, to effectuate, in the same manner, the original purpose, and, in case the original college resumed the exercise of its functions, would then require the trust to be executed through it.

2. SAME—EQUITY—COSTS.

Where the question of the disposition of a charitable trust fund, which has become inactive through unforeseen circumstances, is raised by the suit of the grantor's heirs to recover the fund, or, in the alternative, to have it applied in an analogous manner, and the trustees, while asking a different application, do not unduly resist this alternative prayer, the court, on making such disposition, under the doctrine of cy-pres, will charge the costs, including a reasonable attorney's fee to each party, against the fund.

In Equity. Suit by Martha J. Barnard and others against Frank F. Adams and others to recover a trust fund, or to enforce its application to the purposes of the trust.

G. S. Kloch and M. C. Matthews, for complainants.

P. Finch and R. M. Wright, for respondent trustees.

J. N. Prouty and D. F. Coyle, for respondent college.

WOOLSON, District Judge. Upon July 16, 1877, David White and wife, as party of the first part, of the state of New York, duly executed an instrument of conveyance, wherein they conveyed, as-

signed, and transferred unto certain persons therein named, trustees of the First Congregational Church and Society of Humboldt, Iowa, and their successors in office, as party of the second part, certain real estate situated in the state of Iowa, also real-estate mortgages and notes thereby secured, and also a certain judgment recorded in the United States circuit court for the district of Iowa—

"To have and to hold the same, unto the said party of the second part, their successors in office, or substitutes appointed as hereinafter specified, and assigns, forever; in trust, nevertheless, for the purpose of creating out of or with the proceeds of said sale, or other disposal of said property, a trust fund to be called and known as the 'David White Fund,' and to be securely and profitably loaned at, or invested at, annual interest, or semiannual, by the party of the second part, their successors in office, or substitutes appointed as hereinafter specified, who shall be responsible for both principal and interest, and shall collect and receive such interest accruing on said fund, and annually pay one-half thereof to the said Congregational Church and Society, for its support, and the other one-half thereof to Humboldt College, located at Humboldt, Iowa, for the purpose, primarily, of affording of said college educational facilities to poor, worthy young men, who desire to go into the gospel ministry, without regard to Christian denomination. And said trustees shall have the right to annually designate who shall be the beneficiaries of said fund, by issuing to such persons as they may select, or deem worthy to receive the same, untransferable yearly scholarships in said college, equaling in amount, at the regular rates of tuition, the amounts of said fund paid in for that year; and, in case said fund is not exhausted in the manner above specified, said trustees may issue scholarships, as aforesaid, to any other persons they may select thereof. Should said trustees fail to so designate the beneficiaries of said fund, or any part thereof, for any year, as aforesaid, the right to make such designation shall devolve upon, and be exercised by, the executive committee of the board of trustees of said Humboldt College for the time or amount unappropriated by said trustees. [Then follow directions to convert the property into money, and that trustees shall serve without compensation out of the fund.] And to the end that said trust shall not fail for want of trustee, and that the purposes thereof may, in any event, be fully and completely effectuated and carried out, said party of the second part shall annually report their doings herein to the district court of Humboldt county. [Here follows provision authorizing said court to appoint trustees, when necessary, and that, until trustees do accept, J. N. Prouty shall act as trustee.]"

This conveyance bears the written acceptance of the trustees of said church, as provided for in the deed of trust.

The said First Congregational Church and Humboldt College, named in this deed, had been incorporated under the laws of the state of Iowa. (Formerly, the town of Humboldt was called Springvale.) Such proceedings were duly taken by the party of the second part with reference to the property named in the deed, and in accordance therewith, as that the same was reduced to money, and amounted, in the hands of the trustees, (principal of fund,) to the sum of \$4,800. This sum became the David White fund. It appears from the evidence—and the briefs of counsel on either side state the fact with words of hearty commendation—that this fund has been guarded and attended to with prudent care, so that the same has been annually productive. As directed in the deed, the trustees have annually reported the condition of this fund, and these reports from the year 1888 to 1892 are in evidence.

From the evidence and admissions in the pleadings herein, it ap-

pears that, since the year 1880, Humboldt College has had no active existence as a college. The school buildings and ground are owned by that incorporation, and for some years since 1880, a private school has been held in the school building. There has been no election of officers of the college incorporation, nor, indeed, any formal meeting of the board of trustees, since 1880. The president of such board testifies that he has, since 1880, signed some papers officially, as such president. But, apparently, no corporate act has been performed on the part of the institution, in the line of the purposes for which it was incorporated, since 1880, and the college has not been receiving or educating pupils since 1880. The evidence shows that the trustees have regarded and treated the fund as an entirety, and kept its accounts as such. The net income, however, has annually been divided by the trustees into two equal parts,—the one part whereof has annually been paid to the church, while the other half has been retained by the trustees, and each year thereafter the half of the net income for that year has been added thereto. This half, which, had Humboldt College been in active existence, would have been expended in educating persons for the gospel ministry, amounted, upon November 19, 1892, to \$2,153.98, according to the report of that date.

Complainants' bill alleges that Humboldt College is no longer in existence; that by nonuser it has "voluntarily surrendered its charter, and its rights and franchises acquired thereunder, and that since 1880 said college has had no existence whatever, and the same is wholly extinct, and that there is no institution in existence, under the aforesaid name, designation, and title, which has for its object and purpose the education of the young in literature and science." And complainants, who are the sole heirs of said David White, (said David White and his wife being both dead,) claim that said trust, as to said Humboldt College, has failed, and that they are therefore entitled to said fund, i. e. that part which was conveyed in trust for Humboldt College,—an amount equal to one-half of the principal fund, and all the said net income therefrom, which is now in the hands of said trustees, by their report shown,—and they pray decree accordingly. But they present an alternative prayer, to wit, that in case the court shall determine said complainants are not entitled to said fund as prayed, then this court shall "designate and appoint a beneficiary or beneficiaries, so that the said trust fund shall become active," etc. The trustees of said church file a cross bill, wherein, among other matters, they allege said Humboldt College has ceased to exist, so far as relates to the purpose to whose attainment said trust was created,—the facts constituting such nonexistence being alleged, substantially, as in complainants' bill; that no other college or institution has succeeded to said trust; that "it was the intention, purpose, meaning, and design of said White and wife, at the time of executing the said deed of trust, that, on failure and neglect of said Humboldt College to keep up its organization, the trustees and their successors in office, of the said Congregational Church, should designate the institution at which the beneficiaries of the one-half of said fund should be educated." And having

averred their willingness, at all times, to carry out said trust, and their inability to so carry out the same, as to said half of income of said fund, (other than the half devoted to the church,) because of the alleged nonexistence or noncontinuance of said college, they ask the aid of this court, and averring that "under the order and direction of this court, and to carry out the intent and purpose evidenced by said trust deed, your orators, and their successors in office, ought to be permitted either to pay over annually to the said church the proceeds and accumulated interest on the one-half of said trust fund, which was designated in said trust deed for the benefit of Humboldt College, or else they ought to be permitted to select poor, worthy young men, desiring to enter the gospel ministry, without regard to Christian denomination, as the beneficiaries of said fund, and to designate the college where such young men should be educated," etc., and having selected Iowa College, at Grinnell, Iowa, as such college, they pray accordingly.

The respondent Humboldt College has filed its answer by J. N. Prouty, who states he is secretary thereof, among other averments, admitting that since 1881 "it has not maintained a school for the education of young men and women in literature and science," but denying that its charter rights and franchises have been forfeited by nonuser or nonholding of such school; denying that since 1880 the college has had no existence, but avers the fact to be that it is still in existence; and thereupon said answer proceeds to name the president and secretary and trustees. The college also avers that it has been prevented and kept from maintaining and keeping such school by the want and absence of money and funds for that purpose, but states that it still holds its "charter and rights and franchises, and still owns and possesses valuable school property, to wit, library, charts, maps, and school apparatus, and it has never received any portion of the income arising from the aforesaid trust fund for the reason that no person has ever applied to be the beneficiary of the aforesaid fund, and no persons have ever been designated by the aforesaid trustees, or any other persons, as the beneficiaries of the aforesaid fund, and that this defendant, and the executive committee of its board of trustees, have not designated the beneficiaries for the reason that said fund was not converted into money, and made available therefor, until since the year 1881, and prior to 1881 there was no income received from said fund by said trustees." And the college, while, in its pleading, first praying decree declaring it to be entitled to full and complete possession of that part of the trust fund which was by said trust deed intended to be used towards education in said college, presents, as an alternative prayer, that if the court find that, by reason of failure to apply said fund, in accordance with said trust deed, to said college, the purpose of said trust fund has not been carried out, and has failed, "that this court inquire whether it was not the purpose and intention of said White and wife that the income arising from said fund should be applied to some other purpose, similar thereto, and connected with the education of young men and women at the school of this defendant," and asks decree accordingly.

I shall not attempt to state the evidence on which I determine the few contested facts involved herein, nor shall I attempt elaboration of the conclusions to which I have arrived, nor make any large or extended citations from, or reference to, the authorities which, I understand, govern the decision reached. The pleadings are exceedingly voluminous. I have above given an abstract of so much as seemed necessary to present the points with reference to which the decision herein is reached. The pleadings agree that when this trust deed became effective,—by acceptance of trust and possession of trust property by the trustees,—Humboldt College was in active operation. Had this trust property, at that time, been yielding a net income, the college would have been entitled to have then received, each year, its moiety of the net income. As this trust falls within the generally accepted definition of a "legal charity" the trust then vested. So far as that half of the income is concerned, which, by the trust, is for the use of, and is to be annually paid to, the church named in the trust deed, all parties hereto recognize, in the pleadings, the trust as effective, and such half has annually been paid to said church. The controversy herein relates solely to the remaining half of the income and proportionate interest in the trust fund, which, under the terms of the trust deed, was to be paid to Humboldt College.

Upon the whole case, I conclude that the intention and purpose of the donor, in creating this trust, as evidenced by the trust deed, was, using the phraseology of that instrument, "primarily, of affording educational facilities to poor, worthy young men, who desire to go into the gospel ministry, without regard to Christian denomination." True, the instrument uses the phrase, "affording of said college educational facilities," etc. But, taking the entire scope of the instrument, I am satisfied that the application of said fund to education in said college was of secondary importance, in the mind of the donor, and that it was not his purpose or intention that, in case of the nonexistence of said college, said fund should cease to be operative in what I find to be its primary object. All the parties to this action have joined in the request that the court shall enter such decree herein as shall determine the disposition of such fund. A concise statement of my view of the general principles governing this case is given in *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9:

"The rule of equity seems clear, that, when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the sufficiency of the formal intention. It is accordingly well settled, by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit to a particular institution or mode of application, and afterwards, either, by a change of circumstances, the scheme of the testator becomes impracticable, or, by change of law, becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law, as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular direction as possible, to carry out his general charitable intent."

"It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that this intent ought to be observed; and, when this cannot be literally and strictly done, this court will cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable. When the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes, and regulates the disposition of such property, under its general jurisdiction of the subject of trusts. What is the nearest method of carrying into effect the general intention of the donor must, of course, depend upon the subject-matter, the expressed intent, and the other circumstances of each particular case, upon all which the court is to exercise its discretion. *American Academy v. Harvard College*, 12 Gray, 582."

I conclude:

1. The prayer of complainants for decree awarding to them said portion of the trust fund, which, by the terms of the trust deed, is to be paid to Humboldt College, must be denied.

2. The prayer of respondent trustees of said Congregational Church, for decree awarding to them, for use and benefit of said church, said Humboldt College portion of said fund, must be denied.

3. The donor intended this trust fund should be active. The failure of Humboldt College to maintain an institution of learning, wherein the primary purpose of said trust fund could be carried out, prevents said fund from being operative through said college. As the corporate term of said college, as fixed by its articles of incorporation, seems not to have expired, I am unable to say that said trust fund may not yet become operative through said college. The corporate character of said institution still exists. Its board of corporate managers may be called together, and, in the property now owned by said college, it is possible said board may yet renew and maintain such an institution of learning as the donor contemplated when he created said trust fund. I may not, therefore, declare that said fund shall be permanently turned away from said college. But the trustees of said church, whom the donor selected as the custodians of such fund, have requested the fund may be decreed and made active by empowering them to act towards the Iowa College, at Grinnell, Iowa, as in said trust deed they are empowered to act toward Humboldt College. I find it just and equitable that such prayer should be granted, subject, however, to this proviso: That if, at any time, said Humboldt College resume an active existence, and, within the meaning of said trust deed, shall become capable of carrying out the provision of said trust, that application may then be made to this court for decree authorizing and directing said trustees to expend said trust fund towards and for said Humboldt College; and, so far as may be necessary for that purpose, this court will retain jurisdiction of this cause. In the mean time, said trustees will expend said trust fund towards said Iowa College in same manner as though that college had been named in said trust deed in lieu of said Humboldt College.

I may here note that in some of the reports, as made to the district court of Humboldt county, and in evidence herein, I observe that the money set apart for Humboldt College has been charged with expenditures which are, apparently, not chargeable against

that portion of that fund. This error should not be, hereafter, repeated. The trust deed seeks to hold the trustees responsible for any diversion of the fund. This portion of the fund must not be chargeable with any expenses which are properly chargeable against the half provided for said church, and it should not be charged with more than its proportionate share of those expenses which are chargeable against the entire fund.

4. I find against the prayer of Humboldt College for decree directing payment to J. N. Prouty for labor and services, and for money expended in matters of tax sales, etc. The evidence shows that such services and payments were intended by him to be a gift to said college. His act and intent in the matter are highly commendable, but I find no basis for making such payments a charge against the trust fund.

5. Complainants, as heirs of said donors, were justified in bringing this action, and thus making this trust fund operative. The evidence does not satisfy me that the trustees of this fund have discharged their whole duty with reference to the trust committed to them. The fund has apparently been well invested, and made remunerative. But the trustees, in the more than 10 years since Humboldt College ceased its active existence, should have applied for directions as to the use to be made of this fund. Nevertheless, I do not find this a case requiring or justifying the imposing on them of the costs herein. They have not improperly resisted herein, and they have, since action brought, apparently been sincerely desirous of obtaining and obeying the decree to be rendered herein. I find, therefore, that the reasonable expenses of this action should be paid out of this fund, which their reports show has been retained in the trustees' hands, and which I find, to wit, the income, was, on November 19, 1892, \$2,153.98; that is that a reasonable solicitor's fee to solicitors for complainants as also to solicitors for respondent trustees of said church, and the costs and fees properly taxable in this case, should be paid out of said trust fund.

Let decree be drawn in accordance with these findings. If the solicitors' fees above named can be mutually agreed upon, the amounts so agreed may be submitted with the draught of decree for consideration of this court; and, in connection therewith, the clerk of this court will submit statement of all other costs and fees taxable herein, so that the court may be fully advised with reference to the amounts which will, under these findings, be chargeable against said trust fund as expenses of this action.

POTTSVILLE IRON & STEEL CO. v. ASCHERSON et al.
(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 18.

SALE BASED ON OCEAN FREIGHT RATE—CONSTRUCTION OF CONTRACT—DISPATCH MONEY.

In a sale of ores to be imported by the seller, a stipulation that the price is based on a specified ocean freight, buyers to receive or pay the

difference between that and the rate named in the "bill of lading," does not entitle the buyers to receive dispatch money earned under charter parties, although each bill of lading, after specifying the freight rate, contains the words "all other conditions as per charter party." *Earnshaw v. McHose*, 56 Fed. Rep. 606, distinguished.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. Action by the Pottsville Iron & Steel Company against Edward Ascherson and others for recovery of money. A verdict was directed for defendants, and from the judgment entered thereon plaintiff brings error. Affirmed.

A. H. Wintersteen and Wayne MacVeagh, for plaintiff in error.

Samuel Dickson and John G. Johnson, for defendants in error.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

ACHESON, Circuit Judge. This action was brought to recover the sum of \$5,881.41, alleged to have been wrongfully retained by the defendants from the plaintiff in settlements for foreign iron ore bought by the plaintiff from the defendants, deliverable at Philadelphia. By the terms of the written contract between the parties, dated December 3, 1885, the defendants agreed to sell to the plaintiff about 9,000 tons of ore, at a stipulated price; but this was qualified by the following distinct clause:

"Price based on freight of nine shillings per ton, buyers receiving or paying differences between that and the rate specified in bill of lading."

The sum sued for is the amount of dispatch money allowed by the terms of the several charter parties for quick dispatch in loading and unloading the carrying vessels, which the defendants had taken and retained in good faith. The circuit court excluded the evidence offered by the plaintiff to show the amount of dispatch money so received by the defendants, and directed a verdict in their favor. The judge below was of the opinion that this case is distinguishable from that of *Earnshaw v. McHose*, 56 Fed. Rep. 606, in which this court held that the buyer was entitled to have the dispatch money accounted for. There the clause of the contract of sale upon which the question arose was in these words:

"The above prices are based on an ocean freight rate of twelve shillings per ton; all freight over twelve shillings to be added to the invoice as part of the price of the ore, and all freight under twelve shillings to be deducted from the invoice."

The difference in the language of the two quoted clauses justifies, we think, the distinction which the circuit court made. The court read the clause here in question according to its natural meaning. Certainly, on their face, the words "the rate specified in bill of lading," in the connection in which they stand, import that the rate of freight mentioned in the bill of lading shall be controlling. That was the agreed basis of settlement. It must be presumed that the parties deliberately chose these words as the expression of their intention, and we are not at liberty to disregard or modify

them. No bad faith, it will be noticed, is imputed to the defendants. It is not pretended that the rates of freight specified in the bills of lading were unfair.

It is, indeed, earnestly contended on behalf of the plaintiff in error that, because each bill of lading refers to a charter party, the two instruments are thereby so connected that for the purposes of this case all distinction between them is obliterated. Quoting from one of the bills of lading, as a sample of all, we find this language, (referring to the consignees, the defendants:)

"He or they paying freight for the said goods ten shillings and six pence per ton of 1,015 kilos delivered, and all other conditions as per charter party, dated London, 31 December, 1885."

The argument based on this phraseology is not convincing. We do not see that the words "the rate specified in bill of lading" must mean the rate of freight indicated by both the bill of lading and the charter party, taken together. The two papers, while closely related, are yet distinct instruments. This the parties here have plainly recognized.

It is to be observed that we are dealing with a question of the construction of a clause of the contract of sale. What did the parties mean by the language they have seen fit to employ? They have particularized the bill of lading, and expressly made the freight rate specified therein one of the terms of their contract. It is to be assumed that they had a purpose in so doing. If they had intended to contract with reference to the rate specified in the bill of lading as it might ultimately be affected by the allowance of dispatch money under the provisions of the charter party, presumably they would have used language different from that which they adopted.

The judgment of the court below is affirmed.

PRESS CO., Limited, v. CITY BANK OF HARTFORD.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 17.

1. NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASERS — FOREIGN CORPORATIONS.

It is no defense against negotiable paper in the hands of an innocent purchaser that the payee was a foreign corporation, which had failed to comply with the statutory conditions for doing business in the state, and that the paper grew out of business transacted there by it. 56 Fed. Rep. 260, affirmed.

2. SAME—PLEADING AND PRACTICE.

Under the system of pleading established by the Pennsylvania statute of 1887, plaintiff's averment that he obtained negotiable paper sued on, before maturity, for value, is sufficient, when not denied, to establish bona fides; and, on a rule for judgment for want of a sufficient affidavit of defense, he is not required to further show that he was unaware of the particular illegality set up.

3. SAME—BONA FIDES—PRESUMPTIONS.

The fact of obtaining negotiable paper before maturity, for value, raises a presumption that the holder is ignorant of any illegality affecting it, and relieves him of the necessity of averring such ignorance.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. Action by the City Bank of Hartford against the Press Company, Limited, upon three promissory notes. Judgment was entered below in favor of plaintiff, for want of a sufficient affidavit of defense. 56 Fed. Rep. 260. Defendant brings error. Affirmed.

James H. Shakespeare, for plaintiff in error.

George Tucker Bispham, (Paul Wilcox, on the brief,) for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

BUTLER, District Judge. The action is on promissory notes drawn by the plaintiff to the Thorne Type-Setting Company, or order, and indorsed to the defendant. The claim filed avers that the indorsements were made before maturity and for value. The affidavit of defense denies proper execution of the notes; and says the payee is a foreign corporation, without authority to transact business in this state, because of failure to comply with the statute of 1874; that the notes grew out of business transacted here, and are therefore invalid. The affidavit was held to be insufficient; and judgment was entered accordingly. The defendant (below) appealed, and assigns the entry of judgment as error.

The objection to the execution of the notes is abandoned. The points urged are, first, that the notes are invalid; and second, that the pleadings do not warrant the judgment.

Neither objection can be sustained. Granting that the notes could not be enforced by the payee, they can be by an innocent indorsee. This seems to be settled. Daniel, Neg. Inst. § 197; Shars. & B. Bills, etc., 110; Wyatt v. Bulmer, 2 Esp. 538; Williams v. Cheney, 3 Gray, 220; Carpenter v. Longan, 16 Wall. 271. Why should not the ordinary rules which govern the transfer of negotiable paper, apply? Why should the plaintiff, who has expressly promised to pay the indorsee, escape on the defense set up? If the notes were wrongfully given, in violation of the statute, the wrong was his. Why therefore should he be allowed to cast the consequences upon another? If the payee's right to transact business in this state was questionable *he* should have investigated it. He could as readily have discovered the lack of authority before drawing the notes as after. The indorsee knew nothing of such question. He did not know even that the notes grew out of a transaction here. It is urged that public policy forbids a recovery; that to hold otherwise will nullify the statute. We do not think so. If the legislature intended the consequences claimed, we would expect it to say so. It has not; and we think justly, for otherwise the drawer of such paper might cast the consequences

of his misconduct or carelessness on others, who rely on his promises without means of protecting themselves. The public interests require that persons dealing with foreign corporations shall inform themselves of the authority to transact business here, in advance, instead of aiding violations of the statute, and then repudiating their promises to the injury of innocent persons. Public policy requires that the circulation of negotiable paper shall be free from unnecessary trammels.

We think the objection based on the pleadings is equally untenable. The holder of negotiable paper is presumed to have received it for value, before maturity. Where the common-law method of pleading prevails this presumption stands until it is assailed by plea or notice, followed by proof. Under what was known in this state, prior to 1887, as the "Affidavit of Defense Law," it was held that the defendant's averment of fraud in obtaining the note, or other similar defense, was of itself a sufficient attack upon the holder's bona fides to deprive him of a right to judgment before trial; *Hutchinson v. Boggs*, 28 Pa. St. 296; *Hoffman v. Foster*, 43 Pa. St. 137. Under the new system, introduced in 1887, whereby the plaintiff is required to file a statement of claim, specifying the facts on which he relies to recover, and the defendant required to answer, it is held that all facts so specified and not denied in the answer, are to be treated as admitted; *Ashman v. Weigley*, 148 Pa. St. 61, (23 Atl. Rep. 897.) In *Shoe Co. v. Eichenlaub*, 127 Pa. St. 164, (17 Atl. Rep. 889,) this conclusion was foreshadowed, though the case did not call for its announcement. The latter case is especially interesting, as the suit was on negotiable paper and the question was similar to ours. Here the plaintiff avers that he obtained the note before maturity, for value; and the defendant does not deny it. This is therefore a conceded fact. It is urged however that more is necessary to establish the plaintiff's bona fides—that he should further show that he was unaware of the defense now set up. There are two answers to this; first, that it would be unreasonable to hold the plaintiff to proof of such a fact; it is always difficult to prove a negative, and parties are not generally required to do it; and second, that the fact of obtaining the note in due course, as by paying value before maturity, raises a presumption that he was unaware of the defense. *Carpenter v. Longan*, 16 Wall. 273. Especially strong is this presumption where the defendant, as here, concedes the indorsement was in due course, and makes no suggestion of bad faith.

The judgment is affirmed.

JERSEY CITY GASLIGHT CO. v. UNITED GAS IMP. CO.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 1.

CORPORATIONS—LEASES—CONSTRUCTION.

A corporation which leases all the property and franchises of another corporation, agreeing to pay all taxes assessed upon "the real and per-

sonal property, franchises, capital stock, or gross receipts" thereof, is not bound to pay a tax levied on "dividends," under a statute existing at the date of the lease.

In Error to the Circuit Court of the United States for the District of New Jersey.

At Law. Action by the Jersey City Gaslight Company against the United Gas Improvement Company to recover a sum paid by plaintiff as taxes, and which it alleges defendant was obliged to pay under the terms of a lease made by plaintiff to defendant. There was judgment for defendant below, (46 Fed. Rep. 264,) and plaintiff brings error. Affirmed.

Hamilton Wallis, (William D. Edwards, on the brief,) for plaintiff in error.

J. D. Beale and Wm. E. Potter, for defendant in error.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. This action was tried without a jury, and, as was said by the learned judge who tried it, "practically, there was no dispute as to the facts, the real question at issue being the true construction of a covenant in the lease." The covenant referred to is as follows:

"The party of the second part [the defendant in error] shall pay to the party of the first part, [the plaintiff in error,] annually, during the continuance of the agreement aforesaid, the sum of seventy-seven thousand dollars per annum, and the party of the second part shall also pay all assessments and taxes which may be lawfully assessed or levied upon the real and personal property, franchises, capital stock, or gross receipts of the party of the first part during the continuance of this agreement, and shall pay the rent of the office now occupied by the party of the first part during its present lease thereof."

When the indenture in which this covenant is contained was made, there existed a statute of New Jersey, in which state the plaintiff below (a gas company) was doing business, which provided that "every gas company * * * doing business in this state * * * shall pay an annual tax, by way of a license, for its corporate franchise, as hereinafter mentioned." If this tax is included among those which the defendant below had agreed to pay, then, but not otherwise, the judgment in its favor was erroneous. It contends that this tax is not within the scope of its undertaking—First, because, if upon franchises, it has not been, and could not be, "lawfully assessed," in view of the mandate of the constitution of New Jersey that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value;" and second, because the true intent and meaning of its covenant is not such as to require the payment by it of this particular tax, even if lawful. This court will not, without necessity, pass upon an averment that a statute and the constitution of a state are in conflict; and therefore as we have, upon the last-stated contention of the defendant in error, arrived at a conclusion which is determinate of this case, we refrain from discussion of the other.

To ascertain the true construction of the covenant in question with regard to the point at issue, it is only necessary to read it in connection with other parts of the instrument which embodies it, and with reference to the circumstances under which it was made, and to the position of the parties at the time it was entered into. The plaintiff, by this lease, demised to the defendant, for the term of 20 years, the works and property of the former in Jersey City at an annual money rental therein reserved, and the defendant agreed to pay certain enumerated taxes, among which taxes upon dividends were not specified. The lease is dated December 17, 1884, and the act of the legislature of New Jersey to which reference has been made was approved upon April 18, 1884. The first section of the latter, which has already been quoted, required every company of any of the several kinds therein mentioned, including gas companies, to pay a tax by way of license for its corporate franchise, as hereinafter mentioned; and in section 4 it provided "that each gas company * * * shall pay to the state a tax at the rate of one-half of one per centum upon the gross amount of its receipts * * * and five per centum upon the dividends in excess of four per centum." If the question presented were simply as to the correct interpretation of this statute, distinct and apart from the covenant under consideration, it would be requisite to decide whether the legislative intent was to lay a tax upon franchises, or upon gross receipts and surplus dividends, and, if upon franchises, then to determine whether or not the act contravenes the constitution of New Jersey. But the precise question in this case is a very different one. We have to deal with the covenant of the defendant, and its construction, not that of the statute, is the matter with which we are primarily and chiefly concerned. The meaning of the contract is the essential subject of inquiry, and that of the statute is of but subordinate consequence. Presumably, and, no doubt, in fact, the act of April, 1884, was in the minds of the parties when the lease of December, 1884, was made. It imposed upon the lessor a tax "for its corporate franchise," but required it to pay, at rates designated, upon gross receipts, and also "upon dividends of the said company in excess of five per centum;" and, with these provisions of the law before them, these parties stated their agreement to be that the lessee should pay all taxes "upon * * * gross receipts,"—that is to say, which the lessor would otherwise be required to pay upon such receipts,—and without any mention whatever of taxes which it might be required to pay upon dividends. This marked omission cannot be assumed to have been accidental, nor be taken to have no significance. Therefore, and without regard to the several questions relating to the construction and constitutionality of the statute, which have been very ably argued, we are of opinion that the defendant did not agree to pay the tax involved in this action, because that tax, whatever may be its subject, is payable upon dividends.

By the lease the real and personal property of the lessor was transferred to the lessee, and the franchises, capital stock, and gross receipts of the former were subjected to the dominion of the latter;

but the right of the lessor to declare dividends from the rental it was to receive, and from any other resources it might have, remained wholly unimpaired and unaffected. Hence it would seem to be a reasonable and natural stipulation that, as between themselves, the lessee corporation should pay all taxes which the state had made, or might make, payable upon the first-mentioned subjects, but that the lessor should itself discharge any taxes, no matter upon what laid, which it had been, or might be, required to pay upon its own dividends; and that this was actually designed by the parties we think clearly appears. If it had been contemplated that the lessee should pay all taxes whatever, any detailed specification of them would have been worse than useless; and if it had been intended to especially impose upon the lessee the obligation to pay taxes payable upon dividends, it is scarcely conceivable that such intent would not have been manifested by the express inclusion of them in the discriminative enumeration which was, in fact, inserted in the covenant.

The judgment of the circuit court for the district of New Jersey is affirmed.

NEBRASKA & K. FARM LOAN CO. v. BELL.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 260.

CORPORATIONS—CONTRACTS—RATIFICATION BY DIRECTORS.

A board of directors of a corporation authorized by its by-laws to borrow money and execute securities therefor may ratify the unauthorized execution of a promissory note by the secretary of the corporation for money borrowed, and thus bind the corporation.

In Error to the Circuit Court of the United States for the District of Nebraska.

At Law. Action by Ortha C. Bell, receiver of the First National Bank of Red Cloud, Neb., against the Nebraska & Kansas Farm Loan Company, on a promissory note. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

C. G. Greene, (Irving F. Baxter and G. R. Chaney, on the brief,) for plaintiff in error.

James McNeny, H. H. Baldrige, and B. S. Baker, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This action was brought in the United States circuit court for the district of Nebraska by Ortha C. Bell, as receiver of the First National Bank of Red Cloud, Neb., against the Nebraska & Kansas Farm Loan Company, hereafter called the "company," to recover the contents of a promissory note, of which the following is a copy:

"\$5,545.00.

Red Cloud, Nebraska, May 4, 1891.

"Sixty days after date we promise to pay to the order of the First National Bank of Red Cloud, fifty-five hundred forty-five and 00-100 dollars,

at the First National Bank of Red Cloud, with interest at ten per cent. per annum from maturity until paid.

"Value received.

Nebr. & Kas. Farm Loan Co.

"J. A. Tulleys, Secy."

The complaint also contains a count for money had and received. The answer alleged that Tulleys, as secretary of the company, had no authority to make the note, and averred that the company never received any consideration for the same. There was a trial before a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

The company was incorporated under the laws of Nebraska on the 28th day of February, 1885. The charter declared the business of the corporation to "be the buying and selling of county, precinct, and school bonds, municipal securities of all kinds, the effecting of loans upon real estate, and guarantying the same; and buying, selling, and dealing generally in all kinds of public and private securities." The charter provides that "the affairs" of the company shall be conducted by a board of nine directors, who are to elect the officers of the company, namely, a president, vice president, secretary, and treasurer, and prescribe their duties. The by-laws, among other things, provide that the board of directors "shall have entire control of all loans and purchases of securities, of all money and property, of all sales, trades, negotiations connected with the business of the corporation;" and that "they shall have power to borrow money and execute any manner of security for the payment of the same." Robert V. Shirey was treasurer and J. A. Tulleys secretary of the company. Although the company was a Nebraska corporation, and its charter provided that its principal place of business should be at Red Cloud, Webster county, Neb., and its secretary and treasurer resided there, the majority of its shareholders and directors resided in the state of New York, and the board of directors commonly held their meetings at the city of Albany, in that state. It was essential to the exercise of its charter powers that the company should have an officer or agent authorized to manage and conduct its affairs at the place designated in the charter as its principal place of business. Accordingly, the business of the company was in a large measure committed to and managed and conducted by its treasurer, who made monthly written reports of his operations to the board in New York. Mr. Shirey, the treasurer, testifies:

"I was, by virtue of my official position, manager of the loan company, and had control of its business. A majority of the shareholders and directors reside in the state of New York, and they committed the transaction of their business and the protection of their interests to me. * * * During the intervals between meetings of said board, I, as treasurer of the company, conducted its business."

The note in suit had its origin as follows: The company owned several tracts of land, upon which there were prior mortgages. The lands were unproductive, and the interest accruing on the mortgages and the taxes on the lands made it desirable, in the opinion of the treasurer, for the company to get rid of them. Accordingly he sent

an agent to Cincinnati, Ohio, who traded these lands to some party in that city for a stock of goods. In the trade the goods were valued at \$29,025, and the lands at \$19,425. The difference between the value of the goods and the lands, namely, \$9,600, was paid in cash in the following manner: At the time of the trade there was to the credit of the company in the First National Bank of Red Cloud \$2,100, and the treasurer borrowed for the company from the bank \$7,500 and the \$2,100 to the credit of the company and the \$7,500 borrowed went to pay the balance due in the trade for the goods. For the \$7,500 borrowed from the bank the secretary of the company, by the direction of the treasurer, executed at the time—May, 1890—the company's note. This note was renewed from time to time, and payments made thereon at different times, the money to make the payments being derived from a sale of a part of the goods. The note in suit is the last renewal, and was given for the balance due on the \$7,500 note after deducting payments and adding some overdrafts of the company.

The only questions in the case to be determined are, had the secretary authority to execute a note for borrowed money binding upon the company, and, if not, had the directors of the company power to ratify his act, and, if so, did they ratify it? Under the charter and by-laws of the company it is very clear that the secretary had no authority to bind the company by executing a promissory note in its name, without the previous sanction or authority of the directors. It is equally clear that when he did execute a note in the name of the company for borrowed money, it was competent for the board of directors to ratify and adopt his act, and that when they did so the note bound the company as fully as if its execution had been authorized in advance. It is a maxim that whatever may be authorized in advance may be ratified afterwards. *Mor. Priv. Corp.* §§ 228-231, 623-625; *Allis v. Jones*, 45 Fed. Rep. 148. As we have seen, the by-laws provide that the board of directors "shall have power to borrow money and execute any manner of security for the payment of the same." Undoubtedly, under this grant of power, the board could execute, or cause to be executed, in the name of the company, a promissory note for the money it borrowed. It could authorize the secretary to execute the note in the name of the company in advance, or, if he executed such a note without authority, it could ratify its execution afterwards. It is only where there can be no authorization of a given act in advance that there can be no ratification afterwards. Whether the board did ratify the act of the secretary is a question of fact which it was the province of the jury to determine. The instructions of the court submitting that question to the jury are not subject to any just exception on the part of the defendant. We do not think they state the rule on the subject of ratification in cases like this as strongly and favorably for the plaintiff as the law and the facts warranted. *Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. Ry. Co.*, 120 U. S. 256, 7 Sup. Ct. Rep. 542; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. Rep. 770.

It is unnecessary to go into a detailed history of the trade for the

goods. That was no concern of the bank, and it is quite immaterial whether the company made or lost money by the transaction. The bank loaned the money to the company, through its secretary and treasurer, to complete the trade, and the jury have found, under proper instructions, that, with a full knowledge of all the facts, the directors ratified and adopted the acts of its secretary and treasurer in the matter.

The judgment of the circuit court is affirmed.

FULLER v. UNITED STATES.

(District Court, N. D. Georgia. October 17, 1893.)

1. CLERKS OF COURT—FEES—REPORTS AND ORDERS FOR WITNESS FEES.

The clerk is entitled to fees for making separate reports to the court of the amount of witness fees due from the United States and obtaining separate orders for payment thereof, such services being rendered pursuant to an order of court, and prior to the decision of the supreme court (U. S. v. King, 13 Sup. Ct. Rep. 439, 147 U. S. 676) condemning the practice in a case where no order of court existed.

2. SAME—TRIAL RECORD IN CRIMINAL CASES.

The clerk is entitled to fees for copying into the final record in criminal cases all papers which he is required to so record by an order of court.

3. SAME—ENTERING JURORS' NAMES.

For entering names of jurors with post-office addresses on slips for the jury box, and recording the same in a book kept in his office, the clerk is entitled to charge 15 cents per folio, under Rev. St. § 828, par. 8.

4. SAME—OATHS IN SCIRE FACIAS CASES.

The clerk is not entitled to any fee for administering oaths to answers of defendants in scire facias cases.

5. SAME—COMMITMENTS.

The clerk is entitled to fees for issuing, entering, and filing returns of four separate commitments, when four separate bench warrants are issued for the four defendants, and each defendant is committed to jail by a different deputy marshal on the same day.

Suit for clerk's fees. Judgment for plaintiff.

O. C. Fuller, in pro. per.

J. S. James, U. S. Dist. Atty., for the United States.

NEWMAN, District Judge. Olin C. Fuller, clerk of the circuit court for the northern district of Georgia, brings this suit against the government for certain disallowances made by the treasury department in his accounts as clerk. After plaintiff has dismissed certain parts of the bill of particulars set out in his original suit, the case now proceeds on the following items:

Item 1. (As amended.) Fees in connection with orders, etc., for the payment of witnesses.

Treasury Statement No. 124,850.....\$60.45

Item 2. Fees for recording in complete final record of criminal cases orders otherwise recorded on the minutes of the court.

Treasury Statement No. 122,895.....\$13.65

Item 3. Fees for drawing list of 700 names of jurors, with post-office addresses, in revising jury box.

Treasury Statement No. 124,850..... \$4.80

Item 4. Fees for entering 700 names of jurors, with post-office addresses, in jury box.

Treasury Department Statement No. 124,850.....\$4.80

Item 5. For administering oaths to answers of defendants in scire facias cases.

Treasury Statement No. 124,850.....\$.30

Item 6. For issuing and entering return and filing commitments.

Treasury Statement No. 126,161.....\$3.75

The plea filed by the United States attorney for the government is: First, a general denial; second, the plea of payments; third, "that the defendant is not and cannot be held liable for the payment of said accounts, and the several items thereof, pending questions of law involved before the supreme court of the United States, and which questions of law have not yet been determined."

The stipulation as to the facts agreed upon between the United States attorney and the claimant is as follows:

"(1) It is agreed that the orders for payment of witnesses, for which claim for payment is made, were drawn, entered upon the minutes of the court, filed, and one copy of each order certified to the marshal; also that each witness was sworn as to the mileage and per diem. It is agreed that the above services were performed in obedience to an order of the court passed May 27th, 1890, and section 855, Rev. St.

"(2) It is agreed that final records were written in all criminal cases, for which claim for payment is made, as directed in the order of court directing the recording of criminal cases, and prescribing what papers and pleadings shall be recorded, passed by the court on March 19th, 1888.

"(3) It is agreed that the claimant drew lists of the names of 700 persons, with their post-office addresses, for jurors, and the same were deposited in the jury box, as prescribed by section 800, par. C, and that said names were also entered upon jury book by claimant, as required by rule No. 56 of this court.

"(4) It is agreed that claimant administered the oaths to the 3 answers of defendants in scire facias proceedings, for which claim is made.

"(5) It is agreed that the claimant issued the 3 writs of commitment in the case of the United States vs. Geo. Sanges et al., on Dec. 19th, 1890.

"S. A. Darnell, U. S. Atty.

"O. C. Fuller, in propria persona.

"In regard to the 5th stipulation referred to above it is further agreed by the district attorney, upon an examination of the papers, that there were four separate bench warrants issued for the four defendants, and each defendant was committed to jail by different deputy marshals, on the same day.

"Oct. 13th, 1893.

Geo. L. Bell, Asst. Dist. Atty."

It will be seen that the stipulation concedes that the service was rendered by the clerk, so that, the facts being conceded, the only question is as to the legal liability of the government to its officers for the service performed.

Item 1. This item is for fees claimed to have been earned by the clerk in drawing and entering upon the minutes of the court certain orders in reference to the payment of witnesses, and the filing and certifying the same to the marshal. It will be seen that the district attorney concedes that this service was rendered in pursuance of an order in reference thereto, passed by the circuit judge on May 27, 1890, as follows:

"The clerk and the marshal of this court desiring a rule as to orders for the payment of witnesses, and it appearing to the court that the practice of this court of many years standing of requiring the clerk to make a report to the court in each case of the amount due the witnesses, each by name, for travel and attendance, which, after being approved and signed by the court, is entered on the minutes of the court, and a copy of each order certified to the marshal, enabling him to pay at once, is a better and more appropriate practice than to permit the certificate on which the marshal is to make payment to be withheld to the end of the term, and then made, including all cases, it is ordered that said practice, heretofore prevailing, be pursued until further order of the court.

"In open court, this 27th day of May, 1890.

"Don A. Pardee, Circuit Judge."

Prior to the passage of this order there was no rule on the subject, but the practice had been as indicated in the order. It is clear that it is the duty of the clerk to comply with this order passed by the circuit judge. In the case of *U. S. v. Van Duzee*, 140 U. S. 173, 11 Sup. Ct. Rep. 758, the court says:

"When the clerk performs a service in obedience to an order of the court he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

In the case of *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. Rep. 439, the supreme court condemned the practice such as that for which this claim is made, but in that case it appeared simply to have been the practice of the court, and there was no order of the court, so far as the report of the case shows, especially directing the method in which the accounts of witnesses and jurors should be prepared and certified. In view of the decision in the *Van Duzee Case*, *supra*, it is not believed that the supreme court would have disallowed the items alluded to in the *King Case*, even if they had condemned the practice as improper. If the circuit judge had, by an order, directed the clerk to do the work in this particular manner, I do not see how the clerk could, under the circumstances, disregard the order. Immediately after the publication of the *King Case*, *supra*, this court, by an order, discontinued the old practice, and adopted a practice in harmony with that decision. I am of the opinion that the clerk is entitled to recover this item of \$60.45.

Item 2. This charge of \$13.65 is for recording in complete final record in criminal cases orders otherwise recorded on the minutes of the court. The following order as to what papers, pleadings, entries, etc., shall be included in the complete final record of criminal cases was passed by the court on March 21, 1887, and concurred in by the circuit court judge on March 19, 1888, and is now in force:

"In the Circuit and District Courts of the United States for the Northern District of Georgia.

"In re Complete Records in Criminal Cases.

"The clerk desiring a rule as to what papers, pleadings, entries, etc., shall be included in the complete records in criminal cases, it is ordered that hereafter, in cases prosecuted by indictments by the grand jury, the record shall consist of the bill of indictment; the order for *capias*, if any; the *capias* and return; the bond; the order for forfeiture, if any; and the order setting forfeiture aside, if any; the plea, verdict, sentence, the commitment and return, or order of discharge on verdict of not guilty, or, if not proessed, the order of

nolle prosequi; the motion for a new trial, if any, and order thereon; in case of felony, the testimony taken down by the direction of the court, where there is a conviction. In cases where the prosecutions are by criminal information, the same as above, (the information instead of the indictment;) also the affidavit and warrant, return of marshal, and action of commissioner thereon, which are essential to the record.

"In open court, March 21st, 1887.

W. T. Newman, U. S. Judge.

"For the circuit court, I concur in this order as to final record.

"March 19th, 1888.

Don A. Pardee, Circuit Judge."

As the manner in which this work seems to have been done was expressly directed by the court, the clerk should recover for it, for the same reasons given as to item 1. In addition thereto, the charge itself, independently of any order, by the decision in the case of *U. S. v. Taylor*, 147 U. S. 700, 13 Sup. Ct. Rep. 479, is proper, so that the clerk is entitled to recover that item.

Items 3 and 4 are embraced in the same stipulation, viz. stipulation 3. Item 3 is for "fees for drawing list of 700 names of jurors, with post-office addresses, in revising jury box." The act of congress in reference to drawing jurors, amendatory of the former acts on that subject, approved June 30, 1879, and contained in Supp. Rev. St. p. 270, provides that the clerk of the court and the jury commissioner shall place in the box the names of the jurors, to be drawn by the court, from time to time, for service in the court. The rule of court (No. 56) on this subject provides that the full names of the persons selected by the clerk and jury commissioner, from whom the jurors are to be chosen, together with the names of the counties in which they reside, respectively, shall be written, each on a separate slip of paper, etc. It will be seen that the act of congress and rule together mean that the clerk and jury commissioner shall obtain the names of suitable persons to serve as jurors, from time to time, as may be necessary to replenish the box, and that the names of the jurors, with their places of residence, shall be written upon separate slips of paper, and placed in the jury box, from which they are to be subsequently drawn, as needed by the court. The jury commissioner is allowed per diem compensation for his services, and it cannot be that the clerk is required to perform this service without compensation of any kind. In the case of *U. S. v. King*, *supra*, the supreme court, in discussing services of this kind by the clerk, says:

"We think that the construction given to this section is conclusive against the claim of the clerk for per diem services in the drawing of juries, or for such services as are not taxable as orders, certificates, or the like, under section 828, fixing the compensation of clerks."

The clerk has made his charge for this service under paragraph 8, § 828, Rev. St. That paragraph is as follows:

"For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond or making any record, certificate, return or report, for each folio 15 cents."

The charge is 15 cents per folio as for making any other record, and it seems to be the only proper way in which the clerk can be compensated for his service.

Item 4 is for services rendered in same connection as item 3. The charge is for recording the names of 700 jurors in a book, which is kept in the clerk's office for this purpose. The rule of court on this subject, after requiring that the names shall be placed in the jury box, requires that they shall be "entered in a book to be kept by the clerk." The suggestion of the district attorney that the language "to be kept by the clerk" might mean that the book itself is simply to be kept in the clerk's office, and the jury commissioner required to do the writing therein, is not sustained by the ordinary and common use of this expression. When we say that the clerk shall "keep" a record, or that a record shall be "kept" by the clerk, we do not refer to the mere possession and control of the book in which matters are recorded, but rather to the work itself in writing up the record. The only fair meaning of this rule is that the clerk, by himself or his deputies, shall enter the names in the jury book; and, that being true, he is entitled to charge therefor, the same as he would for writing in any other record, under the section named.

Item 5. This is a charge for administering oaths to answers of defendants in scire facias cases. I do not think that this is a proper charge against the government, nor do I think it can be allowed.

Item 6. This is a charge for issuing and entering and filing return of three separate commitments. One commitment and return is allowed by the accounting officers, and three disallowed as unnecessary. Section 1027, Rev. St., is as follows:

"When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit for trial," etc.

Section 1028, Id.:

"Whenever a prisoner is committed to a sheriff or jailor by virtue of a writ, warrant or mittimus, a copy thereof shall be delivered to such sheriff or jailor as his authority to hold the prisoner, and the original writ, warrant or mittimus shall be returned to the proper court or officer, with the officer's return thereon."

My attention has not been called to any statute or rule requiring the clerk or committing magistrate to include more than one person in a commitment. The two sections above cited are the only ones, that I am aware of, bearing upon this question. In this particular case the necessity for a separate writ for each prisoner was shown by an additional stipulation, filed at the time of the hearing of this case. It was agreed by the district attorney, upon examination of the papers, that there were four separate bench warrants issued for the four defendants, and each defendant was committed to jail by different deputy marshals on the same day. It would seem, therefore, that the four separate commitments were not only proper in this case, but were really necessary. The statutes require officers serving commitments to make a return on the same, and, as different officers had the different prisoners in charge, there would seem to be no way for them to comply reasonably with this requirement of the law other than for each officer to have a separate commitment

for the prisoner in his charge. I see no reason whatever why this item is not proper, and it is allowed.

The foregoing items, which have been allowed, aggregate \$87.45; and judgment will be rendered against the United States in favor of the plaintiff for this amount.

GERMANIA IRON CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 281.

PUBLIC LANDS—SUIT BY UNITED STATES TO CANCEL PATENT.

The secretary of the interior having rejected certain rival applications for a patent for a certain tract of land, a motion for a rehearing of the secretary's decision was filed. By the rules of the department the filing of such motion made it the duty of the officers of the land department to suspend all action looking to the disposal of said land until the motion for a rehearing was determined. While such motion was pending and undetermined, a clerk in the department inadvertently approved the land for patenting to a third party, and a patent was issued. On a bill filed by the United States to vacate the patent on the ground that it was issued by mistake, *held*, (1) that the United States had sufficient interest to maintain the suit, and (2) *held*, further, that in such suit it was not necessary for the United States to allege or prove that other persons than the patentee had a superior right to the land,—that it was sufficient to show that other persons whose claims were pending and undetermined might have such superior right. *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. Rep. 457, applied.

Appeal from the Circuit Court of the United States for the District of Minnesota.

In Equity. Bill by the United States of America against the Germania Iron Company, Emil Hartmann, Richmond D. Mallet, and Thomas Reed, to cancel a land patent. Reed, the patentee, made default. The other defendants answered the bill, and appeal from a decree for complainant. Affirmed.

Statement by THAYER, District Judge:

This was a bill filed by the attorney general, in behalf of the United States, to cancel a patent for certain lands situated in the Duluth land district, of the state of Minnesota, which was issued by mistake to Thomas Reed on the 20th day of November, 1889. The admitted facts on which the government predicates its right to the relief sought by the bill are, substantially, these:

On the 21st of July, 1885, the land in question being a part of the public domain, Orillie Stram adjusted a certain scrip location thereon that had been previously made, which location was duly posted in the office of the commissioner of the general land office on the 9th day of the following September. The validity of such location was contested by Fred. T. Huntress. Thomas W. Hyde and Angus McDonald also made certain pre-emption claims to some of the same lands, and the controversy thus raised came by appeal before the secretary of the interior. On February 18, 1889, the secretary disposed of the appeal, for the time being; holding that the scrip location of said Stram was invalid, and that the Hyde and McDonald claims must likewise be rejected. Thereafter, on February 23, 1889, Thomas Reed was allowed to make a soldier's additional homestead entry on a part of said lands, and to obtain a final certificate therefor, numbered 1,420. At the same time that Reed made his entry, Charles P. Wheeler, Warren Wing, and

William Stokes were present, and sought to make entries on the lands now in dispute, in pursuance of various provisions of the land laws of the United States, but they were less successful. The applications of Wheeler, Wing, and Stokes were denied, and they thereupon prosecuted appeals to the commissioner of the general land office. On the 18th of February, 1889, and long prior thereto, there was a rule in force in the department of the interior to the following effect: That motions for the review of decisions of the secretary of the interior, and applications under department rules 83 and 84, should be filed with the commissioner of the general land office, who should thereupon suspend action under the decision sought to be reviewed, and forward to the secretary such motion for review or application. Motions in behalf of Stram, Hyde, and McDonald, to obtain a review of the secretary's decision of February 18, 1889, were duly made, and filed on March 13 and 15, 1889; and, pursuant to the rule aforesaid, an order was made, suspending all action on said decision, which order was in full force on November 20, 1889, when the patent to Reed was issued. At the latter date, the appeals of Wheeler, Wing, and Stokes, heretofore mentioned, were pending and undetermined, and are still undetermined by the land department. Notwithstanding these facts, while the aforesaid motions and appeals were pending, a clerk in the general land office approved the lands in controversy for patenting to said Thomas Reed, and in consequence of such approval a patent was issued on November 20, 1889. The action of the clerk in approving the lands for patenting appears to have been induced solely by oversight, in failing to take notice of the pendency of the motions for review aforesaid, and the order made thereon suspending action under the secretary's decision of February 18, 1889. The president's signature to the patent, by his secretary, and the signature of the recorder of the general land office, were each induced by the action of said clerk in inadvertently approving the land for patenting.

The patentee, Reed, who was named as a defendant in the circuit court, suffered a default. The appellants have acquired title to the lands in controversy by mesne conveyances under Reed, but it is not claimed that, as purchasers in good faith, they have a better title than their grantor. The circuit court decreed that on the facts aforesaid, which were undisputed, the government was entitled to a cancellation of the Reed patent on the ground of accident, inadvertence, and mistake, and from such ruling the defendants below have prosecuted an appeal.

W. W. Billson, (Mr. Congdon, on the brief,) for appellants.

Richard Olney, Atty. Gen., Eugene G. Hay, U. S. Dist. Atty., and Robert G. Evans, for the United States.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the facts, delivered the opinion of the court.

The learned counsel for the appellants does not challenge the right of the attorney general, under the laws of the United States, to file a bill in behalf of the government to obtain the cancellation of a patent on the ground of fraud, accident, or mistake, where the government has an interest in, or is under an obligation in respect to, the relief sought; and, in view of the decisions of the supreme court of the United States, the right in question could not be successfully challenged. *U. S. v. Tin Co.*, 125 U. S. 273, 285, 286, 8 Sup. Ct. Rep. 850; *U. S. v. Beebe*, 127 U. S. 338, 342, 8 Sup. Ct. Rep. 1083; *U. S. v. Railway Co.*, 141 U. S. 358, 380-382, 12 Sup. Ct. Rep. 13. But it is urged as grounds for reversal (and these are the only points which we deem it necessary to consider) that, upon the undisputed

facts disclosed by the present record, the United States had no interest entitling it to maintain the bill, and that, in any event, it was not entitled to a decree canceling the Reed patent on account of the mistake disclosed by the bill, unless it alleged, and affirmatively proved, that other persons than Reed had a superior right to the land, and would probably have prevailed in the controversy before the secretary of the interior, if the mistake complained of had not forestalled a decision.

We are compelled to dissent from both of these propositions. The United States, in disposing of the public domain, through the action of its land department, cannot be relegated to the position of an ordinary private vendor of lands. As has been frequently declared, in substance, the government is clothed with a trust in respect to the public domain. It is charged with the duty of protecting it from trespasses and unlawful appropriation, and likewise with the duty of enforcing the laws which have from time to time been enacted by congress, prescribing the terms and conditions upon which individuals may acquire a title to portions thereof. For the purpose of supervising the execution of such laws, and all proceedings taken thereunder, it has created a land department, which is recognized as pertaining to the executive branch of the government; and this department has, in turn, established rules and regulations for the orderly conduct of its business, which, within certain well-defined limits, have the force and effect of law, and on the due observance of which all citizens have the right to rely. *Smelting Co. v. Kemp*, 104 U. S. 636, 640; *U. S. v. Beebe*, supra; *U. S. v. Railway Co.*, supra.

Again, as the land department is charged with the execution of the laws relating to the sale and disposition of the public lands, it has a primary jurisdiction to hear and determine all contests involving claims to portions of the public domain; and the decision of the proper officers of the land department, upon questions of fact properly determinable by them, cannot be assailed in a collateral proceeding. *Smelting Co. v. Kemp*, supra; *Beard v. Federy*, 3 Wall. 478, 492; *Marquez v. Frisbie*, 101 U. S. 473, 476. A patent for lands, when issued, thus becomes a powerful weapon of offense or defense; and for both of these reasons—that is, because of the primary jurisdiction lodged in the land department, and the weight accorded to its decisions—the courts have, on various occasions, refused to take any action that would interfere with or forestall the final action of that department in a controversy properly pending before it. *Marquez v. Frisbie*, 101 U. S. 473, 475; *Casey v. Vassor*, 50 Fed. Rep. 258.

In view of these considerations, it cannot be successfully maintained that the United States had no interest in, and was under no obligation in respect to, the relief sought, that entitled it to maintain the present bill, or that it was bound to show affirmatively, as a condition precedent to a decree in its favor, that Reed was not entitled to the land. By sheer accident—by an oversight of a subordinate clerk—a person had obtained a patent for public land

said to be worth \$75,000, not only in violation of a long-standing rule of the department, but contrary to an express order of the commissioner of the general land office, suspending, for the time being, all action "looking to a disposal of the land." The interest of the government lies in its obligation to its citizens to see that the rules and regulations made by the land department for the guidance and protection of the citizen are faithfully observed, and in the further fact that a primary jurisdiction vested in one of the co-ordinate branches of the government has been inadvertently wrested from it, and transferred to another, where one of the claimants, in view of the outstanding patent, will be compelled to pursue the contest with his adversary at a great disadvantage. And, having such an interest in the prosecution of the suit, the courts will not compel the government, as a condition precedent to obtaining relief, to try the very question which was pending before the land department at the time it lost jurisdiction, and to show affirmatively that some other person than the patentee had a superior right to the land. It is sufficient for the purposes of this suit that some other person may have a superior right, and that it is the function of the land department to determine that question in the first instance.

Touching the question of the interest of the government to maintain the present bill, the views which we have expressed find support in a recent decision heretofore cited. *U. S. v. Railway Co.*, 141 U. S. 358, 380, 12 Sup. Ct. Rep. 13. In that case it appeared that, through a mistake on the part of the officers of the land department, certain lands had been wrongfully patented to a railway company, as a part of its land grant, on which lands many persons had settled, claiming a right to do so under the homestead and pre-emption laws, although the officers of the land department had not permitted such settlers to do any act with them, officially, for the purpose of perfecting their titles. On a bill filed by the attorney general, in behalf of the United States, to vacate said patent, Mr. Justice Harlan said, concerning the right of the government to sue, "that it was under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title by the patents in question, and thereby enable itself to properly administer these lands, and give clear title to those whose rights may be superior to those of the railway company." In other words, the court refused to compel the settlers to prosecute a private suit against the holder of a patent which had been inadvertently issued, holding that it was the right and duty of the government to sue, in such cases.

The case of *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. Rep. 457, more pointedly supports the views that we have expressed. In that case a notation opposite a particular tract of land, described on a list of lands that had been selected by the state of Nevada, to the effect that it was a "mill site," was erased while such list was on file in the land department, awaiting the approval of the secre-

v.58f.no.2—22

tary of the interior. It was conceded, for the purpose of the decision, that the erasure was due to inadvertence and mistake. The existence of the notation would have prevented the secretary of the interior, in the orderly discharge of his duties, from approving the list, as it was his province to do under the act authorizing the state of Nevada to select certain lands, until a pending controversy as to the right of the state to select the particular tract had been determined. But the accidental erasure of the notation led the secretary of the interior to approve the list, and forward the same to the governor of the state. On a bill filed by the United States against a person who had a contract with the state to purchase the tract of land noted as a "mill site," to cancel such contract of sale, and to divest his title, on the ground that the lands had been improperly certified to the state through fraud and mistake, it was held that the United States was entitled to the relief sought solely on the ground of mistake. And to the argument strongly urged against the United States, that it was not entitled to relief because, in any event, under existing laws, the state had an undoubted right to select the particular tract, and must have prevailed in any controversy touching that right, the court answered, in substance, that, conceding such to be the case, there was a limited discretion imposed on the secretary of the interior in the matter of approving the selection, which, through accident and mistake, he had been deprived of the right to exercise; that, but for the erasure of the notation, the secretary might, at least, have withheld his approval until the right of selection under existing laws had been finally determined by the department, or until some relief had been afforded by special act of congress to the party who contested the state's right of selection.

It must be conceded, we think, that the last-mentioned decision strongly supports every position which has been assumed by the government, even if it is not decisive of the present controversy. Our conclusion is that the decree of the circuit court was right, and it is hereby affirmed.

NEW YORK LIFE INS. CO. v. SAVAGE.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 297.

1. PLEADING—COMPLAINT SHOWING AUTHORIZATION OR LICENSE—PUBLIC NUISANCE.

A complaint in an action for personal injuries sustained by falling into an opening in a public sidewalk, which alleges that it was defendant's duty, "at all times during which it has been permitted to maintain said opening," to keep the same properly protected, does not show that the opening was made and maintained by state or municipal authority, where other portions of the complaint negative the idea of such authorization or license, but should rather be construed as stating that the making and maintenance of the opening was by public nuisance.

2. NEGLIGENCE—OPENING IN SIDEWALK.

The testimony showed that the owner of a building caused a large opening to be made, nearly in the center of a public sidewalk adjoining

the building, for use as an elevator shaft; that the shaft was left open until midnight of a dark night to admit air into the basement; and that the plaintiff fell into said opening as he was passing along the street, and was injured. *Held*, in a suit against the owner for the injuries so sustained, that there was abundant evidence of the owner's negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE.

The plaintiff could not be held, as matter of law, guilty of contributory negligence in failing to see the opening, when it appeared that he had no previous knowledge of its existence; that he was obliged to use great haste to catch a car; that it was a dark night; and that there was no light in the street, and none proceeding from the opening.

In Error to the Circuit Court of the United States for the District of Nebraska.

At Law. Action by John E. Savage against the New York Life Insurance Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Ralph W. Breckenridge, for plaintiff in error.

T. J. Mahoney and C. J. Smyth, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is a suit for personal injuries. The action was brought by the defendant in error in the circuit court on account of injuries which he had sustained by falling into an opening in a public sidewalk which the defendant company had caused to be made in front of its building in the city of Omaha. In the circuit court there was a verdict and judgment in favor of the plaintiff, and the defendant company thereupon sued out a writ of error. The only questions which arise upon the record that have been presented for our consideration are—First, whether there was any evidence tending to show negligence on the part of the defendant company; and, secondly, whether the trial court should have declared as a matter of law that the plaintiff was guilty of contributory negligence. These questions require for their determination a brief summary of the facts which the testimony tended to establish. It appears from the evidence that has been preserved in the bill of exceptions that in June, 1892, the defendant was the owner and proprietor of a large building situated at the northeast corner of Seventeenth and Farnam streets, in the city of Omaha; that the defendant company, for its own benefit, had caused a large opening to be made in the public sidewalk on Seventeenth street along the west side of its building for the purpose of constructing an elevator well or shaft, by means of which coal, ashes, and other articles could be lowered into or raised from the basement of its building; that the outer edge of this elevator hole was two feet and eight inches from the curb, and from that point it extended inward four feet and four inches towards the center of the sidewalk. The opening was also four feet and four inches wide, and the sidewalk was about twenty feet in width. When not in actual use, the hole in the walk was closed by an iron door, made in two sections, which opened outwardly, and swung on hinges. On the night of June 23, 1892, this door had been left open by the defendant's engineer until

after midnight, to admit fresh air into the basement, and, while the elevator door was thus open, the two sections of the door stood on edge, at right angles with the sidewalk. At about 20 minutes past 12 of the night in question, the plaintiff came down Seventeenth street from the north, intending to take a street car at or about the corner of Farnam and Seventeenth streets. As he approached the elevator hole, and was some distance north of the same, he heard a street car coming, and started to run, with a view of boarding it. While so running he stumbled against and fell over the north section of the iron door of the elevator shaft, that was standing on edge at a height of about two feet and three inches above the sidewalk, and was precipitated to the bottom of the shaft, a distance of twenty-five feet, and was severely bruised and injured. The night in question was quite dark, but there was an electric street light to the north of the elevator shaft, at a distance of about three-quarters of a block, and another electric light to the south, about a block and a quarter therefrom. The plaintiff testified that he had no previous knowledge of the existence of the opening in the public walk; that at the place where the accident occurred there was no light in the street at the time the accident happened; and that no light was proceeding from the doorway or elevator shaft which he observed; and that he was running at the time in great haste, to catch the street car, with a view of going home for the night. There was some other testimony in the case which tended to show that on the occasion of the accident some light was proceeding from the elevator shaft, and that the iron door, as it stood elevated above the sidewalk, was a visible object, which might have been seen if it had been looked for.

The first contention above stated—that there was no evidence tending to show negligence—seems to rest entirely upon the assumption that the plaintiff below had so framed his complaint as to show that the opening in the sidewalk was not a public nuisance, but that the defendant company had been authorized by some competent authority, either state or municipal, to make and to maintain such an opening. There is one clause in the complaint which alleges “that it was the duty of the said defendant, at all times during which it has been permitted to maintain said opening in said sidewalk and said elevator shaft thereunder, to keep the same properly protected and guarded, in order that the public generally, in using said sidewalk, should not be submitted to unnecessary risk and hazard.” But other portions of the complaint averred that the opening complained of was in a public thoroughfare, and that, in disregard of its duties to the public, the defendant, on the occasion of the accident, had negligently permitted the same to remain open and unguarded until after midnight. There was no averment in the plaintiff's petition that the defendant company had been duly licensed to make or maintain an elevator shaft in the public sidewalk in question, nor was any such license either pleaded or offered in evidence by the defendant company. Under these circumstances, we think it is not affirmatively shown by the record that the company had the right to maintain the elevator shaft or opening in the

condition in which it was left on the occasion of the accident. In its then condition, at midnight of a dark night, with the iron door elevated and extending across the walk for more than four feet; and nearly to the center of the walk, it was a serious obstruction to travel, to say nothing of the risk incurred by pedestrians of being precipitated to the bottom of the shaft. *Prima facie*, one who places an obstruction in or makes a pitfall of that nature in a public thoroughfare thereby creates a public nuisance; and we will not presume, in view of the single allegation of the complaint above quoted, that by virtue of any license or municipal ordinance the defendant company had acquired the right to make and maintain the elevator shaft in the condition in which it was found when the accident happened. We will rather construe the pleading as stating, in substance, that by public sufferance the defendant had been permitted to construct the elevator shaft, and to use it at intervals, during ordinary business hours, for the purpose of lowering articles into the basement of its building, or removing articles therefrom. At the time of the accident it was not being used for either of these purposes, nor was the hour suitable for such use. It had been opened, and was kept open, as the evidence shows, solely for the comfort of the defendant's employes, and without any apparent regard for the convenience or safety of pedestrians. In accordance with these views, it must be held that there was abundant evidence of the defendant's negligence, and its contention to the contrary must be overruled. *Congreve v. Smith*, 18 N. Y. 79, 82; *McGuire v. Spence*, 91 N. Y. 303; *Durant v. Palmer*, 29 N. J. Law, 544; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719.

The second ground of reversal relied upon by the plaintiff in error is likewise untenable. In our judgment it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in failing to see the opening in the sidewalk, in view of his statements that he had no previous knowledge of its existence; that he had not "been along there before;" that he was called upon to act in great haste; that it was a dark night; that there was no light in the street where the opening was located; and that no light proceeded from the shaft. It is no doubt true that a person who walks along a sidewalk in a city, either in the daytime or at night, is bound to exercise ordinary care. He must use his eyes as persons of ordinary prudence commonly use them, but, if a man has no knowledge of a defect in a public sidewalk or thoroughfare, he is entitled to presume that it is in a reasonably safe condition, and he is not bound to act on the assumption that there are dangerous pitfalls or other obstructions therein. Even though he is aware that the area under sidewalks is frequently utilized in large cities by the owners of adjoining buildings for the storage of coal or other articles, and that openings are sometimes made through the sidewalk into such areas for the convenience of the owner, yet he is nevertheless entitled to presume that the coverings to such apertures, when they are not in actual use, have been made secure, so that they will not operate as an obstruction; and especially is he entitled to indulge in that presumption when he has occasion to walk along a sidewalk

after business hours, and in the nighttime, if no signals have been displayed to warn people of existing dangers. These principles rest upon such a sure foundation of reason and common sense that it is almost unnecessary to cite authority in their support. *Wall v. Town of Highland*, (Wis.) 39 N. W. Rep. 560, 562; *Brusso v. City of Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, supra; *Dickson v. Hollister*, 123 Pa. St. 421, 16 Atl. Rep. 484; *Gordon v. Cummings*, (Mass.) 25 N. E. Rep. 978; *Weare v. Fitchburg*, 110 Mass. 334; *Raymond v. City of Lowell*, 6 Cush. 524, 530; *Barnes v. Sowden*, 119 Pa. St. 53, 12 Atl. Rep. 804. And the application of these principles to the case at bar makes it evident that it was the province of the jury to determine, in the view of all the facts and circumstances to which we have adverted, whether the plaintiff ought to have seen the obstructions in his way, and whether his failure to do so was such contributory negligence as precluded a recovery.

Finding no error in the record, the judgment of the circuit court must be affirmed.

PACIFIC MUT. LIFE INS. CO. v. SNOWDEN.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 242.

1. ACCIDENT INSURANCE—APPLICATION—CLASSIFICATION OF RISK—REPRESENTATIONS OF AGENT.

Where an applicant for insurance against accident makes a true and full statement of his occupation to the company's agent, the company is bound, after loss, by the classification which the agent gives him; and if he is wrongly classified, according to the company's rules, the fact that he certifies to an understanding of the company's classification of risks, and that he belongs to the class given, is immaterial, when in fact his only means of understanding such classification is through the representations of the agent.

2. SAME—ACTION ON POLICY—EVIDENCE.

A cattle dealer, insured under an accident policy which permits him to attend his cattle in transit on the cars, can rightfully do, on such a trip, whatever is customary among reasonably prudent cattle dealers under like circumstances; and, in an action on the policy for injuries received while looking after his cattle at a way station, it is not prejudicial error to permit him to show what is the common practice among cattle dealers.

3. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to sustain the verdict is not reviewable in federal appellate courts, unless defendant asked a peremptory instruction for a verdict in his favor at the close of the whole evidence.

In Error to the Circuit Court of the United States for the District of Nebraska.

At Law. Action by Andrew J. Snowden against the Pacific Mutual Life Insurance Company upon an accident insurance policy. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Statement by CALDWELL, Circuit Judge:

On the 19th day of June, 1889, Andrew J. Snowden, the plaintiff, who was then engaged in the business of buying, shipping, and selling cattle, made application to the defendant, the Pacific Mutual Life Insurance Company, through its agent at Grand Island, Neb., for an accident policy of insurance

for the sum of \$10,000, to run 90 days. A policy in the usual form was issued, and the plaintiff paid the premium of \$50. By the terms of the policy, if the assured suffered the loss of a hand, one-third of the principal sum of the policy was to be paid him. On the 15th day of September, 1889, the plaintiff, in the prosecution of his business as a cattle dealer, shipped at Cushing, Neb., to Chicago, by the way of South Omaha, over the Burlington & Missouri River Railroad, several car loads of cattle, and took passage himself, by the same train, for the purpose of looking after and caring for his cattle during the transit. The plaintiff's cattle were in cars near the head of the train, which consisted of 39 cars. The caboose in which he rode was the last car in the train. At Seward, Neb., the train stopped about 12 o'clock, midnight, to take water; and, being told by the conductor that he would have time to look after his cattle, the plaintiff got out of the caboose with his prod pole, and proceeded to within three or four cars of the engine, where he found one of his steers down, and immediately set about getting him up, in the customary method. Before he had completed his work, the engineer sounded the signal, "off brakes," and realizing that he was so far from the caboose that, before he could get to it, the train would be under such headway that he could not get on, he started to climb up on the iron ladder attached to such cars for the use of the train crew, stock men, and others having the right and occasion to use it, intending to climb to the top of the car, and remain there until the next station was reached. But just as he was in the act of reaching the top of the car, and was still holding on to the iron ladder, a "helping engine" at the rear of the train pushed the cars with such suddenness and force as to break the plaintiff's hold upon the ladder; and he was thrown down between the cars, and his left hand cut off, or so mangled that it had to be amputated.

The answer contained a general denial, and set up, as special defenses: First. That the plaintiff did not use due diligence for his personal safety and protection. Second. That his injury resulted from, or was attributable to, the plaintiff's voluntary exposure to unnecessary danger. Third. That he violated the rules of the railroad company in getting on the cattle car while it was in motion, which avoided the policy. And, fourth, that the defendant has a classification of occupations, in which they are variously classed as "preferred," "ordinary," "medium," "special," "hazardous," "extra hazardous," "special hazardous," and so on, and that the rate of insurance and the amount of the policy, under the rules of the company, is determined by the classification of the applicant's occupation, and that the plaintiff, in his application for insurance, made this statement: "My occupations are fully described as follows: Cattle dealer or broker, not tender or drover, not on farm or ranch,"—and that he also stated that: "(6) The class or risk under my application is preferred." That by the terms of the policy these statements were made warranties, and that they were false, in this: that the defendant's classifications of persons engaged in shipping or dealing in cattle was as follows:

"Classification.

Occupation.	Class.
Cattle shipper and tender, in transit.....	Ex. haz.
Cattle dealer or broker.....	Med.
Cattle dealer or broker, visiting yards.....	Med.
Cattle dealer or broker, not tender or drover, not on farm or ranch	Pref."

—That the plaintiff had described his occupation in his application as "Cattle dealer or broker, not tender or drover, not on farm or ranch," and the class of risk as "preferred," when he should have described his occupation as "Cattle shipper and tender, in transit," and the risk as "extra hazardous."

There was a trial before a jury, and a verdict and judgment for the plaintiff for \$3,958.73, and the defendant sued out this writ of error.

Charles O. Whedon, for plaintiff in error.

H. M. Sinclair, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The defendant had a traveling and local agent in Nebraska. Some time before the plaintiff took out the policy in suit, he obtained from one of these agents an accident policy for \$5,000. The application for that policy and the policy were identical in terms with the application and policy in this case, save in amount. When the first policy was taken out, the defendant's agent Davis testified that the plaintiff asked the question—

"Whether, under that contract, he would be insured if he should go with his cattle to the market, and I told him he would be insured under the contract, as I understood it; that he went along just occasionally, like I sometimes do. That he was insured as he was doing business. That if he changed his occupation, however, under the contract, it would be pro rata."

In answer to a question whether the witness told the plaintiff that he had a right to go with his own cattle to market, he answered:

"Yes, sir; of course, cattle shippers— That is their business, all the time, to be on the road with cattle, and occasionally a cattle dealer or broker goes to the yard. The policy allows traveling by any usual means of conveyance, and I called his attention to that; and I said, 'Certainly,' that he would be insured under that contract. He said that he generally had a shipper, but sometimes, occasionally, he went himself with the cattle,—may be, a dozen times a year; and I knew that was so, without him telling me, because I had been on the road many times with cattle previous to that. And he said, if that did not cover that, he would rather pay more, and be sure to have the policy that did cover it; and I held that covered the case, and I told him that covered the case."

Both agents were present when the policy in suit was applied for and issued, and agent Davis testifies that:

"Mr. Snowden recited to Mr. Limback, just about as he did to me, that he questioned in his own mind if he would be insured, in case of an accident, if he was accompanying his cattle; and Mr. Limback said he would be insured, in going with his cattle."

The book containing the company's classification of risks was not shown to the plaintiff, and it appears that he had no knowledge of such classification, other than that which was communicated to him by the defendant's agents, who in each instance wrote out the applications, and with full and exact knowledge and information as to the plaintiff's occupation, and the manner in which he pursued it, described his occupation as it appears in the application, and also stated therein that the class of risk for the assured's occupation was "Preferred." An objection to the foregoing testimony was overruled, and that ruling is assigned for error.

The contention of the company is that, under the description of the plaintiff's occupation in the application, he was not insured while going with his cattle, and caring for them, when taking them to market, and that the assurance given to the plaintiff by defendant's agents at the time the policy was issued, to the contrary,

does not bind the company. The book said to contain the defendant's definition and classification of different occupations, with the rate of premium established for each, is published by the defendant for its own use, and furnished to its agents for their information and guidance. Neither the book, nor any portion of its contents, is carried into the application or policy, or even referred to. How applicants for insurance are to possess themselves of knowledge of the contents of this book, or, indeed, that there is any such book, does not appear. The agent testifies that this book, so far as he knows, was never shown to the plaintiff. When the plaintiff applied for insurance, he could do no more than state fully and truthfully what his occupation was, and what he did in the pursuit of it, and leave it to the agent to classify the risk, and fix the rate of premium. This is precisely what was done. There is no claim that the plaintiff did not give full and exact information as to what his occupation was, which the agent says was already known to him. Upon these facts, the description of the plaintiff's occupation made by the agent, and the classification of the risk thereunder, and the assurance given the plaintiff that his policy covered injuries received while accompanying his cattle to market, bind the defendant as effectually as if these representations and assurances had been written into the policy. But it is said the plaintiff states in his application for the policy that "I understand this company's classification of risks. * * *" How did he understand it? Certainly, not by intuition. He had no book. His understanding of it, then, must have been acquired from the representations made to him by the defendant's agents. Under such circumstances, the classification of the risk, so far as related to the policy in suit, must be such as these agents represented it to be when the plaintiff purchased the policy, and not what it may appear to be according to a classification made by the defendant which was not shown to the assured, and of which he was ignorant. In many cases the insured is required to state facts respecting the risk within his own knowledge, and in such cases he must state them truly; but where he states them truly, and the insurance agent writes them down differently, the assured is not prejudiced thereby. And the rule is the same where he answers a question or makes a statement about a matter peculiarly within the knowledge of the insurance company, and his answer or statement is dictated by, or based upon information derived from, the company's agent. The time has long since passed, in this country, when an insurance company can perpetrate a fraud upon the assured by accepting the premium, and, when the loss occurs, avoid its payment upon the ground that its agent varied from his private instructions, or misinterpreted them, or exceeded his authority in a matter in which the company had held him out to the public as having authority. Within the apparent scope of his authority, acts and assurances of the agent are the acts and assurances of the company itself. In 2 Amer. Lead. Cas. (5th Ed.) 917, the learned author states the rule as follows:

"By the interested or officious zeal of the agents employed by the insurance companies, in the wish to outbid each other and procure customers,

they not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that when this course is pursued the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers."

This statement of the law is quoted approvingly, and emphasized, by Mr. Justice Miller, in delivering the unanimous opinion of the supreme court in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, 235, 236. This is now the accepted doctrine. *Eames v. Insurance Co.*, 94 U. S. 621; *Insurance Co. v. Baker*, Id. 610; *Insurance Co. v. Mahone*, 21 Wall. 152. The cases in the state courts which support the rule here laid down are too numerous to require or justify citation.

According to the testimony of the defendant's own agent, the plaintiff's policy describes, and was intended to describe, his occupation as precisely that in which he was engaged when he received his injury; and he classed, and intended to class, the risk of such occupation as "Preferred." The assured paid for the policy on the faith of the correctness of the agent's description of his occupation and classification of the risk; and the law will not permit the company, after an injury has occurred, to change the definition of the plaintiff's occupation, and the classification of the risk, to his prejudice. The company is bound by the terms of the contract, as it was understood and entered into by its agent with the assured.

It is assigned for error that the court admitted testimony to show that cattle dealers commonly accompanied their cattle to market, and gave them that care and attention the plaintiff was giving to his cattle at the time he received his injury. The plaintiff having, by the terms of the policy, as it was explained and interpreted by the defendant's agent, the right to accompany his cattle to market, the defendant was not prejudiced by the proof that this was the common practice of cattle dealers, for the plaintiff had that right under his policy, independently of a custom or common practice to that effect.

In the matter of accompanying his cattle to market, and caring for them while in the course of transportation, the plaintiff could rightfully do whatever was customary with other cattle dealers under like circumstances and conditions. The plaintiff had a right, if it was not his duty, to incur all the risk and danger incident to caring for and looking after his cattle in the cars, while en route to their destination, in the time and manner customary among reasonably prudent and careful shippers, and such risks and dangers, no matter how great they are, do not constitute any violation of the provisions of the policy requiring the plaintiff to use due diligence for his personal safety and protection. Nor is the incurring of such risks and dangers a voluntary exposure to unnecessary danger, within the meaning of that clause in the policy. Whether the assured, at the time he received his injury, was engaged in doing something outside of the occupation covered by his policy, or whether, though in the pursuit of an occupation covered

by the policy, he exposed himself to unnecessary danger, and did not exhibit due regard for his personal safety, such as an ordinarily prudent man, charged with the same duty, and placed in like circumstances, would have done, were questions of fact for the determination of the jury. We are asked to review their finding, but as the defendant did not ask a peremptory instruction, at the close of all the evidence, for a verdict in its behalf, we cannot consider the question whether the verdict of the jury was warranted by the testimony. The truthfulness of the agent's testimony was not questioned. Its competency and legal effect, only, were disputed. In view of the legal effect of the facts testified to by the agent, the court did not err in telling the jury that, if the plaintiff was entitled to recover at all, his recovery should be for one-third of the principal sum of the policy, that being the amount fixed by the terms of the policy for the loss of a hand.

Finding no error in the record, the judgment of the circuit court is affirmed.

CHATTANOOGA MEDICINE CO v. THEDFORD et al.

THEDFORD et al. v. CHATTANOOGA MEDICINE CO.

(Circuit Court, N. D. Georgia. November 3, 1893.)

1. TRADE-NAMES—TRANSFER OF RIGHT TO USE ONE'S OWN NAME—CONSTRUCTION.

A contract whereby one parts with the right to use his own name in a certain trade connection will not be extended by the courts any further than the clear terms of the agreement show his intention to do so.

2. SAME.

Where one conveys the exclusive right to the use of his name in connection with "Simmons' Liver Medicine," the grantees are not entitled to protection against him when they have ceased to sell or advertise that medicine, and are using his name in advertising and selling a different medicine. 49 Fed. Rep. 949, reaffirmed.

3. EQUITY PLEADING—CROSS BILL.

Where one claiming the exclusive right under a contract to use the name of another in the sale of patent medicines files a bill against him to enjoin a violation thereof, whereupon the latter files an alleged cross bill to enjoin complainant from making a use of the name not authorized by the contract, this latter bill is not a true cross bill, but an original bill.

In Equity. Bill by the Chattanooga Medicine Company against M. A. Thedford and W. J. Satterfield to enjoin the use of a trade-name. Defendants filed a cross bill asking the same relief. A preliminary injunction was heretofore denied. 49 Fed. Rep. 949. The case is now on first hearing. Decree for defendants on the original bill, and decree dismissing the cross bill.

John L. Hopkins & Sons and J. T. Lupton, for complainant.

N. J. & T. A. Hammond and C. P. Goree, for defendants.

NEWMAN, District Judge. This case has now been heard for final decree on the bill, answer, and evidence. The bill seeks to enjoin the M. A. Thedford Medicine Company, of Rome, Ga., from

the manufacture, advertisement, and sale of what is known as "Thedford's Liver Invigorator." The facts in the case are shown with sufficient fullness in the statement of facts and in the opinion filed by the court on the application for temporary injunction, and reported in 49 Fed. Rep. 949. Much testimony has been taken, and has been heard by the court. The case has also been fully argued, and elaborate briefs submitted, by counsel on both sides; and the court has held the matter up for some time, in order to give it full consideration. The main question in the case is now, as it was at the preliminary hearing, as to the right acquired by Smith, McKnight & Patten under their contract with M. A. Thedford, of date November 26, 1876, and as to the extent to which Thedford parted with the right to use his name in connection with liver medicines, and, consequently, what right remains in him as to such use. This court held on a former hearing that "Thedford only parted with the right to use his name in connection with Dr. Simmons' Liver Medicine." After the sale by Thedford to Patten and his associates, the A. Q. Simmons Liver Medicine Company was organized for the purpose of making, advertising, and selling Dr. A. Q. Simmons' Liver Medicine. This company commenced and continued the business until it was enjoined from using Dr. Simmons' name on its wrappers and advertising matter by a decree of the United States circuit court for the eastern district of Tennessee in a suit by J. H. Zeilin & Co., of Philadelphia, against the Simmons Company. After this injunction, and after the company was compelled to drop the name of Dr. A. Q. Simmons from its literature, the Chattanooga Medicine Company was organized, and became its successor. It then commenced, and is now engaged in, the manufacture of what is called "M. A. Thedford's Original and Only Genuine Liver Medicine or Black Draught," claiming the right to so designate its medicine by reason of the contract with Thedford made in November, 1876. The evidence shows that there were transfers in writing from Smith, McKnight & Patten to the A. Q. Simmons Liver Medicine Company, and from that company to the Chattanooga Medicine Company, and shows, further, that these transfers were destroyed in a fire which occurred at the manufactory of the Chattanooga Medicine Company. Z. C. Patten, who is now president of the Chattanooga Medicine Company, and has been connected with both companies, testifies that all the rights acquired by himself and his associates from Thedford were thus regularly transferred to the A. Q. Simmons Medicine Company, and by it to the Chattanooga Medicine Company. The wrappers, such as were used by the A. Q. Simmons Liver Medicine Company, and a poster used by it, have been put in evidence. They show that the medicine was presented to the public as "Dr. A. Q. Simmons' Original and Only Genuine Vegetable Liver Medicine, Manufactured by the Dr. A. Q. Simmons Liver Medicine Co., Successors to M. A. Thedford & Co." There is, also, on both wrappers and poster, an excellent picture of Dr. A. Q. Simmons, (judging by his photograph, which is in evidence,) and underneath it appear the words, "Trade-Mark, Registered." The evidence shows that this picture was regularly registered as the

trade-mark of the A. Q. Simmons Liver Medicine Company in the proper office at Washington.

Now, this becomes important, in view of a contention as to the construction to be given to the use of the term "trade-mark" in the contract between Thedford and Patten and his associates. It is contended that this term was not used in any technical sense, but that the intention of the parties was rather the transfer of its use as a firm name. Now, even if the intention of the parties was the use of Thedford's name as a trade-mark, in a technical sense, it is urged that the adoption of another trade-mark, and regularly registering and using the same, was an abandonment of any such rights so acquired. It is entirely clear, as was stated in the former opinion in this case, that Thedford sold the right to use his name in connection with Dr. A. Q. Simmons' Liver Medicine, only, and that the contract cannot fairly be extended beyond this. The action of the Simmons Liver Medicine Company in adopting the wrapper just described strongly favors the view that what Patten and his associates were buying was the Simmons Liver Medicine, and the right to advertise it and sell it as such. It further tends to show that Thedford's name was rather an incident to what was acquired than the principal thing conveyed, as counsel for complainant argue. The purpose of the parties to the contract between Thedford and Patten and his associates seems to have been, mainly, on the one hand to part with, and on the other to acquire, the right to manufacture, advertise, and sell Simmons' Liver Medicine, and then to bind Thedford not to engage thereafter in the manufacture of said Simmons' Liver Medicine, under any other name or style, unless he should repurchase the right to do so, and, in addition thereto, to give Patten and his associates the right to continue the use of the name of M. A. Thedford & Co. in their business, as it was then being used. This construction is borne out by the subsequent action of the parties, until, by reason of the decree in the Zeilin Case, they were deprived of the right to the use of Dr. A. Q. Simmons' name in the advertisement and sale of their medicine. This is especially true of the wrapper and poster which have been alluded to.

It is contended on behalf of complainant that the contract referred to "makes a clean sweep of all rights and interests, present and future, that the said Thedford had, or could have had, in this liver medicine, a competing liver medicine, or any other liver medicine, so far as his name is concerned." The court cannot agree with the view that this contract has a meaning so broad. Where an individual parts with a right to the use of his own name in any given connection, the courts should not extend the contract by which he does so beyond its necessary scope. It certainly will not be held that a man has tied himself up so as to prevent the use of his own name any further than the clear terms of the agreement show his intention to do so.

Now, the pleadings and proof show that the Chattanooga Medicine Company has abandoned all pretense, so far as advertisement, wrappers, etc., to the use of Simmons' name, or to the manufacture and sale of Simmons' Liver Medicine, and show that it is only selling,

so far as is material here, a medicine called "M. A. Thedford's Original and Only Genuine Liver Medicine or Black Draught." The Chattanooga Medicine Company claims that Thedford, in manufacturing, advertising, and selling "Thedford's Liver Invigorator," is infringing its rights in the manufacture, advertisement, and sale of the "Black Draught," because of his contract with its predecessors, conveying the use of his name in connection with Dr. A. Q. Simmons' Liver Medicine. To state the proposition is to answer it, if the court construes the contract correctly. Even if the Chattanooga Medicine Company was manufacturing and selling what purported to be the Simmons Liver Medicine, it would be questionable (with the exceptions that will be noted hereafter) whether Thedford and his associates, by what they are now doing, are violating his contract; but, certainly, when complainant has abandoned entirely, so far as representations to the public are concerned, the manufacture and sale of Simmons' Liver Medicine, or, in other words, has ceased entirely to use Thedford's name in the connection which he, by his contract, authorized it to use it, it cannot reasonably be claimed that the present use Thedford is making of his name is such as the court will interfere to prevent.

It seems that the effect of the decree in the Zeilin Case was to leave in the Dr. A. Q. Simmons' Liver Medicine Company the right to make the compound known as the "Simmons Liver Medicine," although its advertisement and sale as such was enjoined; and it is contended that the Chattanooga Medicine Company, as the successor to the Simmons Liver Medicine Company, having this right, Thedford cannot, for this reason, make this compound, notwithstanding the fact that the Chattanooga Medicine Company does not advertise its medicine as such. There is an issue as to whether the M. A. Thedford Company, of Rome, is making, as to ingredients, the compound known as "Simmons' Liver Medicine." Quite a number of witnesses testified on behalf of complainant that the agents and salesmen of Thedford's Rome company have been representing to the public that the medicine they were selling was the same as the Old Dr. Simmons' Liver Medicine; and some testified that it was represented as being the same as the Black Draught made by the Chattanooga Medicine Company. Thedford denies that he gave his salesmen authority to so represent his medicine, and denies that the medicine he is now making is the same, as to ingredients, as the Simmons Liver Medicine. There is no evidence before the court, independently of these statements said to have been made by Thedford's salesmen and Thedford's own evidence, to show what the truth about this really is. The court is not prepared to hold that the emphatic denial by Thedford that the medicine is the same is overcome by the statements made by traveling salesmen anxious to sell medicine, and desiring to represent it in such a way as to make sales. The course of the argument and evidence in the case does not show, however, that it is very important to either party as to what are the ingredients of either medicine. The main controversy is over the right to represent it in particular ways to the public. This seems to be the valuable thing in connection with such medicines,—the

right to give them a particular designation to the trade and the public. One of the counsel for the complainant, in his brief, emphasizes this view of it in this way. He says:

"If his [Thedford's] name was important, it was as a means of identifying the medicine; and it would do just as much or more harm to put it on a different medicine, though a competing medicine, as to put it on the one sold."

The court should have some practical reason for granting the writ of injunction. If the Chattanooga Medicine Company has only the bare right to make the compound known as "Simmons' Liver Medicine," and no right whatever to advertise it and put it on the market as such, what injury can be had from the advertisement and sale of even the Simmons Medicine by another person? Even if Thedford was engaged in representing his medicine to the public as Dr. A. Q. Simmons' Liver Medicine, it is difficult to see wherein any harm would be done to the Chattanooga Medicine Company.

In this connection it is proper to notice complainant's claim of wrongdoing on the part of the Thedford Company, of Rome, as to one feature of the wrapper used by it. On the side of the wrapper used to inclose the box containing "T. L. I." is this expression:

"We make a valuable tonic, formerly made by my grandfather, Dr. A. Q. Simmons, in his lifetime; and is a most excellent tonic for ladies, and for nervousness and general debility of either sex."

On the wrapper in which is contained the bottles of "S. V. T." is the following:

"We make 'T. L. I.,' Thedford's Liver Invigorator, an excellent liver medicine for all diseases that arise from a torpid state of the liver. The only genuine has my likeness and signature on the front of each wrapper."

As to the "S. V. T.," it may be remarked that very little of it seems to have ever been put up, and it is mainly as to the language used on the boxes containing "T. L. I." that the complainant's contention is of any force, which is that the purpose of the Thedford Company in using it is to connect the "T. L. I." with Dr. A. Q. Simmons, thereby giving the public the idea that it is the same medicine as that formerly made by Dr. Simmons. This might be of some force, if the Chattanooga Medicine Company was engaged, in any way, in making the Simmons Medicine, but as has been stated, it is not. The evidence shows that the Chattanooga Company has expended a very large sum of money in advertising the medicine known as "Thedford's Original and Only Genuine Liver Medicine or Black Draught." "Liver Medicine" and "Black Draught" are the words which are displayed in the boldest type on the wrapper. By reason of the Chattanooga Medicine Company's continued use of the wrapper and of this name, and of the extensive advertising which it seems to have given it, it is this which is valuable to it. Certainly, the particular matter now being discussed cannot in any way interfere therewith. If the Chattanooga Medicine Company had the right, and was making Simmons' Medicine, this might be a proper subject of complaint, but, as matters now are, it is deemed immaterial.

After the decision in this case on the application for temporary injunction, what purported to be a cross bill was filed by defendant against complainant, the purpose being to enjoin the original complainant from the use of the name of M. A. Thedford as they are now using it on the wrappers of their medicine, and in advertising, etc. Service was made on the counsel for the Chattanooga Medicine Company residing in this district. A motion was made to dismiss the service on the ground that the pleadings filed as a cross bill did not make a good cross bill, and that, consequently, it was not a case for substituted service. This motion was overruled, the bill retained, and substituted service sustained; the court stating, however, that it would not then determine how far relief could be granted under it. A brief opinion was filed, in disposing of this motion, in which the expression was used that the contract between Thedford and Patten and his associates is the "subject-matter" of the original bill. This is now considered to have been erroneous. While the contract is a prominent feature of the matters set up in the original bill, and of the litigation, it cannot be said to have been the subject-matter of the suit. The proper purpose of a cross bill is to obtain discovery, or to obtain a full determination of a matter already in court. The purpose of the original bill in this case was to determine the right of M. A. Thedford & Co., of Rome, to manufacture, advertise, and sell the medicine known as "T. L. I." In order to determine this, it is not necessary to have any decision or decree as to the right of the Chattanooga Medicine Company to do what it is now doing. It may be true that a determination of the right of the Thedford Medicine Company, of Rome, to carry on its business, involves some consideration of what complainant's rights are as to the use of Thedford's name; but it is not at all necessary, in order that the defendants may have a complete determination of the questions raised against them in the original suit, that their cross bill should be entertained and heard. The supreme court, in the case of *Ayres v. Carver*, 17 How. 591, states the rule in reference to a cross bill (on page 595) as follows:

"A cross bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matter charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross bill constitute but one suit, so intimately are they connected together. *Field v. Schieffelin*, 7 Johns. Ch. 252."

This is in line with all the authorities on the subject, and supports the view now taken, that the pleading filed and called a "cross bill" is not good as such, and it will be dismissed, with costs.

There must be a decree on the original bill in favor of defendants, denying the injunction.

McKAY & COPELAND LASTING MACH. CO. v. CLAFLIN et al.

SAME v. DIZER et al.

(Circuit Court, D. Massachusetts. September 22, 1893.)

Nos. 2,776 and 2,786.

1. PATENTS FOR INVENTIONS—LIMITATION OF CLAIMS — COMBINATION—LASTING MACHINES.

Claim 8 of letters patent No. 197,607, issued November 27, 1877, to Copeland, Woodward & Brock, covers "in a lasting machine, the combination of the adjustable carriage, B, provided with means for supporting an oscillating plate, and said oscillating plate, substantially as described." *Held*, that the words "substantially as described" refer only to the elements mentioned in the claim, namely: (1) "Adjustable carriage, B;" (2) "means for supporting an oscillating plate;" and (3) "an oscillating plate;" and that, although every combination described in the specification includes a centering foot or equivalent instrumentality for tipping the adjustable carriage, this element should not be read into the claim.

2. SAME—CONSTRUCTION OF CLAIMS.

General rules as to construction of claims. Limitations of functions of mechanical experts in this particular.

3. SAME.

The claim must be construed as covering a combination of only the three parts named, for use with any lasting machines to which they can be applied through any adaptable instrumentalities on the plate, and with such methods for operating all the same as may be applicable thereto.

4. SAME—"SUBSTANTIALLY AS DESCRIBED."

Whether the words "substantially as described" limit the "means for supporting the oscillating plate" to the ordinary pivoting arrangement, which is the only one described in the specifications, or whether the word "substantially" would include all equivalent means, is not decided; but, assuming the former construction to be correct, the claim is not infringed by a machine which uses spring rockers for tipping the plate.

5. SAME—ANTICIPATION.

Watson v. Stevens, 2 C. C. A. 500, 51 Fed. Rep. 757, distinguished.

6. SAME—INVENTION.

Assuming that the claim should be broadly construed to cover every method of tipping a plate or table carrying lasting tools, it is void as claiming so universal a function as the tipping motion in its application to a use analogous to those familiar generally and in prior lasting machines.

In Equity. These were two suits for the alleged infringement of letters patent No. 197,607, issued November 27, 1877, to Copeland, Woodward & Brock for an improvement in lasting machines for boots and shoes. Bills dismissed.

Fish, Richardson & Storrow and James J. Storrow, for complainant.

John L. S. Roberts, Elmer P. Howe, and Walter K. Griffin, for defendants.

PUTNAM, Circuit Judge. The issues in these two cases are the same. They turn on the eighth claim of the patent in suit, which reads as follows: "In a lasting machine, the combination
v.58f.no.2—23

of the adjustable carriage, B, provided with means for supporting an oscillating plate, and said oscillating plate, substantially as described." The first question which arises touches the construction of this claim. The respondents contend that by reason of the manner in which the specifications describe an automatic method of tipping the adjustable carriage through the instrumentality of the centering foot, the words "substantially as described" involve the latter; that the automatic movement is a part of the combination covered by the claim, and that a machine which does not contain that movement cannot infringe. Experts have testified upon this proposition, which nevertheless is, in this case, entirely one of construction, and wholly for the court. There is no peculiar mystery in the statutes of the United States touching patents, nor in the application of them; and the specifications and claims for which they provide are to be construed according to the rules of the common law. So far as they are plain and need no construction, the court is not to be governed or influenced by opinions of mechanical experts. The most such witnesses can do towards aiding to ascertain their meaning is to explain to courts the sense of words of a technical or special character, and to bring before them a knowledge of the state of the art, and of other facts constituting the circumstances in the light of which the rules of law are to be applied.

The words "substantially as described" refer, according to the plain use of language, only to the elements stated in the claim. If there was any doubt on this point of construction, the case would be aided by *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. Rep. 33, which on this proposition was quite like the case at bar. There the court held (page 235) that the words, "constructed and arranged substantially as specified," mean "substantially as specified in regard to the combination which is the subject of the claim." A strikingly analogous case is *Day v. Railway Co.*, 132 U. S. 98, 10 Sup. Ct. Rep. 11. There the position of the parties was reversed from that at bar. The patentee of an alleged improvement in railroad track clearers attempted to interject into one of the claims, for the purpose of saving it, a peculiar method of pivoting, which had been described in the specifications. The claim did not set this out, although other claims did; but it contained the words, "as and for the purpose set forth." It was contended by the owner of the patent that, as the combination would be inoperative "for the purpose set forth," unless the bottom of the car was treated as a part of the combination, the peculiar method of pivoting must also be included; but the court overruled this contention. In the case at bar, therefore, "substantially as described" concerns only the specific things stated in the claim, namely: "(1) Adjustable carriage, B;" (2) "means for supporting an oscillating plate;" and (3) "an oscillating plate." The expression "a lasting machine" need not be considered, because all parties must agree that it is generic.

It is true that every combination described by the specifications includes the centering foot, or at least an equivalent instrumentality, for automatically tipping the adjustable carriage; but, while this might aid if the language of the claim was obscure, it is not sufficient to throw any doubt on what, standing by itself, is complete and precise. The fact that the specifications describe no method of making use of the complainant's alleged improvements, except by the aid of a centering foot or its equivalent instrumentality, might raise a question to be considered later on, if necessary.

While claim 8 mentions no immediate lasting instrumentalities to be carried on the oscillating plate, yet, on fundamental principles, it is not necessary that a patentee should enumerate elements which he has a right to assume every one would supply, whether it be, as in this case, the instrumentalities or tools intervening between the oscillating plate and the work, or the means of applying power lying back of the parts described. It follows that the claim is satisfied without attaching to it the centering foot, or other automatic method for tipping the oscillating plate; and it is to be construed as covering a combination of only the three parts already specified, for use with any lasting machines to which they can be applied, through any adaptable instrumentalities upon the plate, and with such methods for operating all the same as may be applicable thereto.

So far as all these are concerned, there will be no dispute as to the meaning of the words "substantially as described," except so far as they relate to "the means for supporting" the oscillating plate. In the specifications the means described seem to be the ordinary pivoting, which would probably be the first to occur to any mechanic; while in the respondents' machines the tipping or oscillating is accomplished by the use of spring rockers. There can be no question that the contention of complainant is correct, that a spring rocker is a perfectly familiar way of obtaining a tipping motion, as well as a pivot, and that ordinarily one is a well-known equivalent for the other; so that, if the case turned on this alone, the court would have no doubt that respondents' machines infringed. But here comes in the consideration of the words "substantially as described," with reference to the "means for supporting" the oscillating plate. In the view which the court is compelled to take of this case, it is not necessary for it to determine absolutely whether or not these words are limited to the specific device of pivoting, in which case there would clearly be no infringement, and would be a decree for respondents; or whether, by the construction to be put on the claim and specifications, the word "substantially" covers all equivalents for the pivoting. The inclination of the court is to the latter, as is claimed by the complainant; but it can for this case assume that on this point his contention is correct.

The substance of this contention is illustrated by the fact that complainant states that the patented improvement consists in

mounting the closing-in plates on a tipping, instead of on a rigid, bed, thus claiming the benefit of all that can be covered by contrasting the word "tipping" with the word "rigid." Again, it puts it that the invention does not consist in changing the details of a joint where a joint already permitted motion, but in first inserting a joint, and thus first giving the capacity for an adjustment where none existed before. The breadth of the construction which it puts on the claim is further illustrated by the fact already referred to, that it maintains that the spring rockers used by respondents are, for the purposes of the claim, the equivalent of the pivots shown by the specifications. The result, according to complainant's contention, is a claim so broad as to reach every form of tipping longitudinally an oscillating plate suited to carry any form of tools for lasting, at least those for lasting the heel and toe, combining with them the other matters already specifically referred to. Everything is admitted to be old even in combination, except the function of tipping instead of rigidity. The question of the validity of so broad a claim will be considered further on.

The utility of the adjustable carriage becomes evident at once on its being presented to view, and is clearly stated by the testimony of expert Crisp, on his cross-examination, as follows:

"Question. Isn't it true that a large part of the progress in lasting machines has been in increasing the adjustability of the lasting tools or devices? Answer. Yes. Q. And that includes increasing the speed and facility of adjustment; is that not so? A. It certainly is, and any facility of adjustment which saves the operator a few seconds per shoe is a marked improvement in the art of machine lasting."

Touching also the defense of want of novelty, including alleged anticipation by other patents, the court is satisfied that it is not maintained by that clear state of facts and convincing balance of proofs which the supreme court now requires. It would subserve no useful purpose to state the reasons for this at length. They are sufficiently summed up in the following further testimony of Mr. Crisp, again on cross-examination:

"Question. Now, do you find anywhere in the state of the art, as it existed at the date of the patent in suit, any machine or patent which embodies or describes a pair of lasting plates mounted upon another plate capable of being tipped transversely to the length of the last? And in answering my question you need not confine yourself to 'a pair of oscillating lasting plates,' but consider any pair of lasting plates, whether capable of individual oscillation or not, so long as they are both mounted upon a third plate which is capable of being tipped transversely to the length of the last. Answer. The exact equivalent to said device mentioned in the question, and as the question is put, is only found in the defendants' exhibit, Fischer Toe-Lasting Head. Q. I am uncertain what you mean by the word 'equivalent' in your last answer, but I suppose you mean that you do not find the construction referred to in Int. 56 anywhere in the state of the art as it existed at the date of complainant's patent, except in the Fischer patent, already referred to, and in the toe head of the American machine. A. I mean that I find only in the Fischer device two lasting plates, mounted upon a third plate, or bed, which is capable of being tipped transversely to the length of the last. Q. And the transverse tipping of the Fischer device was accomplished, was it not, by putting a piece of cardboard between the contracting parts of the head and base, as illustrated by Mr. Fischer in defendants' exhibit, Fischer Toe-Lasting Head?

A. Yes; by either shimming or wedging the head to the proper inclination upon the base, and there clamping it. By 'shimming' I mean one or more layers of any thin material,—cardboard, leather, or metal."

From the proof elsewhere it appears that the result produced by the shimming referred to was not anticipatory, within the rule laid down in *Tilghman v. Proctor*, 102 U. S. 707, 711, and *Topliff v. Topliff*, 145 U. S. 156, 161, 12 Sup. Ct. Rep. 825.

As already stated, the specifications throughout describe the improvements of the patent as used in connection with the automatic movement produced by the "centering foot." That portion which describes the pith of the invention, so far as important in this case, has the following language:

"The particular features to which our invention relates consist—First, in means for automatically adjusting the heel-lasting mechanism by the slope of the bottom of the last, whereby the heel-folding plates, when actuated, close upon the bottom of the last, substantially parallel with the plane thereof, as hereinafter explained."

As already stated, the court cannot perceive that the specifications anywhere point out that claim 8 can be availed of without means for automatically adjusting the heel-lasting mechanism, as the complainant now says it may be, and as is now in the complainant's commercial machines invariably practiced. Although the claim receives the construction which the complainant insists on, this will not necessarily aid him, unless it also appears that the patent describes a method of using the combination covered by it without the centering foot. *Kelleher v. Darling*, 4 Cliff. 424, 436. There is an exception, probably applicable here, based on fundamental principles of patent law, whenever persons skilled in the art or science to which the improvement appertains can with the aid of the specifications supply the omission. This point, however, is not clearly raised, and the court has reached a conclusion which makes its determination unnecessary.

If the claim does not go to the extent contended for by the complainant, respondents' machines do not infringe, as already said. If it does go to that extent, and is valid, the court is convinced that respondents' spring rockers are the equivalent of complainant's pivots, and that there is an infringement. This leaves what for the court is the most difficult question the case involves.

In the present state of mechanical advancement a claim so broad as complainant's, of which the new function is in substance every method of tipping a plate or table carrying lasting tools, bears at the outset a very strong presumption that it seeks to grasp too much to be valid. The field seems to be too familiar, and too much in common, to permit any one to acquire a monopoly of any very large portion of it. The court is unable in this record to find anything which overcomes the presumption stated.

The patent in suit issued on an application filed November 8, 1877. The prior patent for a lasting machine issued to the same patentees on an application filed May 26, 1877. The specifications of the patent in suit describe the improvements covered by

it as modifications and developments of the devices embodied in the earlier patent. So far as the claim in contest is concerned, the earlier patent contained everything necessary according to the complainant's contention for a successful lasting machine, except the tipping plate in lieu of a rigid one. The earlier patent was the pioneer one, if either was of that character, which the court need not consider. It carried on the rigid plate, corresponding to the oscillating plate, what are described in it as "oscillating, turning, and smoothing finger plates," and which were intended to a certain extent to adjust themselves to the inequalities of lasts, and were directly suggestive of the additional oscillation embraced in claim 8, now in question. A witness for the complainant shows that the machine, according to the first patent, was quite satisfactory, so far as the side-lasting devices were concerned, but not as to the heel and toe lasting, and that to overcome this difficulty it was essential that the wipers or slides turning over the upper at the toe and heel should be so arranged that they would adjust themselves to the slope or roll or twist of the last. The witness continues, in effect, that the result was an improvement, so that, while the bed-plate in the earlier patent was rigid, in the later one it was cut away from the carriage, and mounted so as to tip, and that from the moment this was applied the machine became a successful operative one, lasting shoes, either rights or lefts.

The defect and remedy must have been discovered after the application for the earlier patent, May 26, 1877, and before that for the later one, November 8th. The court is not referred to anything in the record which shows that the difficulty to be overcome was not met promptly and easily on its being discovered. The case, therefore, has none of the special elements which enabled the court of appeals in this circuit to sustain the patent in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. Rep. 757; or of those of other like instances where patents have been maintained. There the controlling considerations were that what was claimed to be invention was shown to have been such as a matter of fact, and independently of any theories which courts may entertain; because, notwithstanding it was insisted in each instance that the improvement was one which would ordinarily occur to a skilled mechanic, the fact was that it had been long sought after, and had not been found.

The court might perhaps assume to understand of its own knowledge, concerning whatever is required to be moved to and from the thing on which it is to operate, or to be adjustable at different angles with reference to it, that it is common to support such on a plate or table so mounted that it may be tipped, and this whether the tipping is to be longitudinal or transverse, or even by a universal joint; but the court prefers to rest this fact on the evidence sustaining it, which is found in this record at several places.

It is not necessary to incumber this opinion with citations from familiar cases; but the court notes the language of Mr. Justice

Matthews in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 73, 5 Sup. Ct. Rep. 717, fatal to the patent in that case, that, "as soon as the mischief became apparent, and the remedy was seriously and systematically studied by those competent to deal with the subject, the present regulation was promptly suggested and adopted." The facts shown in the record, already referred to, seem to meet exactly this last observation; although, of course, the court is aware that some of the most valuable and useful aids to mankind in the way of discovery, and therefore most deserving the reward of a patent, have come as a mere happy thought, and not as the result of long study or seeking for results, and that some were also such imperceptible advances as hardly to be measured by the courts, while thoroughly appreciated by the common understanding of mankind. It is not always easy to put one's self in the place where the claimed inventor stood at the time he made his advance, whatever it might have been; and the final determinations of questions of this nature are necessarily more correct as the average judgment of several than as the unsupported conclusions of only one individual. Nevertheless, while proceeding with some doubt, the court feels obliged to apply to the case the pith of *Lovell Manufg Co. v. Cary*, 147 U. S. 623, 637, 13 Sup. Ct. Rep. 472, and hold that under all the circumstances brought to its attention the improvement as presented by this broad claim was only applying an old process to an analogous subject, with no change in the manner of application, and no result substantially distinct in its nature; and that to sustain complainant's claim 8 would be to monopolize so universal a function as the tipping motion in its application to a new use analogous to those which were familiar, not only generally, but in this very machine, without any evidence that those skilled in the art had before sought or failed to do the same. It seems to the court that these patentees do not go beyond what was disallowed as a so-styled "double use" in the leading case of *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220, and in *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. Rep. 58.

The complainant refers to the position occupied by Mr. Copeland, one of the patentees, who sold to complainant the patent on which this bill rests, and who is now said to be interested in the rival machines of respondents. In view of the fact that the court has been compelled to adjudge invalid the eighth claim of a patent which probably Mr. Copeland sold as valid, it may be that there is some just principle of law which would estop Mr. Copeland from disputing its validity if he was a party respondent in either of the cases under consideration, although such a proposition has not been pressed on the court. Inasmuch, however, as he is not a party respondent, and as the question does not turn on a conflict of proofs, but on the effect of the fair construction of the claim in question, and of facts relative to the state of the art which cannot be disputed, the court is required to examine the case as it would if the patent was contested by any persons with whom Mr.

Copeland was in no way connected, or who derived no interest under him; and accordingly it has done so.

In view of the relations which a judge disposing of a case in the circuit court holds to the court of appeals, and of the importance and difficulty of the questions involved, and of the consequent consideration which this court has been compelled to give them, it seems proper to cover in this opinion the principal matters which have been discussed at bar, notwithstanding the fact that the litigation has been disposed of on the single point that the claim does not cover a patentable invention. In each case the order will be, bill dismissed, with costs.

FASSETT v. EWART MANUF'G CO.

(Circuit Court, N. D. Illinois. April 3, 1893.)

1. PATENTS FOR INVENTIONS—DIVISIONAL APPLICATIONS—RESERVATIONS—CONSTRUCTION—LINK-CHAIN COUPLING MACHINE.

Nelson B. Fassett filed divisional applications, designated as "Cases A and B," for a machine for coupling the links of drive chains. Case A described and claimed, among other things, a machine which assembled the links by thrusting them endwise together, and resulted in a patent issued August 17, 1886. The patent contained this reservation, designed to cover the matter contained in Case B: "The feed chute, guide way, and means for pushing the assembled links forward therein, a delivery wheel or device, the fulcrum plate or corner, operating mechanism, and such details of construction not herein broadly claimed,—form the subject of a separate application." (Case B.) Case B was put into interference with the patent issued to Eugene L. Howe May 12, 1885, (No. 317,790,) for a machine for coupling links by a sidewise thrust, and the proceedings resulted in favor of Howe. Pending this proceeding, however, Fassett, claiming that the interference issue did not cover all the matter of Case B, filed a divisional application thereof, (Case C,) alleged to include the omitted matters, which resulted in patent No. 377,376, issued to Fassett February 7, 1888. The last 9 claims of this patent were broader than those of Case A, and covered, substantially, a machine for coupling links by both an endwise and sidewise thrust. *Held*, that these claims were invalid—First, because they were too broad to be covered by the reservation in Case A; and, second, because the matter of Case C was not divisional or properly severable from the matter of Case A, whether the severance be considered as direct, or made through Case B.

2. SAME—ABANDONMENT.

By taking out the patent resulting from Case A, which was for a device arranged to operate in a specific manner, the claimant abandoned to the public the more general claims which might have been predicated upon the same combination of parts.

3. SAME—SEPARATION OF CLAIMS—ACTION OF PATENT OFFICE NOT CONCLUSIVE.

The action of the patent office in allowing a separation of claims into divisional applications is not conclusive, and the question whether the severance was proper and valid may be passed upon by the courts.

4. SAME—DIVISIBILITY OF APPLICATIONS.

The doctrine of the patent office that applications for patents shall not be severable, except on structural lines, must be held to mean upon physical lines, which actually divide the machines into separate parts.

5. SAME—INTERFERENCES—PATENT OFFICE DECISION—CONCLUSIVENESS.

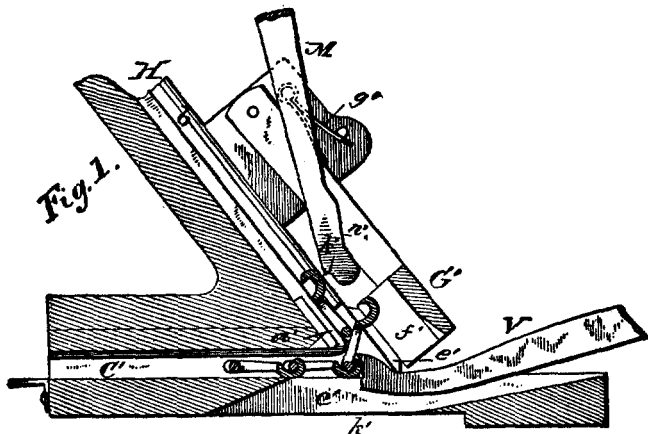
A decision by the patent office in an interference proceeding is conclusive between the parties, even if wrong, when no steps have been taken to set it aside.

In Equity. Suit for infringement of the last 9 of the 10 claims of letters patent No. 377,376, issued February 7, 1888, to Nelson B. Fassett, for a "machine for coupling chain links." Bill dismissed.

The object of the invention is thus described by the inventor in the caveat filed by him in the patent office: "This invention relates to the production of a machine which, under conditions of form and structure, shall render it capable of accomplishing automatically the labor now performed by hand manipulation, namely, that of uniting or coupling together the integral parts or links of a drive chain, to form a chain, at the same time removing any and all surplus material that may remain in consequence of the sprues not having broken off sufficiently close to the links, thereby trimming them to conform to uniform caliber from inside surface of hook, and also removing any fins or feathery extremities of the hook, if any shall there exist, and of bringing all hooks to standard size by thrusting a drift through them."

From the agreed statement of facts in this case, it appears "that the complainant, Fassett, during the winter of 1882-83, invented and constructed a machine for assembling the links of drive chains together, like that represented and exhibited in his model marked 'Fassett Exhibit Model No. 1,' and operated the same experimentally, during the first half of 1883, at the Moline Malleable Iron Works, at Moline, Ill., and put together during said time about 5,000 feet of chain, none of which, however, was ever used or sold; that said machine assembled the links of the drive chain together by an endwise thrust of the links, as shown in said model."

The coupling mechanism of this model is shown, substantially, in Fig. 1. H is a guide way or chute along which the separate links descend after being trimmed and sized by appropriate devices above. C' is the chain channel or guide way, along which the coupled chain is forced. M is a force bar which pushes the descending link into engagement with the last preceding link as it lies in the chain channel at the proper angle. V is a thrust bar which pushes the completed chain along the guide way, C', the proper distance to receive the next descending link.



Fassett's caveat was filed April 8, 1884, and renewed for one year, under the rules of the patent office, on April 4, 1885. The caveat contained the following passage: "So far, it will be noted that all that has been said about the machine has had reference only to drifting, coupling, etc., drive-chain links that belong to that class of links that are coupled together by one link being thrust endwise at an acute angle into union with the adjacent link; the end bar being adapted to enter laterally through the mouth of the hook

of the adjacent link, whatever may be the device for retaining the links in union with each other. But now it will be found that the same machine is equally applicable to the purposes of drifting, trimming, coupling, etc., certain other styles of links, with but a very slight modification of the machine already illustrated. That modification is to be found illustrated in Fig. 28 of the drawings, and it has for its object the drifting, trimming, coupling, etc., of a class of links now in common use, which are made to slide sidewise into union with each other; the crossbar entering the hook at one side of the adjacent link, and moving endwise through the opening of the hook, as shown in Fig. 27."

In January, 1884, Eugene L. Howe had made a machine for assembling coupling chain links by a sidewise thrust. Howe obtained a patent for his machine on May 12, 1885, while the Fassett caveat was on file, the patent being No. 317,790. On August 21, 1885, Fassett filed divisional applications known as "Case A and Case B." Case A contained claims covering the device for coupling links by an endwise thrust, and a patent was issued thereon August 17, 1886, being No. 347,333. This patent contained the following claims, which relate more especially to the coupling devices: "(5) The chain channel or guide way, located directly under the feed chute or link channel, and in the same vertical plane therewith, in combination with a periodically moved pushing device for intermittently carrying the chain along within said guide way or chain channel the required distance to bring the hook of the link last coupled directly under the crossbar of the lowermost link in the channel of the feed chute, substantially as set forth. (6) The chain channel or guide way, located directly under the feed chute or link channel, and in the same vertical plane therewith, in combination with a force bar or coupling device for periodically forcing the lowermost link lengthwise downwardly in said feed chute into union with the last link in the chain channel or guide way, substantially as set forth. (7) The chain channel or guide way, located directly under the feed chute or link channel, and in the same vertical plane therewith, in combination with a fulcrum plate or corner, and means for pushing the chain along, at proper intervals, the required distance to bring the hook of the last coupled link directly under the end bar of the next link to be coupled therewith, substantially as set forth. (8) The chain channel or guide way located directly under the feed chute or link channel, and in the same vertical plane therewith, in combination with a fulcrum plate or corner, and means for periodically forcing the lowermost link lengthwise downwardly in said feed chute or link guide, into union with the last link in the chain channel, or guide way, substantially as set forth." "(19) In a machine for putting together or coupling the links of drive chains, a feed chute and guide way in the same vertical plane, provided at their juncture with a fulcrum plate, substantially as and for the purpose set forth. (20) In a machine for putting together or coupling the links of drive chains, a feed chute in combination with a link-coupling device located above and over the link channel of the chute, and operating substantially as and for the purpose specified. (21) In a machine for putting together or coupling the links of drive chains, the combination of a feed chute, a link-coupling device, and a spring guide connected to the lower end of the chute, substantially as and for the purpose described. (22) In a machine for putting together or coupling the links of drive chains, the combination of a feed chute, a guide way, a link-coupling device, a spring guide for the links as they turn over, and a thrust bar to feed the chain along in guide way, substantially as and for the purpose set forth."

This patent contained the following reservation, intended to cover the matter of Case B.: "The feed chute, guide way, and means for pushing the assembled links forward therein; a delivery wheel or device; the fulcrum plate or corner; operating mechanism; and such details of construction not herein broadly claimed,—form the subject of a separate application, (serial No. 174,962.)"

Case B was thrown into interference with the Howe patent under an issue framed as follows: "The combination with an inclined chute or feed way of a pusher slide for pushing the links sidewise, one at a time, to interlock

with another link held in a suitable guide way, through which the interlocked links are conveyed from the machine; a link feeder for turning over and feeding the interlocked links along the discharge guide way; and intermediate mechanism for automatically operating said devices."

This issue was finally determined in favor of Howe, on the ground that, while Fasset was the first to conceive the idea of a coupling machine having a sidewise thrust, Howe was the first to reduce the invention to actual practice, in his machine of January, 1884. But, while the interference was pending, Fasset, claiming that the interference issue did not include all the matter of Case B, filed another application as a division thereof, alleged to include the omitted matters. This application, which was designated "Case C," resulted, after several appeals from adverse decisions by the examiner, in the issuance, on February 7, 1888, of the patent now sued upon, being No. 377,376. The 9 claims in controversy are as follows: "(2) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a link coupler for pushing the end bar of an uncoupled link into the hook of one of a series of assembled links, and a stop or abutment to support the hook of one of the assembled links against the thrust of the link coupler, substantially as set forth. (3) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a chain channel adapted to receive assembled links, and a link coupler for pushing the end bar of an uncoupled link into the hook of one of the assembled links, substantially as set forth. (4) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a chain channel adapted to receive assembled links, a link coupler for pushing the end bar of an uncoupled link into the hook of one of the assembled links, and a pushing device for advancing the assembled links in the chain channel, substantially as set forth. (5) In combination with a guide way for containing two or more assembled links, an inclined feed chute, and a link coupler for pushing or feeding from the latter the links placed therein, a positively moved pusher device arranged and operating to periodically move the assembled links to the proper extent to bring the last one of the series into proper relationship with the link to be next engaged with it, substantially as set forth. (6) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a chain channel adapted to contain assembled links,—the feed chute and the chain channel being arranged at an angle to each other,—a link coupler for pushing the end bar of an uncoupled link into the hook of one of the assembled links, and a pusher device for advancing the assembled links in the chain channel, substantially as set forth. (7) In a machine for coupling chain links, the combination of an inclined feed chute adapted to receive uncoupled chain links, a horizontal chain channel adapted to receive assembled links, a link coupler for pushing the end of an uncoupled link into the hook of one of the assembled links, and a pusher device for advancing the assembled links in the chain channel, substantially as set forth. (8) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a chain channel adapted to receive assembled links, a link coupler for pushing the end bar of an uncoupled link into the hook of one of the assembled links, a pivoted thrust bar adapted to advance the assembled links in the guide way, and a spring adapted to move the swinging end of the thrust bar into position for engagement with one of the assembled links, substantially as set forth. (9) In a machine for coupling chain links the combination of a chain channel adapted to contain the assembled links, a pusher device adapted to engage with one of the assembled links, and an adjustable bar for actuating the pusher device to properly advance chain links of different sizes, substantially as set forth. (10) In a machine for coupling chain links, the combination of a feed chute adapted to receive uncoupled chain links, a chain channel adapted to receive assembled links, a link coupler for pushing the end bar of an uncoupled link into the hook of one of the assembled links, the plate arranged in the plane of the chain channel, and means for advancing the assembled links in the guide way, and turning the last coupled link under the plate, and into line with the previous link, substantially as set forth."

Goodyear v. Rubber Co., 2 Fish. Pat. Cas. 514; Tlghman v. Mitchell, 4 Fish. Pat. Cas. 624; Whitney v. Mowry, Id. 208; Railroad Co. v. Stimpson, 14 Pet. 458; Foley v. Harrison, 15 How. 448.

L. Hill and Kerr & Curtis, for defendant.

WOODS, Circuit Judge. Suit for infringement of patent and injunction. In the opinion of the court, the patent in suit, in respect to the claims alleged to have been infringed, is invalid, for two reasons: First, because it is not covered by the reservation contained in patent No. 347,338, (Case A;) and, second, even if the reservation were sufficient, the matter of this patent (Case C) was not divisional, or properly severable from the matter of the first patent, (A,) whether the severance be considered as direct, or as made through Case B.

The contention of the complainant is that the claims in the patent of Case A, and the claims of Case B and of the Howe patent, with which B was put into interference, were for specific constructions,—the first for an endwise, and the others for a sidewise, coupling machine,—while the patent in suit is fundamental and generic, and covers a machine made up of the parts named or described, whether arranged and combined for coupling by an endwise, sidewise, or other kind of thrust, and that, the first applications being specific, the reservation in Case A operated, as it was designed to do, to save to the applicant the right to put into Case B generic claims, and that, having been prevented from doing that by reason of the declaration of interference between Case B and the Howe patent, Case C was a legitimate means of attaining the desired end. The reservation will not bear that construction. The reference, instead of being to broad or generic claims, was plainly to claims more specific than those of the patent, which were already to be found in Case B, covering the sidewise thrust, and not to any which were thereafter to be formulated, and added to the application in that case. The entire reservation is as follows:

"The feed chute, guide way, and means for pushing the assembled links forward, a delivery wheel or device, the fulcrum plate or corner, operating mechanism, and such details of construction as are not herein broadly claimed,—form the subject of a separate application, (serial No. 174,962)."

In other words, whatever is "broadly claimed" is to be found herein, but, for the elements specified with such details of construction as are not herein broadly claimed, reference is made to Case B, of which they "form the subject." The patent granted, though for an endwise coupling, showed the entire machine, with all its so-called fundamental or generic elements; and the evident purpose of the reservation was to guard the patent against being construed so broadly as to include the claims in Case B for the sidewise movement; the avowed object of the separation having been to bring about a declaration of interference between Case B and the Howe patent, and meanwhile to enable Case A to go, as it did, to undelayed issue. There was necessity for guarding against such construction. The patent itself contains a suggestion of the applicability of the machine to the coupling of other "forms or patterns of chain links," and in the caveat which Fassett had filed the

mode of construction for sidewise thrust had been expressly described and illustrated. Indeed,—to my mind, though it is not a point necessary to be decided,—once the machine for the endwise coupling had been invented, it was only a matter of mechanical skill, and not invention, to adapt it to the sidewise thrust, and if Fassett was, as it seems clear he was, the first to invent the machine for the endwise thrust, the interference with Howe should have been resolved in his favor, on the ground that Howe's patent was a mere mechanical modification of Fassett's device. Besides the manner of coupling shown in Howe's patent, the sidewise coupling might have been effected without removing the chain guide or channel from its location directly under, and in the same vertical plane with, the feed chute. This could be done by causing each link, as it reaches the bottom of the chute, to be pushed a proper distance to one side, and then either to be lowered or moved forward into position to be pushed into coupling by a counter sidewise thrust. A skilled mechanic would readily supply the means for these movements, and perhaps suggest other more simple or familiar modes of accomplishing the result. But, whether the decision upon the interference was right or wrong, it is conclusive between the parties, since no steps were taken to set it aside. Indeed, there has been an avowed acquiescence in the ruling.

In view of the terms of the reservation, and of the fact that the applications in Cases A and B were prepared with the intention that the latter should be put into interference with the Howe patent, the assertion that the complainant discovered that his generic claims had been omitted from Case B when, on account of the interference, it was too late to add them, must be regarded as an afterthought.

Some of the considerations already advanced go far to establish the proposition that the matter of Case C was not severable from Case A, and that, by taking out the patent for a device arranged to operate in a specific manner, the claimant abandoned to the public the more general claims which might have been predicated upon the same combination of parts. The conclusive consideration is that the so-called fundamental or generic claims and the specific claims found in Cases A and B and in the Howe patent are for the same machine, as a whole, and not for different parts thereof, and are distinguishable only in respect to their scope. The generic claims are for a chain-link coupling machine, composed of the following elements, (as named in the reservation,) without restriction of the manner in which the coupling should be effected, viz. the feed chute, guide way, pusher, delivery wheel, fulcrum, and operating mechanism; while the specific claims are for the same machine composed of the same physical elements combined in the same general manner, but so arranged as to effect the coupling of the links in one case by an endwise, and in the other case by a sidewise, movement. Except those two, it does not appear that any other mode of effecting the coupling had been thought of as feasible or desirable, though it is conceivable that other modes might be used; and there was therefore no practical reason for prosecuting the generic

claims, except to procure a patent which should dominate the other two, the effect of which would be to nullify the decision in favor of Howe upon the interference, and to extend for eighteen months the monopoly acquired by the complainant under his first patent.

These results are perhaps not conclusive of the invalidity of the patent, but they justify and require a strict application of the doctrine of the patent office that applications for patents shall not be severable except upon structural lines; meaning, as I think must be held, upon physical lines which actually divide the machine into separable parts. It may happen, in proper cases for division, that some of the parts will be dominating; but they must be less than the whole device, and separable upon a structural line from other physical parts. If the claims in question here were properly severable, it is difficult to suppose a case in which broad and narrow claims covering the same devices or combinations of elements might not be severed.

It has been argued that the action of the patent office in allowing a separation of the claims is conclusive, but the proposition is deemed unsound, and not established by the authorities cited in support of it.

The court, upon the whole case, finds for the defendant, and that the bill should be dismissed for want of equity.

R. E. DIETZ CO. et al. v. C. T. HAM MANUF'G CO.

(Circuit Court, N. D. New York. July 27, 1893.)

No. 5,922.

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—TUBULAR LANTERNS.

Letters patent No. 287,932, issued November 6, 1883, to Charles J. Higgins, for an improvement in tubular lanterns, whereby the globe is supported in a frame composed of a collar, rods to which said collar may be pivoted, and the supporting base connected directly by the said rods to the collar, the frame being hinged to the oil reservoir, and movable laterally from the lantern without moving the air tubes, burner, or reservoir, are valid, and are infringed by a lantern having a globe supported in and movable with a hinged, tilting frame, composed of a collar which performs all the functions of that of the Higgins patent, and has supporting rods attached to, but not pivoted to, the collar, and connected with the base plate by a direct, though angular, connection.

2. SAME.

Letters patent No. 450,444, issued April 14, 1891, to Lewis F. Betts, for an improvement in tubular lanterns, is a mere improvement on the Higgins lantern, more symmetrical in appearance and convenient in use, but embodying the same general features of construction, neither disclosing new principles of operation nor accomplishing a new result, and must be strictly confined to the precise mechanism described and shown, and, whether involving invention or not, cannot have liberality of construction extended to it nor the doctrine of equivalents applied, and is not infringed by the lantern held to be an infringement of the Higgins lantern.

In Equity. Action by the R. E. Dietz Company and others against the C. T. Ham Manufacturing Company for infringement of letters patent No. 287,932, issued November 6, 1883, to Charles J. Higgins, and No. 450,444, issued April 14, 1891, to Lewis F. Betts,

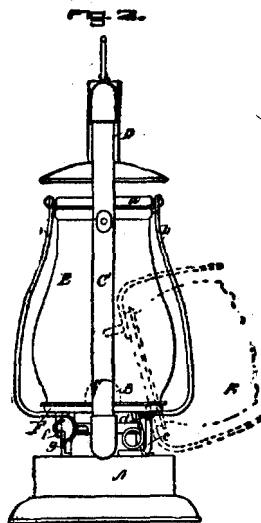
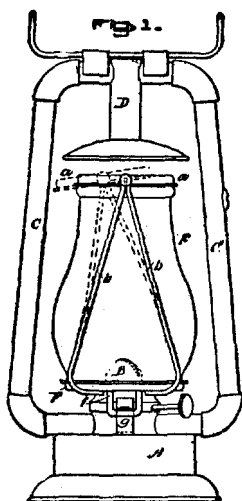
both for improvements in tubular lanterns. Decree for complainants as to the Higgins lantern, and for the defendant as to the Betts lantern.

E. S. Jenney, for complainants.

Melville Church and Fred F. Church, for defendant.

COXE, District Judge. This suit is to restrain infringement of two letters patent owned by the complainants. The first of these, No. 287,932, was granted November 6, 1883, to Charles J. Higgins. The second, No. 450,444, was granted April 14, 1891, to Lewis F. Betts. Both are for improvements in tubular lanterns. The cause was before the court on a motion for a preliminary injunction, but the validity of the patents was not decided. 47 Fed. Rep. 320. Higgins says regarding his invention:

"My invention consists, as hereinafter specified and claimed, in supporting the globe in a frame composed of a collar, rods to which said collar may be pivoted, and the supporting base connected directly by the said rods to the said collar, the frame being hinged to the oil reservoir, and movable laterally from the lantern without moving the air tubes, burner or oil reservoir. * * *



"The globe E, of usual shape, has its upper end fitted into a collar or ring, a, herein shown as pivoted upon the side rods, b b, so that the said collar or ring embracing the said globe at top may be turned, tilted, or sprung, or tipped off from the top of the globe when it is desired to release the latter. These rods are shown as spring rods connected at their lower ends to the perforated plate or globe support F, upon which the bottom of the globe rests, the said plate having a central opening to fit over the usual burner, B. The support F is suitably hinged to the oil chamber A, as herein shown, by a bent wire, c, entering a loop d, attached to the under side of the said support F, whereby the globe and its carrying parts may be tipped over to remove the same and the support F from above the burner to enable the wick of the burner to be lighted. * * *

"I desire it to be understood that I do not limit my invention to rods of the exact shape or construction shown, as it is obvious that the rods or connection between the perforated plate or support for the bottom of the globe and the collar which holds the top of the globe may be variously modified, so as to permit the collar to be turned or moved off the top of the globe to release the same without departing from my invention.

"I claim:

"(1) In a lantern, the globe E, supported in and movable with a frame composed of the collar a, rods b b, to which said collar may be pivoted, and the supporting base F, connected directly by the said rods to the said collar, the frame being hinged to be tilted laterally, substantially as shown and described.

"(2) The combination of the oil reservoir A, burner B, tubes C C' and D, and the globe E, supported in and movable with a frame composed of the collar a, rods b b, to which said collar may be pivoted, and the supporting base F, connected directly by said rods to said collar, the said frame being hinged to be tilted laterally, substantially as shown and described."

The Betts patent is for an improvement upon the Higgins lantern. The specification says:

"This invention relates to that class of tubular lanterns in which the globe plate is hinged to the lower part of the lantern and the globe is held on the globe plate by a wire frame extending toward the top of the globe, so that the burner can be exposed by swinging the globe plate, with the globe resting thereon, to one side of the burner. The object of this invention is to produce a construction of the tilting globe frame which shall be simple and which will hold the globe securely on the plate when in its normal position, and thereby insure the proper draft of the lantern, and also when tilted, and thereby prevent breakage. Another object of my invention is to so construct the lantern that the tilting movement of the globe can be easily and conveniently controlled and that the globe frame is securely locked in its normal position without attaching it to the bell or canopy above the globe."

The claims involved are as follows:

"(3) The combination, with the tubular lantern frame and globe, of a globe plate hinged to the lantern frame, upright wires secured to said plate and arranged on the front and rear sides of the lantern, a bow wire connecting the upper ends of the front and rear wires on one side of the globe, and a guard ring connecting the middle portions of the front and rear wires, whereby the globe can be removed laterally upon tilting the globe frame, substantially as set forth.

"(4) The combination, with the tubular lantern frame and the globe, of a globe plate hinged to the rear side of the lantern frame, upright wires secured to said plate and arranged on the front and rear sides of the lantern, a bow connecting the upper ends of said wires and bearing against one side of the globe, and a cross wire secured to the tubular frame on the front side thereof and supporting the front wire, substantially as set forth.

"(5) The combination, with the tubular lantern frame, of a tilting globe frame composed of a supporting plate hinged to the base of the lantern, upright wires secured to said plate and arranged on the front and rear side of the lantern, a bow connecting the upper ends of said wires and embracing one side of the globe, and a fixed bow secured to the lantern frame and embracing the front of the globe, whereby the upper end of the globe is clasped at one side and at the front when the globe frame is in its normal position, but permitted to be removed laterally when the globe frame is swung back, substantially as set forth."

The complainants' title is not disputed, the only defenses now urged being lack of invention and noninfringement. The feature which distinguishes the Higgins lantern from all preceding tubular

lanterns is that the glass globe is mounted in a separate frame and tipped over from the burner laterally without disintegrating the tubular frame or the globe-holding frame of the lantern. No one had done this before. Globes had been tilted before in tubular lanterns, but it had been done by disrupting the air tubes of the lantern in an awkward bungling manner which rendered it less serviceable as a lantern and interfered with its success as an article of commerce. The record also discloses lamps and lanterns, not tubular, with tilting globes, but it cannot be said, assuming that the idea of placing one of these in a tubular lantern would occur to the ordinary lantern maker, that the ingenious mechanism which makes such an arrangement successful required only mechanical skill. The Cahoon lamp and the Clark & Kintz and Clark lanterns certainly do not anticipate, and, it is thought, it required invention to adapt these devices to a tubular lantern. The advantages of the tilting globe over many, if not all, of the previous structures are obvious; a number of inventors were seeking to secure these advantages, but Higgins was the first to do so by introducing this feature successfully into a tubular lantern. He is, therefore, entitled to protection. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. Rep. 719, and cases cited.

It is thought that the claims of this patent are infringed. The defendant's lantern has the globe E. This globe is supported in and movable with a hinged tilting frame. The frame is composed of a collar which, though not a ring, performs all the functions of the Higgins collar in manner precisely similar. The supporting rods, b, b, are found in the defendant's lantern, attached to, but not pivoted to, the collar, and connected with the base plate by a direct, though angular, connection. One cannot avoid infringement of the claims by cutting out a section of the Higgins collar, attaching the rods rigidly to the collar and bending them twice before connecting the other ends with the base plate. And yet, this is, substantially, what the defendant has done. There is nothing in the description or claim which makes the pivoted connection absolutely essential and nothing which requires the words "connected directly" to mean connected at the nearest point. The drawings of the patent do not show rods so connected and such a construction would entirely lose sight of the idea the inventor had in mind. We speak of two cities as being directly connected by telegraph though the line between them may pursue the most zigzag and circuitous route. A spring may be directly connected with a house though the connecting pipe may be laid around the base of an intervening mountain. It is in this sense that the word "directly" is used, the idea being that the rods, and the rods alone, hold the collar and base plate together. It is only by a very illiberal and illogical construction of the claims of this patent that the defense of noninfringement can be established.

It is conceded by the complainants that the Betts lantern is only an improvement upon the Higgins lantern, embodying the same general features of construction as the latter. It discloses no new principle of operation and accomplishes no new result. All

that can be said is that it is, perhaps, more symmetrical in appearance and convenient in use. Without pausing to consider whether such a structure involves invention it is perfectly clear that the claims which are designed to cover it must be strictly confined to the precise mechanism described and shown. There is no room here for the doctrine of equivalents or for such modified liberality of construction as has just been extended to the Higgins patent. When patents deal merely with inconsequential details each patentee must be confined to the precise structure which he has contributed to the art. *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. Rep. 181; *McCormick v. Talcott*, 20 How. 402. So construed the defendant does not infringe.

The complainants are entitled to a decree for an injunction and an accounting upon the two claims of the Higgins patent, but without costs.

VINCENT et al. v. RIGBY.

(Circuit Court, D. New Jersey. July 28, 1893.)

1. PATENTS FOR INVENTIONS—WEATHER STRIPS—INFRINGEMENT.

Letters patent No. 381,166, issued April 17, 1888, to Charles R. Vincent, for improvements in weather strips, whereby the joined edges of a tubular cushion are reinforced by a binding rib or cord, with a metallic plate adapted to be bound over and upon the reinforced edges, are for mere combinations of constituents previously used in the art, productive of no distinctively new result, and, if sustainable at all, in view of the prior state of the art, are entitled to a narrow construction only, and are not infringed by a device made under letters patent No. 434,890, issued August 19, 1890, to Clifford Seville, for an improved weather strip in which a narrow reinforcing strip is inserted between the lapped edges of the rubber cushion, and firmly secured thereto by coarse stitching, in combination with a metallic housing or backing.

2. SAME—EQUIVALENTS.

As the Seville patent does not use one of the specified elements—the cord—of the Vincent patent, and the invention for which the latter was granted is not of a primary character, the doctrine of equivalents has no application.

In Equity. Bill by Charles R. Vincent and others against William Rigby for infringement of a patent. Bill dismissed.

Edwin H. Brown, for complainants.

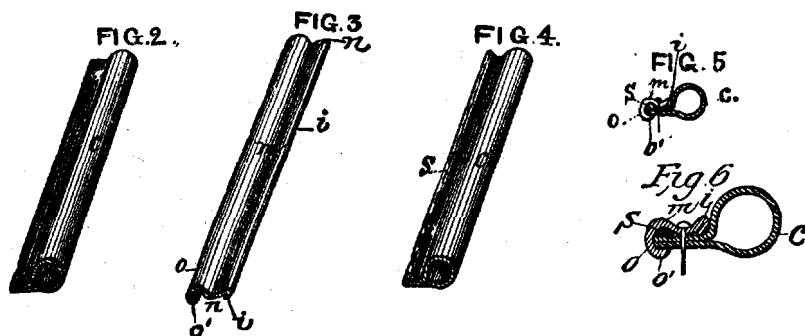
J. E. M. Bowen, for defendant.

ACHESON, Circuit Judge. This suit is founded on letters patent No. 381,166, granted April 17, 1888, to the plaintiff Charles R. Vincent, assignee of Josiah Poyton, for improvements in weather strips. The specification, after stating that Poyton had "improved the weather strip in which a tubular cushion is employed as the weather-protecting strip," and that the improvement consists in "the particular construction of the device," whereby it is rendered more durable in maintaining its tubular form, and its connection with its metallic supporting part is rendered strong and firm and of simple construction, proceeds thus:

"The precise improvement consists in the provision whereby the joined edges of the tubular cushion are reinforced by a binding rib or cord of textile material, and the provision of a metallic binding plate adapted by its peculiar construction to be bound over and upon the reinforced edges of the tubular cushion, and to form a bearing upon the outer side only of the lapped edges of the cushion part, as I will now describe, and make such precise improvement the subject of my claims."

Describing the manner of constructing the device, the specification states:

"First form the cushion, c, into shape by bringing the longitudinal edges together, and stitching the same onto the textile strip or cord, s. * * * It will be noticed that the binding strip, s, is secured to the outer side of the lapped parts of the tubular cushion and at the top reinforced edges of such lapped parts, and that the upper edge of the binding plate is so bent and formed as to grasp this reinforced edge part, so that the reinforcing rib will lie in a hollow on the inner side of the grasping edge of the plate, with the latter on one side, only, of the cushion-lapping parts, as shown in Fig. 5."



The plaintiffs allege infringement of the first and second claims of the patent. The first claim is as follows:

"(1) A weather-strip cushion consisting of a tubular part, c, having its edges lapped and reinforced by an edge-binding ridge or cord, s, in combination with a metallic binding plate having one edge grasping the reinforced lapped edges of the cushion, its other edge having a closed lap or fold, forming a bearing upon the tubular part of the cushion at one side, only, of its lapped parts, substantially as described, for the purpose specified."

The second claim differs from the first only in stating that the tubular formed cushion is made of "rubber," and that the metallic binding plate is provided with "a longitudinal ridge corrugation forming a bearing upon the outer side, only, of the cushion-lapped parts."

In view of the prior art, as disclosed by this record, it is very difficult to see any patentable invention in "the particular construction" here shown. *Atlantic Works v. Brady*, 107 U. S. 192, 200, 2 Sup. Ct. Rep. 225. Weather strips composed of a tubular cushion formed by folding a strip of rubber or other flexible material longitudinally, in combination with metallic backings of divers forms, were old. The prior patent to Cosper not only shows this combination, but also the locking of the two parts together, by looping the strip of flexible material around a wire or other filament so as to longitudinally secure or anchor the strip within the embracing por-

tion of the metallic base. The Browne patent of 1862 shows a weather strip composed of a flexible pad or cushion of rubber or other elastic substance, in combination with a metallic binding plate, which latter is substantially the same in form and function as the metallic binding plate of the patent in suit. The Osgood patent of 1876 for an improved weather strip, while not showing a metallic backing, does show a tubular cushion of rubber or other elastic material, formed by bringing together the longitudinal edges of the flexible strip and reinforcing them by a binding strip laid along one side of the lapped parts, and secured thereto by sewing, riveting, or cementing. Now, it is hard to concede that there is any invention in combining the Osgood cushion and Browne's metallic binding plate.

But, if the patent in suit can be sustained, it must receive the narrowest construction. *Railway Co. v. Sayles*, 97 U. S. 554, 556; *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. Rep. 487; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343. Not only in view of the prior state of the art, but by reason of the very terms of the specification, the plaintiffs must be limited to the "precise improvement" described. *Id.* The textile strengthening "ridge or cord, s," is specifically an element of each of the claims here involved. The illustrative drawings represent, and the text of the specification describes, the reinforcing rib as an independent cord or strip laid longitudinally on the outer surface of one side of the lapped edges of the cushion, and secured thereto by stitching, and it is set forth that the upper edge of the binding plate is so fashioned as to grasp this reinforced edge part, so that "the reinforcing rib, s, will lie in a hollow on the inner side of the grasping edge of the plate." The interlocking of the two parts is thus effected by the coaction of the added strengthening "cord, s," and the "coiled recess" of the metallic plate. It is idle to say that the appended lateral "edge-binding ridge or cord, s," is immaterial or useless. *Vance v. Campbell*, 1 Black, 427, 429. "The combination is an entirety; if one of the elements is given up, the thing claimed disappears." *Id.* And this principle prevails even where the patentee has claimed more than is necessary to the successful working of his device. *McClain v. Ortmyer*, 141 U. S. 419, 425, 12 Sup. Ct. Rep. 76.

As the patent in suit shows both the laid-on cord, s, and a line of stitching, it is quite inadmissible to say that the latter may be used to the exclusion of the former. A careful reading of the specification, it seems to me, can lead to no other conclusion than that the strengthening cord, s, laid on one side of the folded strip, was supposed to be the efficient means to the proposed end. Indeed, under the proofs, it is very doubtful whether any ordinary stitching, however coarse the thread used, would aid appreciably in keeping the rubber cushion within the metallic binding plate. But at all events, by the terms of these claims, the "ridge or cord, s," is a specific and therefore an indispensable element.

The defendant's alleged infringing device is made under and in accordance with letters patent No. 434,890, granted to Clifford

Seville on August 19, 1890, for an improved weather strip, in which a narrow reinforcing strip of rubber, or the like, is inserted between the lapped edges of the rubber cushion, and firmly secured thereto by coarse stitching passing through the lapped edges and the inserted piece, in combination with a metallic housing or backing, one edge of which embraces the stitching of the flexible cushion. The specification states that the inserted strip, in conjunction with the "coarse stitching," facilitates the retention of the edges of the cushion within the metallic backing. One of the plaintiffs' experts thinks that the inserted strip performs no such function, but the defendant's expert is of opinion that it does act as stated in the specification, and evidently this was the finding of the patent office. Upon the strict construction which, as we have seen, must be given to the patent in suit, (if it be sustainable at all,) no invasion of the plaintiffs' exclusive rights is shown. *Railway Co. v. Sayles*, supra; *Hoff v. Manufacturing Co.*, 139 U. S. 326, 11 Sup. Ct. Rep. 580; *Derby v. Thompson*, 146 U. S. 476, 482, 13 Sup. Ct. Rep. 181. In the last-cited case the court said: "But the fact that the defendants have been able, by a skillful contrivance, to dispense with one of the elements of the Kenna claim, does not make the device an infringement." Poyton, at best, was a mere improver, structurally, of an old and commonly used device. He applied no new principle. His claims are for combinations, all the constituents of which had previously been used in this art, and he produced no distinctively new result. The defendant does not employ one of the specified elements,—the cord, *s.* The cases above cited show that the plaintiffs are not entitled to claim broadly the benefit of the doctrine of equivalents, which is rightly applicable to inventions of a primary character. Here the defendant does not make or use the specific form of device shown in the patent in suit, and therefore the plaintiffs have no just cause of complaint.

Let a decree be drawn dismissing the bill, with costs.

CHASE *v.* FILLEBROWN et al.

(Circuit Court, D. Massachusetts. August 22, 1893.)

No. 2,617.

1. PATENTS FOR INVENTIONS—PLEADINGS—ADMISSIONS IN ANSWER.

Infringement of a patent is admitted by an answer stating that the goods sold by defendants were "fabric alleged by the complainant to be such as is described and claimed in said letters patent," further stating that the larger part sold was under a license, and denying that, as to the remainder, such sale was in violation of and an infringement upon any of complainant's rights.

2. SAME—PRACTICABILITY.

After a license to sell a fabric made under letters patent No. 160,684, issued March 9, 1875, to Kent & Leeson, had expired, the licensees, who had previously acted as agents of the patentees, and were also dry-goods commission merchants, continued to sell alleged infringing fabrics. *Held*, in the absence of proof that, as claimed by them, the fabric could not

be made by the use of devices described by the patentee, the fact of the defendants' connection with the article in question, with the patent itself, was prima facie evidence that it could.

8. SAME.

A claim of an invention of a process of knitting, by which no portion of the plush thread appears on the knitted face, is not affected by the fact that the plush threads may appear through the knitted surface when the wales are distended.

4. SAME—ANTICIPATION.

Tilghman v. Proctor, 102 U. S. 707, 711, and *Topliff v. Topliff*, 12 Sup. Ct. Rep. 825, 145 U. S. 156, 161, applied.

5. SAME—FOREIGN PATENT.

A patent for a product with a clean knitted face, not penetrated by the threads of the other face, is not anticipated by foreign patents, describing, in a general way, products having their different faces of different materials.

6. SAME—FOREIGN PATENT.

The words "clean knitted face" mean a fabric not homogeneous, and not knitted solid or through and through, and the patent was not anticipated by the British patent of Keely & Wilkinson for a fabric formed by the plain loop-stitch knitting process from three or more yarns, two of silk or the like, and another or others of low grade; the high-grade yarns enveloping or covering the low-grade yarn or yarns, and appearing on both faces of the fabric.

In Equity. Bill by Richard F. M. Chase against Charles B. Fillebrown and others for infringement of letters patent No. 160,684, issued March 9, 1875, to Kent & Leeson, for an improvement in knit fabrics. Decree for complainant.

The patentees thus describe their invention:

"This invention relates to certain improvements in the manufacture of plush and knitted goods. It consists in the production of an improved fabric, having a clean knitted face on one of its sides, and a plush face upon the other, the several threads being arranged in such a manner that the thread which forms the plush shall not show upon the face side of the goods. By reason of this improvement the fabric is adapted to a great variety of uses, as the plush may be of wool, silk, cotton, or other material, while the face side of the fabric may be wholly of cotton, and it is thereby rendered peculiarly applicable for linings of rubber goods, as the wool or other material of which the plush is formed does not protrude on the face side of the fabric; and it is also well adapted for stockings, jackets, drawers, gloves, chest protectors, and for shoe and glove linings, as well as for a great variety of uses to which both knitted and plush goods are applied. We are aware that various kinds of plush goods with a knitted or a woven face have been made and used; but all knitted plush goods, so far as we are aware, which have heretofore been produced, have been open to the objection that portions of the plush thread passed through the fabric and showed upon the face side. By our improvement this objection is removed, and our improved fabric shows a clean knitted face on one side, and a plush face, of either similar or different material, on the other side; the plush threads being knitted in such a manner that they pass only halfway through the fabric."

John R. Bennett and William P. Preble, for complainant.
Charles H. Drew, for defendants.

PUTNAM, Circuit Judge. The respondents claim that, assuming the validity of the patent, there is not sufficient evidence of infringement. The only proof offered comes from the respondents and their agent; and, to be sure, it is very general and far from

specific. The answer, however, admits that a portion of the goods sold by respondents was "fabric alleged by the complainant to be such as is described and claimed in said letters patent." This expression is, to be sure, obscure, and on a strict criticism might, perhaps, be held not to be responsive; but, if any pleader is content to express himself obscurely, the rule is well settled that the adverse party is entitled to construe what is set out in the way most favorable for himself. The word "alleged" we think may be fairly construed to mean "alleged in the bill." The words quoted are followed by a statement that the larger part of what the respondents have sold was under a license, and that, as to the remainder, respondents deny "that such sale was in violation of, or infringement upon, any rights of the complainant." These latter words do not neutralize the others quoted, but must be construed as only intended to guard against too wide an admission. With this construction, the answer, in this particular, is responsive, and sufficiently admits infringement.

Another ground of defense is that the application, or specifications, do not describe "the manner and process of making, constructing, and using" the product "in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which they appertain, or with which they are most nearly connected, to make, construct, and use the same." The claim here is for the "manufacture or composition of matter," as nominated by the statute, or, in other words, the product. Of course, the portion of Rev. St. § 4888, requiring that the manner and process of making, constructing, and using shall be described in the application, applies as well to a "manufacture or composition of matter" as to any other subject-matter of invention or discovery to which the patent laws appertain. The respondents put their proposition as follows:

"There is no evidence, except such as the patent furnishes, that any fabric can be made by the use of the devices described, and even that fails to show that such a fabric as is claimed can be made by the use of this device."

The law is settled that, as to every point touching the validity of a claim, the patent itself is *prima facie* evidence, (*Mitchell v. Tilghman*, 19 Wall. 287, 390,) although in many cases the presumption which it affords is very slight, and purely technical. We are not shown any proofs in the record in any way meeting this presumption. Respondents have not explained to the court, either by proofs or otherwise, that the patent fails to show that the fabric claimed cannot be made by the use of the devices described; and courts of law cannot assume to decide questions of this nature, unless of the most simple and ordinary character, without assistance. The record shows that the respondents were the agents of the Glenark Knitting Company from the time of its organization, and were the sellers of its manufactures, including those complained of in the pending bill. It further shows that the Glenark Knitting Company held a license from the complainant, which expired only a few weeks before the bill was filed. The complaint

seems to be that after the license expired the Glenark Knitting Company continued to manufacture, and respondents continued to sell, the alleged infringing fabrics; and the portions of the answer already referred to admit that the larger part of the fabrics sold by the respondents was made "by a person or corporation"—meaning, of course, the Glenark Knitting Company—"licensed by the complainant to make the same." It also appears that the respondents were not only the general agents of the manufacturing corporation in question, but were themselves dry-goods commission merchants. Therefore, it may well be assumed that they had precisely the practical knowledge required to enable them to inform themselves touching the various requisites appearing on the face of the patent in question, or that, if they failed in the particular experience necessary therefor, before accepting a license from the complainant, they would inform themselves through persons who were suitably skilled. While none of this operates as an estoppel, yet, taken together, it affords a presumption in favor of the patent. On this particular point there are no countervailing matters brought to the attention of the court, and the presumptions stated must stand. The same line of reasoning, and indeed the same suggestions, meet the objection of respondents that the complainant's patent was not practically useful.

The criticism of the respondents that the complainant's claim is for a different invention from that described in the specifications and shown in the drawings, on the ground that the plush threads may appear through the knitted surface when the wales are distended, cannot be sustained. The claim is plain to the effect that no portion of the plush threads appears "on the knitted face," without any reference to any question whether or not they may be visible through it when the fabric is not in its normal condition, and both parties must stand or fall by that construction.

The principal defense rests on the claim of anticipation, wholly by publication in foreign patents. So far as mere public use or sale are concerned, they alone would not affect the complainant's claim, unless they transpired within the United States. Rev. St. § 4920; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. Rep. 598. Neither would anything found in any prior device aid the defense, if it was of an accidental character of which the parties using it never derived the least hint. *Tilghman v. Proctor*, 102 U. S. 707, 711. The rule on this point is very neatly stated by Judge Taft in *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.*, 55 Fed. Rep. 301. So far as prior publications are concerned, it was settled in *Seymour v. Osborne*, 11 Wall. 516, 555, as follows:

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. * * * Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a de-

fense, must be an account of a complete and operative invention, capable of being put into practical operation."

This was reaffirmed as late as *Eames v. Andrews*, 122 U. S. 40, 66, 7 Sup. Ct. Rep. 1073. This general rule, however, is subject to the qualification—which involves a fundamental principle of patent law—that, if the prior publication contains an omission which would ordinarily be supplied by one skilled in the art, the omission will not avail the subsequent patentee. *Cohn v. Corset Co.*, 93 U. S. 366; *Downton v. Milling Co.*, 108 U. S. 466, 3 Sup. Ct. Rep. 10. In *Cohn v. Corset Co.*, the court also held (page 377) that where, as in the case at bar, the claim is for the manufacture, and not for the mode of making it, the important inquiry is whether the prior publication described the product.

In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. Rep. 825, the court, making a further application of the rule of *Tilghman v. Proctor*, *ubi supra*, said, (page 161, 145 U. S., and page 827, 12 Sup. Ct. Rep.), referring to the particular device claimed to have been anticipatory, as follows:

"Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient, to constitute an anticipation, that the device relied upon might, by modification, be made to accomplish the functions performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

In *Rob. Pat. § 335*, appears the following, which is very pertinent and helpful in the consideration of the English patents set up in this case as anticipatory:

"So when the inventor of the patented invention has included in the art or instrument some act or part, without perceiving its significance, and thus, in patenting it, fails to specifically describe such part or act, although, if his invention had been practically employed, such act or part might have become known to the public, his patent does not place it in their reach."

The principles stated and authorities cited are sufficient to secure a proper application of the facts shown by the record in this cause.

To defeat one who has worthily revived something useful by his own original genius, merely because it had become practically lost in some foreign and forgotten publication, is sufficiently hard, without extending the law touching the same beyond its proper construction. *Rev. St. §§ 4886, 4920*, excluding inventions and discoveries which have appeared in foreign and other publications or patents, relates only to improvements "patented or described." This phraseology is not ordinarily met by showing that the subject-matter of the new patent was merely embraced or hidden away in what is claimed to have anticipated it. On this point the principle of *Tilghman v. Proctor*; *ubi supra*, must receive a broad application. In view of this, the court is unable to perceive any anticipation in any of the foreign patents in the record, unless it be that of *Keely & Wilkinson*. All the others patent the process, and not the product,

so that what is claimed in the case at bar had not been patented by them, as that word is found in the sections of the Revised Statutes referred to. Some of them may describe in a general way a product having its different faces of different material, but none of them go to the extent of describing a product with a clean knitted face; that is, with the face not penetrated by the threads of the other face. This was perhaps expected to exist, or not exist, in each of them, to a certain extent, according to the skill used in the process of manufacturing. In that respect the claim of the complainant carries the art to a complete and perfect standard, which certainly was not described by any of the patents referred to, unless it be that of Keely & Wilkinson. Therefore, in none of them was the product patented or described, to use the language of the statute referred to. But the respondents claim that it can be manufactured by the processes of the anticipatory patents, or by some of them. This is fully met by the rule of *Tilghman v. Proctor*, and *Topliff v. Topliff*, each *ubi supra*.

The court cannot, however, dispose so easily of the Keely & Wilkinson patent. Although this uses frequently the words "looped or elastic fabrics," yet it plainly includes knit goods, because it contains the expressions, "woven, knit, or looped together," and "the common stocking frame." In one place it says that the parts described are nearly similar to those of the old knitting frame, and familiar to all stocking weavers. It describes, claims, and patents both the manufacture or the product and the process. For the most part, it describes the materials as cotton and silk only, but the claims broaden out to cover all kinds. Its fabric is composed of three or more threads,—one or two of cotton, and two of silk, where cotton and silk are used,—in which the cotton thread is interposed between the two silk threads, the silk forming both the outside and the inside of the completed article. In many places the description is limited to gloves and stockings, but the patent extends to all looped or elastic fabrics of several threads. So far it follows the complainant's claim in the case at bar. It also further follows it by making the outside and inside wholly of silk, it being, of course, again understood that silk stands for whatever material may be used.

Respondents also proved by one of their witnesses that this patent shows a fully equipped and organized machine for producing the fabric therein described, so that any person of any skill in the art of knitting could make such fabric upon such machine. This is not contested by any proofs offered by the complainant. The only thing found in the proofs for the complainant touching this patent, is that it makes no allusion whatever to a fabric of any kind having a smooth face and a plush face. This does not meet it. The plush face is no part of complainant's novelty. It appears by his specifications that the plush is raised after the knitting is completed, the fabric being by subsequent operation subjected to the action of an ordinary card, bringing out the plush in the ordinary manner. Therefore, the mere fact that the English patent does not allude to a plush face would not be

effectual for the complainant, because, if its fabric was in other respects the same as his, the ordinary skill of a person familiar with the art would easily raise the plush. In other words, if the anticipatory patent showed the exact fabric of the complainant, lacking only the fact that it had been plushed, this would, perhaps, be sufficient to defeat the complainant. Nevertheless, it is plain that no fabric would defeat him which was not capable of being plushed on one face. This proposition the court will recall further on.

The only other proof offered by the respondents touching this matter is as follows:

"The British patent to Keely & Wilkinson clearly discloses a fabric formed by the plain loop-stitch knitting process from three or more yarns, two of high-grade material, such, for example, as silk, and another or others of lower grade; one yarn of high-grade material appearing upon one face, the other high-grade yarn appearing upon the opposite face, and the low-grade yarn or yarns being enveloped or covered by the high-grade yarns. In this case neither of the high-grade yarns forming one face passes through the fabric so as to appear on the opposite face, nor does the intermediate low-grade yarn or thread appear upon either face. In the production of this fabric, a well-known principle in the art of knitting is employed, namely, that of laying the yarns upon the needles in the order in which it is intended they shall take in the fabric; it being well known that where a plurality of yarns is laid upon the needles, one in advance of the other or others, the one uppermost in the hook, or nearest the end of the needle, will be buried beneath or appear upon the back of the yarns below; and, where three or more yarns are placed upon the hooks of the needles in successive order, the intermediate yarn or yarns will be enveloped or covered by the outside yarns, one of the latter of which will form one face of the knitted goods, and the other the other face, neither of the face yarns passing through the fabric so as to show upon the opposite face."

This, in connection with the established fact that the machine of the patent is operative, meets every requirement of complainant's fabric, except two. One relates to the capability for plushing of the Keely & Wilkinson fabric. The court, as a court, is unable, from the proof in this case, to determine this question, whatever it might accomplish personally by study of the patent itself. Keely & Wilkinson, at one point in their specifications, describe their method of "piling" one of their fabrics, but whether this relates to their knitted fabric under discussion has not been properly explained to the court. The patent, with its specifications, is complicated, and contains numerous subject-matters; and, although some judges may have sufficient technical knowledge to interpret and apply its various particulars, yet others may not. No court, therefore, should assume to pass on them without proper explanation in the record, as well as in the statements of counsel. The entire burden on this point being on the respondents, and the proofs in the record being meager, and insufficient to inform the court, it is unable, according to the rules of law, to find for the respondents that the fabric of Keely & Wilkinson is susceptible of plushing, according to the intention of the fabric of the complainant, with reference to the uses for which it is plainly adapted.

The other element lacking in the respondents' testimony quoted relates to the "clean knitted face." The product of Keely & Wilkinson's patent appears to be a solid knitted fabric, homogeneous throughout, except only that it contains three or four different threads. The respondents' testimony, already quoted, apparently admits this. The fabric of the complainant, however, has what is described by his counsel as a self-sustaining face. Perhaps it would not be safe for the court, or for the complainant himself, to use this word to its full extent, or even according to its ordinary meaning. The court does not find occasion to decide between the litigants with reference to their various refinements touching the word clean; but it is sufficiently plain that the words clean knitted face mean a fabric not homogeneous, and not knitted solid, or through and through. While the claim does not, in terms, refer to the specifications for an explanation of its various parts, yet there can be no doubt that a clean knitted face means something fully as self-sustaining with reference to the other face as though the other face had been woven, and not knitted. The knowledge of the fact brought to the court by the specifications—a fact of so simple and universal a character that the court may act on it without their aid—that various kinds of plush goods with a knitted or woven face have been made and used, emphasizes and makes clear this proposition. On account, therefore, of the lack of a clean knitted face in the Keely & Wilkinson fabric, it was insufficient to anticipate the patent in controversy.

Decree for an account; complainant to file draft decree on or before September rules, and respondents to file corrections of decree on or before September 16th.

RUSSELL v. KENDALL et al.

(Circuit Court, E. D. Wisconsin. January 5, 1891.)

PATENTS FOR INVENTIONS—ASSIGNMENT—WHAT CONSTITUTES.

Two persons owning interests in certain patents declared, by a written contract, that it was their intention in making the contract to perfect and establish in each the sole and entire right to the invention in the states and territories set off to him in a prior contract between the parties. *Held*, that this contract vested the absolute title for the states and territories named in the party to whom they were set off, and he was entitled to sue alone for infringement of the patents therein.

At Law. Action by John H. Russell, assignee of one Ager, (mentioned in the opinion,) to recover damages for the infringement of certain patents. On demurrer to the complaint. Demurrer overruled.

G. W. Hazelton, for plaintiff.

N. C. Gridley, for defendants.

JENKINS, District Judge. Demurrer is interposed to the complaint upon the ground that the complaint shows that one Smith

is in law a joint owner with complainant of the patent in question, and he should be made a party plaintiff. The various agreements between the original patentees, and by which title is claimed to be vested in Ager, are set forth in the complaint, and the question is readily determined upon the construction of two of them. The agreement of December 21, 1872, is the first. It provides that Ager is to complete and perfect his title to the Barter patents, they are to pool their interests, and Ager is to perfect his title to the Barter patent, and thereupon Smith and Ager are to be interested as owners of the two patents, subject to certain rights in Pray. It is then covenanted that the parties are authorized to sell, vend, and dispose of individual and corporate rights to the use of the inventions, improvements, rights, and patents granted, and to be hereafter granted, as aforesaid, but not otherwise to sell or dispose of any state or territorial interest, or of any undivided interest in said patent or inventions, and such sale shall be only within the territorial limits as hereafter agreed upon. This territory, as thereafter agreed upon by the contract, gives to the plaintiff the territory of Wisconsin. In case of failure by Ager to make good his title to the Barter patent, and convey the same to the said Smith within the territory assigned, then the agreement is to be null. Afterwards the two parties made an agreement for acquiring the interest of Pray, by which it was agreed that it was their intention, in making the contract entered into between them and Pray, to perfect and establish in George T. Smith the sole and entire right and title to the invention covered by the contract between Smith and Pray for the states and territories set off to Smith in the contracts between Ager and Smith dated December 23, 1872, and to perfect and establish in Ager the sole and entire right to said invention covered by the contract of June 5, 1872, in and for the state and territories set off to said Ager in the contract between Smith and Ager dated December 23, 1872.

I can come to no other conclusion than that the effect of this agreement is to vest in Russell the absolute title to these patents as to the territory named, and to vest in Smith the title to the territory named as to him, and that, therefore, the demurrer must be overruled, with leave to defendant to answer by the first Monday of February.

RUSSELL v. KERN.

(Circuit Court, E. D. Wisconsin. August 10, 1893.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—WHAT CONSTITUTES.

Instruments executed by a patentee purporting to perfect and establish in another the sole and entire right to an invention in certain named states, excepting "two mill rights heretofore sold," which "are excepted * * * in the above adjustment of territory," constitute an assignment of the patent subject to the specified mill rights, and authorize the assignee, or persons claiming through him, to institute suits for infringement.

2. SAME—SUIT FOR INFRINGEMENT—PLEADING.

Where the inventions covered by several patents enter into and constitute one compact machine, it is necessary, in suing for infringement, to complain upon all of the patents, notwithstanding that some of them have expired; and any question as to the effect of the patents which have expired, and their treatment, upon an accounting with reference to the machine as a whole, must be left to the final hearing.

In Equity. Suit by John H. Russell against John F. Kern, surviving partner, etc., for infringement of certain patents. On demurrer to the bill. Overruled.

George E. Sutherland and Isaac Sharpe, for complainant.
N. C. Gridley and Samuel Howard, for defendant.

SEAMAN, District Judge. The defendant demurs to complainant's amended bill for injunction, etc., which charges him with infringement of 10 several letters patent, issued to George T. Smith, alleged as entering into one compact machine known as "Geo. T. Smith's Middlings Purifier," and substantially employed by defendant. The several patents and title exhibits are annexed to the complaint. It appears that some have expired, but that the invention was of a new machine, which superseded the old methods of manufacturing flour, and for which, as a whole, the original application was made, but subsequently divided, because interferences were interposed; and the patents issued as interferences were disposed of.

The first ground stated for demurrer is want of title in complainant. It is conceded that this point was squarely raised in this court in an action at law upon the same title by this complainant against J. O. Kendall and others, and determined in January, 1891, in favor of the plaintiff, (58 Fed. Rep. 381;) but it is urged in behalf of the defendant that recent decisions of the supreme court, which were not published, and not before the court at that hearing, have settled a rule by which the instruments purporting to give title to the complainant constitute a mere license, on which an action for infringement cannot be maintained. The cases cited are *Pope Manuf'g Co. v. Gormully & Jeffery Manuf'g Co.*, 144 U. S. 248, 12 Sup. Ct. Rep. 641, and *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, and I do not find that they in any measure extend the definition of an assignment held in the early and leading case of *Gayler v. Wilder*, 10 How. 477, which must have had careful consideration in the Kendall decision. On the contrary, I think these later cases, upon the facts stated in each, tend to support the Kendall ruling.

The instruments here in question, held to constitute assignments, (Exhibits Q and T,) purport to "perfect and establish in Wilson Ager, complainant's assignor, the sole and entire right to said invention" in and for the state of Wisconsin and other states, excepting "two mill rights heretofore sold by said Smith in the state of Wisconsin, one in Hudson and one in the county of Trempealeau, in said state, are excepted in favor of said Smith in the above adjustment of territory."

In *Pope Manuf'g Co. v. Gormully & Jeffery Manuf'g Co.* it is held that a conveyance by the patentee of one claim only out of several in the patent, being only so far as it related to a certain hammock seat or saddle in a velocipede, constituted only a license, because there was no authority for so splitting up the several claims in a patent, and placing them in separate ownership, and approving the rule as to assignments in *Gayler v. Wilder*, supra. The conveyance contained an exception in favor of a right to use the saddle in connection with the velocipede made by the patentee at Detroit, and as to that provision no point appears to have been made upon the appeal, as it is not referred to in the opinion; but in the decision below (34 Fed. Rep. 893) by Gresham and Blodgett, JJ., their opinion is expressed as follows:

"The language of this assignment is broad and comprehensive enough to completely transfer all the rights of the patentee to the hammock-seat feature of his patent, saving to the assignor a mere shop right for the city of Detroit; and hence we think this objection is not well taken."

This view would save the instrument here, and, although not passed upon by the supreme court, because of the ruling upon the other point, it is excellent authority for like interpretation of this assignment.

In *Waterman v. Mackenzie* there was an assignment by the patentee, Waterman, to his wife of the whole patent and invention, and a subsequent unrecorded license from the wife to the husband to manufacture and sell under it. The wife subsequently assigned to Shipman & Sons, for the purpose of securing an indebtedness, but in the covenant excepted the license to her husband. Shipman & Sons assigned to Shipman. Mrs. Waterman afterwards assigned to the plaintiff absolutely, and the latter brought suit for infringement. The contention on the part of the plaintiff was that the transfer to Shipman & Sons, being only by way of mortgage security, did not interfere with the absolute transfer to him. The decision was against this proposition, holding that such conveyance confers title, and it further expressly finds title and right of action to be vested solely in Shipman; hence the outstanding license in Waterman did not interfere with such effect.

In *Gayler v. Wilder* it was held that there was not an assignment of the exclusive right within a specified territory, because the assignor reserved right to set up a manufactory for making the patented safes, and to sell them within the same territory. A patent was declared to be a monopoly for one entire thing, which could only be assigned in accordance with the statute, either in whole or in an undivided part, or an exclusive right for a specified territory; and the opinion states that it was the intention of the statute to prevent divisions of the monopoly, which must "inevitably lead to fraudulent imposition upon persons who desired to purchase the use of the improvement, and would subject a party, who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits, instead of one, and to successive recoveries of damages by different per-

sons, holding different portions of the patent right in the same place."

The exceptions from the assignment to Ager in this case create no such difficulties or liability. They are two specified "mill rights" in certain places, which the patentee had previously granted, synonymous with "shop rights," as defendant concedes, and presumably mere licenses to have and use the machine in the specified place. It may be that the licensees would have the right, as defendant's counsel points out, to make or have made a new machine to replace the old, and preserve its use; but they could not employ it outside the specified place, or sell, or license others to use. There would be no interference with the monopoly in the territory granted outside those mills, and I think no division, within the meaning of the decisions.

The other questions upon the title of complainant are met by the opinion on Kendall's demurrer. 58 Fed. Rep. 381.

I have considered the several further objections urged to the complaint, and must overrule them. Upon the point of laches, while the alleged losses in 1873 may not be valid excuses for delay, and it may be that the proofs will fail to make clear showing for equitable relief, the allegations of the amended bill must be taken as true, without reference to the original bill, for the purposes of demurrer, namely, that the complainant "knew nothing of the said infringement until three years last past," and that he "has been, and still is, in a condition of absolute poverty." The allegations of the bill are also sufficient to show a compact machine, into which the several patents enter, and that it is proper and necessary to complain upon all. *Deering v. Harvester Works*, 24 Fed. Rep. 91. Any question as to the effect of those patents which have expired, and their treatment, upon accounting, with reference to the machine or improvement as a whole, must be left for the hearing.

The demurrer to the bill is overruled, with leave to defendant to answer by the first Monday of October.

UNION SWITCH & SIGNAL CO. v. JOHNSON RAILROAD SIGNAL CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

PATENTS FOR INVENTIONS—LIMITATION—PRIOR ART—INFRINGEMENT.

Letters patent No. 216,510, issued June 17, 1879, to A. G. Cummings, for improvements in interlocking railroad switches and signals, which improvements are comprised mainly in a "selector," whereby a switch and two separate and distinct signals or branch lines may be operated by the use of only two levers, must, in view of the prior state of the art, and particularly of the Kelly English patent of 1874, be limited strictly to the construction shown, and are not infringed by a device which has marked difference in the method of operation.

In Equity. Suit for infringement of a patent. Bill dismissed.

J. Snowden Bell, for complainant.

Edwin H. Brown, for defendant.

GREEN, District Judge. The bill of complaint in this cause was filed to enjoin an alleged infringement of letters patent No. 216,510, granted to one Albert G. Cummings, June 17, 1879, for improvements in interlocking switches and signals, which letters patent had been duly assigned by the said Cummings to the plaintiff in the cause. The invention of the patent in suit relates to certain railroad appliances known as "interlocking switches and signals," which have become standard in this country, and indispensable upon all important lines of railroads, because of their material advantages in promoting the certain safety of railroad travel. The patentee states his invention in the letters patent somewhat broadly as follows:

"My present invention relates to certain improvements in what are commonly known as 'interlocking switches and signals,' in which, by a system of levers, stops, connections, etc., a single operator works any desired number of switches and signals near by or at a considerable distance, the construction and arrangement of said devices being such that no switch can be opened and its signal be shifted to 'safety' until all switches that ought to be closed and all signals that ought to be at 'danger' position are properly set or adjusted."

"The present improvement may be incorporated into such a system; or the proper devices used in such system, such as levers, rocking bars, stops, or dogs, etc., may be added to the devices herein described, so as to complete it for separate use."

"The object of my improved construction is to enable a switch—particularly a facing point switch—and two separate and distinct signals or branch lines to be operated by the use of only two levers."

The construction, as described in these letters patent, provides in combination for a switch-operating rod, (R,) a signal-shifting bar, (P,) and two signal rods, (P¹, P²) adapted to operate independent separate signals. The signal rods are moved longitudinally by the signal-shifting bar in operating the signal connected therewith, and the two signal rods are coincidently movable laterally in and by the movement of the switch-operating rod in setting the switch in one or the other of its positions. This lateral movement of the signal rods engages either of the said rods required to be moved to indicate the position of the switch with the signal-shifting bar, and disengages at the same time the other signal rod from that bar. It is alleged that the defendant has infringed the first and second claims of the patent. They are as follows:

"(1) In a switch and signal interlocking apparatus, two or more signal rods capable of being moved longitudinally for the operating of signals, and laterally movable into and out of engagement with a signal-shifting bar by the same motion which shifts the switch or switch rod, substantially as set forth.

"(2) The combination of two or more laterally movable signal rods, a signal-shifting bar, a link for shifting the signal rods into and out of engagement with the shifting bar, and suitable stop or stops for locking the signal rod or rods which are not in engagement with the shifting bar, substantially as set forth."

Generally stated, the improvement of the patentee is comprised in what is known and commonly termed a "selector." The selector is an apparatus whereby interlocking signals and switches may be operated by fewer levers than were originally requisite. After the complainant had closed his *prima facie* case, the defendant discovered a British patent issued to James Kelly, of Liverpool,

England, in 1874, which clearly shows a selector substantially like the Cummings patent. But that device of Kelly was limited, and adapted to but two signals in connection with a single switch, while the complainant's device is adapted to two or more; and the complainant insists that this relieves his invention from the charge of anticipation as evidenced by the Kelly patent. It was insisted upon the argument that all that Cummings had done by his alleged invention was to increase the capacity of the Kelly device, so that it should be operative upon more than two signals, and that such increase of capacity was not the result of inventive skill, but only such as would be devised by any mechanic skilled in the art. Without attempting to discuss the invalidity of the Cummings patent for this reason, it is sufficient to say that the admitted state of the art compels its strictest construction, and, when so construed, I think the apparatus constructed by the defendant and alleged to be an infringement is so clearly differentiated from the complainant's device as to relieve it from the charge of infringement. Thus, in the Kelly apparatus and in the Cummings apparatus the signal rods move laterally to engage and disengage them with and from the shifting bar. In the defendant's apparatus the signal bars are moved vertically to accomplish the same result. In the Kelly apparatus and the Cummings apparatus the signal rods move in the same plane during their engagement and disengagement. In the defendant's apparatus each signal rod moves in a plane peculiar to itself, and different from the planes of all other signal rods, in engaging and disengaging. In the Kelly apparatus and the Cummings apparatus the signal rods are connected by horizontally moving links. In the defendant's apparatus the signal rods are wholly unconnected with each other. In the first and second claims of Cummings' patent the signal rods are described as moving laterally, and are limited to such. The defendant's apparatus has no laterally moving rods. Other differences are also apparent, but I think sufficient number have been particularized to take the apparatus of the defendant, which, by the way, is itself protected by letters patent, beyond the claim of the alleged infringement. The two devices having, indeed, a common object, are so dissimilar, and are operated so differently, that they must be regarded as different inventions; or, if not so regarded, at least must be held to be simply an increase of capacity of the Kelly apparatus, easily made by any one skilled in the art.

Arriving at this conclusion, the necessary result is that the bill must be dismissed.

BRUSH ELECTRIC CO. et al. v. MILFORD & HOPEDALE ST. RY.
CO. et al.

(Circuit Court, D. Massachusetts. September 21, 1893.)

No. 3,085.

PATENTS FOR INVENTIONS—INFRINGEMENT—BRUSH SECONDARY BATTERY.

The Usher secondary battery, in which are combined a support plate, a porous medium, and an active material mechanically applied to the

plate, contains all the features of and infringes the patent for the Brush secondary battery, (No. 337,299,) though the form of the plate and the lead foil wrappings about the active material in the Usher battery are new.

In Equity. Bill by the Brush Electric Company and others against the Milford & Hopedale Street-Railway Company and others for infringement of the Brush letters patent No. 337,299. Heard on motion for preliminary injunction. Granted.

Witter & Kenyon, Charles E. Mitchell, Bentley & Blodgett, and Frederick P. Fish, for complainants.

Edmund Wetmore, William B. H. Dowse, William S. Hall, and Louis D. Brandeis, for defendants.

COLT, Circuit Judge. The Brush patent No. 337,299 for improvements in secondary batteries has been sustained by the courts in several cases. *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 117; *Brush Electric Co. v. Julien Electric Co.*, 41 Fed. Rep. 679; *Brush Electric Co. v. Electrical Accumulator Co.*, 47 Fed. Rep. 48; *Id.*, 1 U. S. App. 320, 2 C. C. A. 682, 52 Fed. Rep. 130; *Brush Electric Co. v. Accumulator Co.*, 50 Fed. Rep. 833. Relying on these prior adjudications, the plaintiffs now ask for a preliminary injunction against the defendants. In opposing this motion the defendants do not attack the validity of the Brush patent, but rest their defense on noninfringement. The question, therefore, presented by this motion is whether the defendants' battery is within the Brush patent.

It may be observed at the outset that, while Brush has taken out a number of patents relating to secondary batteries, the patent in suit is for his broad invention. In the contest between Brush and Faure as to which was entitled to claim this broad invention it was decided that Brush was an original inventor, and the first in this country.

To pass intelligently upon the question of infringement raised by this motion we must first understand what the Brush invention is, and the position it occupies in the art. In this inquiry I shall adopt the conclusions reached by the courts of the second circuit in the cases already cited. A secondary battery is a battery which has no original power of developing a current of electricity, and is active only when rendered so by sending a current elsewhere generated through it. When such a battery is charged from an outside source, as from a dynamo machine, it becomes capable of giving back a current due to the energy which has been stored in it. A primary battery is a chemical generator of electricity, which is active only by virtue of the materials of which it is composed. "The two differ as a spring differs from a reservoir," as was aptly said by Judge Coxe in the first *Julien* Case. In a secondary battery the electrodes are of the same materials, and electro-motively similar, and the plates are insoluble in the battery fluid. In a primary battery the electrodes are of different materials, and differ electro-motively, and the positive plate is dissolved in the battery fluid. The capacity of a primary battery to give a current is limited, and it is soon exhausted, while in a secondary

battery the amount of current depends upon the amount of resistance of the conducting wires discharging it, and it may be charged and discharged an indefinite number of times. It is true that a primary battery which has become exhausted may be partially restored by sending a current through it in a reverse direction from an independent source of electricity in the same manner substantially as a secondary battery. It is also true that there are certain structures which occupy a debatable ground between these two types of batteries. But at the same time the distinctions between the two classes are well known and recognized in the art, and it is important to bear in mind that the Brush invention belongs to the class of secondary batteries.

Gaston Plante, about 1860, first gave to the world a practical secondary or storage battery. Plante took two thin sheets of lead, immersed them in an electrolyte of dilute sulphuric acid, connected them respectively with two poles of any suitable source of electricity, and passed a current through them. This developed oxygen on one lead plate and hydrogen on the other. The hydrogen passed off in bubbles, leaving the plate practically unaffected; but the oxygen combined chemically with the lead of the other plate, and formed a film or skin of peroxide of lead of a finely divided granular character. This coating of peroxide operating to protect the underlying lead soon stopped the action of the oxygen on the lead. The current was then stopped. It was found that the two plates, one covered with a thin film of peroxide of lead, and the other consisting of metallic lead, were capable of discharging a minute quantity of current. This power of discharge was lost if the plates were allowed to stand any time before discharge, and was too small to be of any practical value. Upon investigating these phenomena, Plante discovered that this loss of discharging power was due to local action between the peroxide film and the underlying metallic lead of the plate, whereby the oxygen, by corroding more of the plate, added to the thickness of the film, which now became not peroxide, but a lower oxide. He also discovered that a thicker film on one plate was useless without there was a corresponding film of equal thickness on the other plate. In order, therefore, to produce the granular or spongy film on the other plate, he conceived the idea of reversing the current of the charge, which resulted in developing oxygen on the former hydrogen plate, thereby producing a layer of peroxide on its surface, and hydrogen on the former oxygen plate, which robbed the oxide film of its oxygen, and left it metallic lead, but granular or spongy in physical structure. This second charge was continued as long as the first, followed, as before, by a period of rest. Then a third charge followed in the same direction as the first, and another period of rest; and so on, charge, rest, and reversal followed charge, rest, and reversal for days and weeks, the charges gradually increasing in length as the layers increased in thickness. These layers constituted the active material of the battery, and they were formed by a disintegration of the surface of the solid lead plate through electrical action. It took weeks or months before a layer of

active material could be obtained of sufficient depth for practical purposes, and the process became known as the Plante "forming" process. This battery was open to several objections. It took a long time to "form" the plates, and the expense involved was large. The capacity of the battery was small, and it quickly wore out.

Having investigated the Plante battery, Brush conceived the idea of taking a quantity of oxide of lead or active material and applying it directly to the lead plates before immersion in the battery fluid. This dispensed with the tedious process of "forming" such coatings out of the substance of the plate by electrical treatment, and also provided a larger quantity of active material than was practicable under the Plante method. In his patent Brush declares that his invention consists in a secondary battery element or electrode composed of a suitable plate or support, primarily coated or combined with active material, and in the method of constructing such electrodes by mechanically coating or combining suitable plates or supports with active material. The patent describes the plates as plain, corrugated, ribbed, honeycombed, or studded. They may have grooves or depressions or slots or perforations extending through the plate. The oxide of lead or active material may be retained in position on the plate by a sheet of heavy paper or equivalent substance, secured to the plate in any suitable manner by rivets or binding strips, or the lead oxide may be spread on the plate, and made to adhere by applying pressure. When a pair of these plates are associated together to form a secondary battery, and immersed in dilute sulphuric acid, and charged by the passage of an electric current in the usual manner, one of the plates has its coating peroxidized and forms the oxygen element of the battery, while the other plate has its coating of oxygen reduced to the metallic state, and then absorbs hydrogen, and so forms the hydrogen element of the battery.

The specification then declares:

"I would have it understood that I do not restrict myself to any particular form of active or absorptive material, or to any particular method of applying it to or combining it with the plate or support, as my invention consists, broadly, in a secondary battery plate or element having active or absorptive material primarily and mechanically applied thereto or combined therewith, as contradistinguished from a plate of element having the active material produced by the disintegrating action of electricity, as in the well-known Plante process."

This patent is for the broad invention of Brush. It consists of a secondary battery electrode in which the active material is mechanically applied to a support plate. It was an improvement of the Plante method. It starts, as Plante did, with the plate; but instead of obtaining the active material from the disintegration of the plate itself by the slow process of forming, Brush purchased the active material, and applied it directly to the plate. He provided three ways in which this could be done. If a plain plate is used, the active material may be held in place by a sheet of porous nonconducting material, like blotting paper. If a receptacled plate is used, the active material may be rammed or

pressed into the receptacles. The patent also states that the porous sheet may be used in the case of receptacled plates. The Brush invention is simple and easily understood. There is (1) the supporting plate; (2) the active material mechanically applied thereto; (3) the active material held to the plate by pressure, or by a sheet of porous, nonconducting material. It is the combination of these elements in the formation of a secondary battery which is covered by the patent in suit. By this means Brush produced the first commercial storage battery ever made.

It has been held in the prior adjudications on this patent that batteries of the primary type are not anticipations of Brush, because the two classes of batteries are different in construction, mode of operation, and result. It has also been held that secondary batteries of the vessel-support type like the Percival do not anticipate Brush, for the reason that they have no support plate; the very purpose of that type of battery being to do away with every form of supporting plate. It has further been decided that this invention is not anticipated by the Brush Italian patent, because, among other reasons, the plates described in that patent were specially prepared for the purpose of more rapidly forming active material thereon by the Plante method of disintegration. The invention of Brush is thus described by Judge Coxe:

"Mr. Brush was the first in this country to hold absorptive substance, in the form of dry powder, in place on the supports of a secondary battery by paper or equivalent material, and the first who rammed or pressed it into grooves or receptacles in the plates." *Brush Electric Co. v. Electrical Accumulator Co.*, 47 Fed. Rep. 48, 49.

But, while holding that Brush was entitled to this broad invention, it was decided that certain specific constructions belonged to others; that Faure was the first inventor of the application of the active material in the form of paste, paint, or cement, and that Brush was not the first to make the plate with perforations extending through it.

It is necessary now to examine defendants' battery, and to determine whether it contains the Brush invention. The Usher battery, used by defendants, consists of a plate in the form of a rectangular frame or grid, with vertical and horizontal ribs. Inclosed and held between the ribs are packages of active material, having a wrapping of thin sheet lead. The wrapping is perforated, and the perforations filled with gum. The packages are filled with active material in the form of powdered oxide of lead, commercially known as red lead. Thin sheets of kiln-dried wood separate the plates. The plates and sheets are held together by rubber bands, and are set in a receptacle of hard rubber containing dilute sulphuric acid. In structure, certainly, this battery appears to have the elements of the Brush invention,—a support plate combined with mechanically applied active material, the plates being separated by sheets of porous nonconducting material. It is insisted, however, by defendants that the plate of the Usher battery is not a support plate; but why, it is difficult to see. It certainly acts as a support for the active material. When the packages of red lead are inserted in

the receptacles of this plate, they come in contact with, and are held by, the ribs of the plate. In his patent of August 16, 1892, Usher says, "I first prepare a metallic skeleton plate." This plate has two functions,—to support the active material, and to conduct the current. It is not analogous to the conducting plate of a vessel-support battery, where the active material is placed in and supported by a vessel. Usher starts to build his battery with a plate, and then proceeds to support his material upon it just as Brush does. He does not take a vessel, and pour his active material into it. "Support," in the sense of the Brush patent, does not mean that the active material must be wholly supported on the surface of the plate in the form of a coating, as in the case of a plain plate. The patent expressly refers to receptacled or slotted plates as well as plain plates, and declares that the active material "may be primarily coated or combined" therewith. The word "combined," in the Brush patent, is entitled to the same consideration as the word "coated," and it would be just as unreasonable to eliminate one as the other from the patent. To my mind, it is perfectly clear that the skeleton plate of the Usher battery is a support plate within the meaning and language of the Brush patent, and that it is constructed and used for identically the same purposes as the Brush plate.

Again, the Usher plates are separated by sheets of porous material in the form of kiln-dried wood. These sheets help to support the active material upon the plates, just as the sheets of porous blotting paper in the Brush battery. Brush does not confine the use of this porous medium to plain plates, but specifically states that it may be used with receptacled plates. The fact that the Brush battery of commerce is constructed without this porous medium, and that this is considered an inferior form of construction, does not make it any less a part of the Brush invention. In the Brush battery, as ordinarily constructed, the active material is applied to the plate by pressure. This leads the defendants to declare that the Brush invention is limited to the use of some kind of pressure, and that Usher does not use any pressure. A glance at the Brush patent shows the unsoundness of this contention. He states in his patent that the active material may be applied to the plates in two ways,—by interposing a sheet of porous material between the plates, or by spreading a quantity of material upon the plate and applying pressure, in which case no porous medium is necessary.

It is further urged by defendants that the active material of the Usher battery is new, and unknown before, and that it is not the active material of the Brush battery. They assert that the oxide of lead in the Usher battery does not become the active material of the battery until it has passed through their forming or charging process, when it develops into a new and powerful peroxide. This is the only way they can account for the superior efficiency of the Usher battery. The answer of this is that when the defendants take a quantity of finely divided oxide of lead, such as Plante produced by the disintegration of the plate, and which is known and understood in the art as "active material," and apply it directly to a supporting plate, to form the electrode of a secondary battery, they have ap-

propriated the invention of Brush; and it is useless, for the purposes of this case, to make any further inquiry. But it is significant in this connection that Usher, in his two patents for improved storage batteries, introduced in evidence by plaintiffs, calls the oxide of lead contained in his packages "active material." The only difference in this particular between Usher and Brush is that the former incloses his active material in perforated lead wrappings. This may or may not be an improvement. As to the theory of a new active material, I am inclined to believe that the Usher battery does not develop any new peroxide, and that the phenomena of gradually increasing power and greater ultimate efficiency which are said to characterize its operation are due to the obstruction which is offered to the action of the electrolyte by the lead covering surrounding the active material, and the use of a greater quantity of such material in the packages. This hypothesis is at least more reasonable than to suppose that some unknown chemical action takes place which is foreign to the Brush battery.

There is little force in the argument of defendants that the Usher battery belongs to the vessel-support type like the Percival battery, and is, therefore, not within the Brush patent, because it is apparent on inspection that it does not belong to that class. The distinguishing feature which marks the difference between the two classes of batteries is the support plate. In the Percival there is no support plate, either plain, perforated, or skeleton, but the active material is placed in a vessel divided into two parts by a porous nonconducting partition. In the Usher battery there is clearly a support plate carrying the active material. Usher starts with a plate, not a vessel, for the support of his active material, just the same as Plante and Brush. This feature removes the Usher battery from the vessel-support type, and it becomes a plate-support battery of the same type as Brush. The De la Rive battery described in the *Electrician* in the year 1863 was of the vessel-support type. The Usher battery is not a development of this type. Usher built upon Plante and Brush, not upon Percival or De la Rive. Nor is the Usher battery allied to the Brush Italian patent, for the same reasons that the Italian patent was held by the courts of the second circuit not to contain the invention covered by the patent in suit.

I find, therefore, in the construction of the Usher battery, the combination in a secondary battery of a support plate, porous medium, and active material mechanically applied to the plate. This is the Brush invention. The special form of the plate, and the lead foil wrappings about the active material, may be new with Usher, but at the same time this battery contains all the features of the Brush invention.

But it is strenuously urged by defendants that the mode of operation of the Usher battery is radically different from Brush. They say that the Brush battery is an improvement on Plante, and that the improvement consists in getting rid of the forming process. They contend that their electrodes are "formed," and that, therefore, they do not use the Brush process. I am unable to

accept this theory. The defendants take a body of red lead, or active material, and apply it to a supporting plate. This active material is already formed, within the meaning of the Brush patent. In no proper sense do they form it as Plante did, from the disintegration of the plate itself by repeated charge, rest, and reversal. It may be true that the thin lead covering prevents for a time the battery fluid from reaching the active material, so that it requires more time to charge the battery, and the battery may not reach its maximum power until the lead covering on the oxygen plate has become thoroughly disintegrated by repeated charges, but this falls far short of the forming process in the Plante sense. It may rather be said to be a retarded charging process. Assuming that the Usher battery does not reach its maximum efficiency until it has been in use for some time, while the Brush battery attains its greatest power when first put into use, this difference in operation is due to the modification in structure already pointed out, and it is not brought about by any new departure from the Brush method.

It is also urged that the Usher battery produces new and useful results. One of these results is that it avoids injurious sulphation. Where sulphuric acid is the battery fluid, there will be more or less formation of sulphate of lead, due to local action. This sulphation tends to destroy the life of the battery, and causes the active material to fall away from the plates. Assuming that this evil exists to a less extent in the Usher battery only shows that Usher may have improved upon Brush, but it does not prove that the Brush invention is absent from the Usher structure.

And the same reply may be made to the alleged greater efficiency of the Usher battery. This is no answer to the charge of infringement, if it is clear that Usher has incorporated into his battery the Brush invention. I am not fully convinced of the great superiority of the Usher battery. If, as contended by the defendants, it has solved the problem of a practical storage battery for tramways, (a field in which it is said the Brush battery has only met with failure,) it seems strange that such an important discovery, worth, we are told, many millions of dollars, should not have become more widely known, and put into operation on a more extensive scale.

As to the Johnson battery, it is sufficient to say that, if the Usher battery infringes Brush, the same must be true of Johnson. The defendants have given up the use of the Johnson battery, and the only real contest on this motion has been upon the Usher battery.

I do not think it necessary to consider at length the prior invention of Dr. Blanchard, introduced by the defendants for the purpose of limiting the broad claims of the Brush patent, rather than as an anticipation. It may be observed, however, that the Blanchard invention relates to a battery of the primary type; that it never served any practical purpose, and seems to have been soon abandoned. It further appears that this evidence was

before Judge Green in the New Jersey case, and also formed the subject of a petition and motion in one of the New York cases. The first claim of the patent is as follows:

"(1) A secondary battery element or electrode consisting of a plate or suitable support primarily coated or combined with mechanically applied active material, or material adapted to become active, substantially as set forth."

Claim 2 sets forth a secondary battery electrode whose support is provided with a coating or surface layer of absorptive substance, such as metallic oxide, which is applied thereto. Claim 3 specifies the active material as oxide of lead or equivalent lead compound. Claim 6 is as follows:

"(6) A plate of suitable support provided with grooves, perforations, or receptacles, and primarily coated, combined, or filled with mechanically applied active material, or material adapted to become active, substantially as set forth."

Claim 7 limits the active material applied to the grooves or perforations of the plate to oxide of lead or equivalent lead compound. Claim 9 is as follows:

"(9) The combination, with the plate or support of an electrode and an active spongy layer thereon, of a porous medium for holding said layer on the plate or support of the electrode, substantially as set forth."

Claim 10 includes as an element the fastening together of the support with its active material and holding medium. Claim 12 is as follows:

"The method of making plates or electrodes for secondary batteries, consisting in primarily combining active material with suitable plates or supports mechanically, in contradistinction to forming the active material by an electrical disintegration of the plate or support, substantially as set forth."

I am of opinion for the reasons given that the defendants' battery infringes these claims of the Brush patent, and that an injunction should be granted.

HOYLE et al. v. KERR.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

No. 2.

PATENTS FOR INVENTIONS—ANTICIPATION—WOVEN FABRICS.

The Kerr patent, No. 353,790, for a woven fabric, in which a variety of shades are produced in the pattern by a new way of interweaving the warp and weft threads,—a binder warp thread being placed in the center of each pair of figuring warp threads, and utilized for shading purposes; the weft threads also appearing on the surface, and producing a color effect,—was not anticipated by a fabric in which, at some places, the figuring warp threads were drawn in pairs, with a binder warp between, but which did not appear on the surface, or produce a color effect, and in which the weft threads were also purposely hidden from sight, the whole surface being formed by the two figuring warp threads. Nor was the invention anticipated by a fabric having three figuring warp threads to each binder warp, and in which, consequently, a binder warp

between a pair of figuring warp threads is only of occasional occurrence, the binder warp never being used for figuring purposes. 55 Fed. Rep. 658, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill by James E. Kerr, administrator of the estate of David B. Kerr, deceased, against John Hoyle, Edwin Harrison, and Andrew Kaye, trading as Hoyle, Harrison & Kaye, for infringement of a patent. Decree for complainant. 55 Fed. Rep. 658. Defendants appeal. Affirmed.

George J. Harding, (George Harding, on the brief,) for appellants. John Dolman, Jr., for appellee.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

ACHESON, Circuit Judge. This suit was brought for the infringement of letters patent No. 353,790, for an improvement in woven fabrics, granted to David B. Kerr on December 7, 1886. The object of the invention, as declared in the specification—

"Is to produce in a woven fabric a variety of shades of color in the pattern or figure, by a new way of interweaving the warp and weft threads, avoiding the expense of extra colors in the warp and weft threads."

The patentee states:

"My invention consists in the combination of two warps of the same color with two or more colored weft threads. The warp threads are so arranged in the loom harness as to work in pairs, with a binder warp thread in the center of each pair, as will be hereinafter described."

The invention, it is stated, is especially applicable to all fabrics with one color for warp threads and different colors for weft threads, such as upholstery fabrics, shawls, carpets, etc. The illustrative patent drawings contain 14 figures representing cross-sections, showing various collocations of the warp and weft threads of a fabric woven according to the invention. In the warps there are two figuring threads to one binder thread. The specification described minutely—and it is shown with great clearness, to one skilled in the art—the manner of lifting the warp threads, and inserting the weft, to produce different shades of colors. The patent has a single claim, which is as follows:

"The combination of two or more wefts, each of a different color, with figuring warp threads, and a binder warp thread between the two figuring warp threads of each pair, as shown, described, and for the purpose specified."

The circuit court sustained the patent, and entered a decree against the defendants in the bill, (the appellants here.)

Two grounds for the reversal of the decree are insisted on, namely, that the court erred—First, in finding that the prior fabrics relied on to sustain the defense of anticipation did not contain the patented invention; and, second, in finding that the matter claimed in the letters patent in suit was the invention of Kerr, and not the result of an accident. With respect to the latter of these defenses,

we do not deem it to be necessary to recite or discuss the proofs. Having attentively read and carefully considered them, we concur with the court below in the conclusion that the clear weight of the evidence upon this branch of case is with the complainant in the bill. This defense, therefore, was rightly overruled.

The prior fabrics set up as anticipatory of Kerr's invention are designated "Brooks' Fabric No. 1," "Brooks' Fabric No. 2," and the "Stead & Miller Fabric." Now, in comparing those fabrics, respectively, with the Kerr fabric, we must bear in mind the clearly-established fact that Kerr's invention makes the binder warp, which formerly was rather a hindrance to designers, part of the decoration of the fabric,—an important factor for figuring and shading purposes. His discovery was that a new use, for decorative purposes, could be made of the binder warp, without impairing its old function, of giving stability to the fabric.

We take up Brooks' fabric No. 1 first, for the reason that at the argument the appellants' counsel particularly directed our attention to that exhibit, and because we regard it as the strongest piece of evidence for the defense to be found in the case. It is proved that in some places in this fabric the figuring warp was drawn in pairs, with a binder warp between the threads of the pairs. But here the resemblance between this fabric and a fabric woven according to the directions of the patent begins and ends. Brooks' fabric No. 1 is a single-faced cloth. It has a worsted figuring warp, and a cotton binder warp. It has two cotton wefts, distinctively differing from each other, however, in size and function. One is a fine "binder weft;" the other, a large, coarse "stuffer weft." The whole face of this fabric is formed of the worsted figuring warp, none of the other threads appearing on the face. The fabric is of one color throughout. The pattern or figure is formed by twilling the figuring warp, while the ground is corded or ribbed, this being effected by the presence of the stuffer weft under the warp. The object which Kerr's invention aims at, and achieves, was not attained in the Brooks fabric, at all, and evidently was not contemplated by the designer or manufacturer thereof. The binder warp does not show on the face of the fabric. Instead of being used for decorative or shading purposes, it is intentionally concealed. Moreover, the weft threads do not appear on the face of the Brooks fabric. They, also, are purposely hidden from sight. The wefts do not there perform the function plainly implied in Kerr's claim. The object of the patented invention is to produce a variety of shades of color in the pattern or figure by the interweaving of the warp and weft threads, and, clearly, to that end, the wefts must appear, and produce a color effect on the face of the fabric. Reading Kerr's claim in connection with his specification, as it must be read, (Corn-Planter Patent, 23 Wall. 181, 218; *Tilghman v. Proctor*, 102 U. S. 707, 729,) we have no difficulty in holding that Brooks' fabric No. 1 does not show or suggest the invention disclosed and claimed in the patent in suit. The appellants do not allege that there is any substantial difference between

Brooks' fabric No. 1 and Brooks' fabric No. 2. They seem to us to be similar fabrics. Our conclusion, therefore, with respect to No. 1, applies equally to No. 2.

Turning now to the Stead & Miller Exhibit, we discover that in the weaving of that fabric, instead of the figuring warp threads being arranged so as to work in pairs, with a binder warp thread in the center of each pair, according to the method described in Kerr's patent, the fabric has three figuring warp threads to one binder warp thread. In that fabric, then, a binder warp thread between a pair of figuring warp threads is a thing of occasional occurrence, only. Such pairs, where they do occur, are disconnected, each being a single pair by itself. The fabric never has two consecutive pairs of figuring warp threads, with a binder in the center of each. Only one pair in six in the same transverse line can have a binder in the center appearing on the face of the fabric. Then, again, in the Stead & Miller fabric, the binder warp thread is not used for figuring or shading purposes, and it is incapable of the use contemplated by Kerr.

We think the court below was correct in holding that none of the prior fabrics contains the invention of the patent in suit; and, finding no error in this record, the decree of the circuit court is affirmed.

MONROE v. ANDERSON. PRICE et al v. SAME. RIGGS et al v. SAME.
PATTERSON v. SAME.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

Nos. 4, 5, 6, and 7.

1. DESIGN PATENTS—TEST OF INFRINGEMENT.

Infringement of a design patent is to be determined by the inquiry whether the two designs would appear to be the same to the eye of an ordinary observer, giving such attention to design as a purchaser usually gives, and not whether an ordinary purchaser, giving no attention to design, might not be led to buy the article bearing one of the designs, supposing it to be the article bearing the other.

2. SAME—INFRINGEMENT—DAMAGES—STATUTORY LIABILITY.

The liability imposed by the act of February 4, 1887, for infringement of a design patent is in the nature of damages, and not liquidated profits; and therefore cannot be recovered from one who infringes in actual ignorance of the patent, when the patentee has failed to mark his article "Patented," as required by Rev. St. § 4900.

3. SAME—PARTICULAR PATENTS—DESIGNS FOR MANTELS.

Letters patent No. 19,873, issued June 3, 1890, to William Anderson, for a design for mantels, are not infringed by mantels made in accordance with design patent No. 21,155, issued November 10, 1891, to Edward T. Germain. 55 Fed. Rep. 398, reversed.

Appeals from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. These were four suits brought by William Anderson, one against W. T. Monroe, one against Joseph Price and James A. McMinn, doing business as Price & McMinn, one against R. L. Riggs and Bert Hubbell, doing business as Riggs & Hubbell, and one against

James E. Patterson, for infringement of design patent No. 19,873, granted June 3, 1890, to William Anderson, for a design for mantels. The alleged infringing design was covered by letters patent No. 21,155, issued November 10, 1891, to Edward T. Germain. There was a decree for complainant in the court below, (55 Fed. Rep. 398,) and respondents appeal. Reversed.

W. Bakewell, James K. Bakewell, and Thomas W. Bakewell, for appellants.

William L. Pierce, for appellee.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. These cases were all disposed of by the court below in a single opinion, and may now be considered together. They were suits in equity brought by the appellee against the respective appellants, for alleged infringement of letters patent of the United States No. 19,873, dated June 3, 1890, granted to William Anderson, the appellee, for a "design for mantel." The question of infringement is the only one which it is necessary for us to consider. Counsel for the appellee has insisted in his argument to this court that "*Gorham Co. v. White*, 14 Wall. 511, is decisive of this case," and the learned judge below, to whom, no doubt, the same contention had been addressed, was brought to the conclusion, which he expressed in these words:

"Tested by the law of infringement as laid down in *Gorham Co v. White*, and cases following its lead, we are constrained to hold the respondent has infringed the patent in suit."

The case thus relied upon by both court and counsel is a leading one, and it is, of course, of controlling authority in this court; but we think that, while the rule which it established was clearly perceived, attention was diverted from observation of the precise subject to which that rule is properly related. In the opinion of the court (page 528) the doctrine upon which the judgment rests is thus tersely expressed by Mr. Justice Strong:

"We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same,—if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other,—the first one patented is infringed by the other."

The test for ascertainment of whether an asserted difference is substantial or colorable is here plainly stated, and the thing to which that test is to be applied is also clearly indicated. The point to be determined by the criterion sanctioned is whether "the designs are substantially the same;" that is, whether a purchaser, giving the usual attention to the subject-matter of the patent,—the design,—would be deceived into supposing the two designs to be the same; not whether a purchaser not giving any attention to design might be led to assume that an article embodying the one design was the same article as another by or upon which the other design had been portrayed. The patent alleged to have been in-

fringed in *Gorham Co. v. White* was for a design known as the "cottage pattern" for the handles of spoons and forks. Much testimony was taken with reference to "identity of appearance" or "sameness of effect upon the eye," but the extracts furnished by the reporter disclose that it was directed to the sameness of, or difference between, the "design" or "pattern," and no one appears to have doubted that the circuit court was right in its assumption (page 518) that this was the true question. That the supreme court so dealt with the evidence appears upon several pages (528 et seq.) of its opinion, from which we quote a single additional sentence:

"A large number of witnesses familiar with designs, and most of them engaged in the trade, testify that, in their opinion, there is no substantial difference in the three designs, and that ordinary purchasers would be likely to mistake the White designs for the cottage."

Now, as to the case before us: The suit was brought upon a patent, not for a mantel, but for "a design for mantel," and yet the record shows that inquiry and consideration were addressed, not to the determination of whether the two designs would appear to be the same to the eye of an ordinary observer, giving such attention to design as a purchaser usually gives, but to whether an ordinary purchaser (not excluding purchasers giving no attention to design) might not be led to buy the one mantel supposing it to be the other. At best, the patented design, and that which is alleged to infringe, are not of a very high order, and the mantels to which they are applied are quite commonplace in style and character. It is by no means improbable that an ordinary purchaser would be wholly regardless of, and absolutely inattentive to, such designs upon such articles, and it may readily be supposed that such a purchaser might be misled by a statement that the Germain mantel (having the alleged infringing design) was that of the complainant below. But design is a distinct matter; and, as to that, accepting the suggestion of the learned counsel for the appellee that nothing is entitled to more weight with the court than "the testimony of its own eyesight," we can only say that each of the three judges who heard the argument of this case is, from observation of the two designs, entirely satisfied that they are substantially different in their effect upon the eye, and that his perception of this difference was not dependent upon the fact that he saw the two designs side by side, and heard counsel compare and contrast them, but that their difference in appearance would be manifest to an ordinary observer, giving the usual attention (if any) of a purchaser to that subject. The details of the two designs are, in several particulars, not the same, but to this we would attach no importance if the general effect was substantially identical. On the other hand, their elementary features are, to a very considerable extent, precisely alike, yet this, too, is immaterial, because the impression of the whole upon the eye of even a casual observer is made plainly different, not only by the partial diversity of their elements, but also by the difference in arrangement and correlation of the constituents which are common to both. "Rosettes,"

"beveled edges," "reeds," "moldings," and the like devices for configuration and ornamentation, have long been familiar to the trade of the carpenter. They could not have been exclusively appropriated by the patentee, and he did not claim them. He claimed a specific design composed of old figures, and produced by well-known methods. His title to that for which he asked and obtained a patent need not be questioned; but to hold that his right is invaded by the use of the same figures, and the practice of the same method, for the production of the very different design of which he now complains, would be to extend his monopoly beyond the terms of his grant, or of any grant which, under the law, would be possible.

What has been said applies to all the infringements alleged, except that, in the case of Monroe only, there was a single, trivial sale where the design used was admittedly that of the complainant. But this sale was made before Monroe knew of the issue of the patent, was not repeated, and is quite apart from the real subject of controversy. Its effect was not passed upon by the court below, and the views which we entertain with respect to it may be very briefly indicated. At the time this particular sale was made the requirements of section 4900 of the Revised Statutes with respect to notice to the public had not been complied with. Therefore no damages could be recovered; and the liability imposed by the act of February 4, 1887, (1 Supp. Rev. St. p. 533,) is a statutory penalty in the nature of damages, and not, as has been contended, a "profit liquidated." It was not alleged, and could not have been reasonably asserted, that persistence in this acknowledged use of the exact design covered by the patent was apprehended, and therefore a decree for injunction could not have been founded upon it.

The decree of the circuit court is, in each of the cases named at the head of this opinion, reversed, with costs.

ANDERSON v. MONROE. SAME v. RIGGS et al. SAME v. PATTERSON.

(Circuit Court of Appeals, Third Circuit. November 3, 1893.)

Nos. 8, 9, and 10.

PATENTS FOR INVENTIONS—DEFENSE OF PRIOR SALE—QUANTUM OF PROOF.

The defense of prior sale must be proved beyond reasonable doubt, but not to the exclusion of all possibility of conjecture to the contrary. 55 Fed. Rep. 407, affirmed.

Appeals from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Suits brought by William Anderson—one against W. T. Monroe, one against R. L. Riggs and Bert Hubbell, doing business as Riggs & Hubbell, and one against James E. Patterson—for infringement of design patent No. 19,877, issued June 3, 1890, to William Anderson, for a design for mantels. The bills were dismissed below, (55 Fed. Rep. 407,) and complainant appeals. Affirmed.

Wm. L. Pierce, for appellant.
James K. Bakewell and W. Bakewell, for appellees.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. The only specific assignment of error in these cases has not been sustained. It is that "the court erred in finding that mantels embodying the patented design had been on sale more than two years prior to the application for a patent therefor." Upon the issue of fact presented, the burden was on the defendant below to support the affirmative beyond reasonable doubt, but not to the exclusion of all possibility of conjecture to the contrary. "None but mathematical truth is susceptible of that high degree of evidence called 'demonstration,' which excludes all possibility of error. In the investigation of matters of fact, such evidence cannot be obtained, and the most that can be said is that there is no reasonable doubt concerning them." Conceding to the appellant the benefit of the most rigorous application of the rule with regard to the strictness of proof required to establish the defense of sale made more than two years prior to date of application for patent, careful examination of this record has fully satisfied us that the evidence in these cases was rightly considered by the circuit court, and abundantly justifies its finding that "a sale was intended by the parties, and was consummated as early as March 15th, which was more than two years prior to the application."

The decree of the circuit court is, in each of the cases named at the head of this opinion, affirmed, with costs.

PARRY MANUF'G CO. v. HITCHCOCK MANUF'G CO. et al.

(Circuit Court, N. D. New York. July 24, 1893.)

1. PATENTS FOR INVENTIONS—LIMITATION OF CLAIMS—SULKIES.

Letters patent No. 266,895, issued October 31, 1882, to John Robinson, for improvements in sulky wagons, consisting in a construction which permits a lateral motion of the body, independent of the axle and wheels, so as to secure comfort in riding, ease the back of the animal, and avoid jar upon the wheels, must be limited, in view of the prior art, to the specific construction described, and are not entitled to the doctrine of equivalents.

2. SAME—INFRINGEMENT.

Claim 1 reads: "In combination with the cross bar, C, and the body, E, the hooks, F, and loops, G, the latter constructed as described, to permit a lateral movement of the body, as set forth." The loops, G, are made wider than the hooks, F, so as to permit a lateral play. *Held*, that this claim is limited by its terms, as well as by the state of the art, to the specific construction, and is not infringed by a cart having the body secured to the cross bar by L-shaped bolts or hinges, which do not permit the loose, swaying movement of the patent.

3. SAME—NOVELTY.

The second claim, covering a spring secured to the under side of the body, and connected at the ends to the rear portion of the shafts by

double shackles, whereby vertical and lateral motions are permitted, is void for want of novelty, as practically the same construction is shown in the patents of Soule, Jenkins, and Winecoff.

4. SAME—NOVELTY—LIMITATION—INFRINGEMENT.

The third claim reads: "In a two-wheeled wagon in which the body is pivotally connected at its forward end, a spring, H, arranged between such pivotal connection and the axle, as and for the purpose set forth." *Held*, that this claim, if strictly limited to the mechanism described, is void for want of novelty; and, if construed to include the devices which permit the swaying motion of the body, it is not infringed by a cart which does not have the hooks and loops of the patent, and in which the spring is not arranged between the pivoted connection and the axle.

In Equity. Suit by the Parry Manufacturing Company against the Hitchcock Manufacturing Company and others for infringement of a patent. Bill dismissed.

William M. Eccles, for complainant.

Irving H. Palmer and J. W. Suggett, for defendants.

COXE, District Judge. This is an equity action for infringement, based upon letters patent, No. 266,895, granted October 31, 1882, to John Robinson for improvements in sulky road-wagons. The specification says:

"My invention has for its objects to secure ease and comfort in riding, and to relieve the back of the animal from undue weight, while at the same time the usual jar upon the wheels is avoided; and with these ends in view my invention consists of the peculiar construction and arrangement of parts hereinafter fully described and specifically claimed. * * * E is the body of the wagon, which is secured at its forward end to the cross bar C by means of hooks F, which engage with loops G, secured to the cross bar. The loops G, as seen more particularly at Fig. 1, are wider than the hooks F for the purpose of permitting a sufficient lateral movement of the body in an obvious manner."

The claims are as follows:

"(1) In combination with the cross bar C and the body E, the hooks F and loops G, the latter constructed, as described, to permit of a lateral movement of the body, as set forth.

"(2) The spring H, connected to the under side of the body A, and having its ends connected to the rear portions of the shafts by double shackles I, whereby vertical and lateral motions are permitted, substantially as set forth.

"(3) In a two-wheeled wagon in which the body is pivotally connected at its forward end, a spring H, arranged between such pivotal connection and the axle, as and for the purpose set forth."

The defenses are lack of patentability and noninfringement. The field of invention is exceedingly narrow. For centuries improvements in vehicles drawn by animals have been going on in both hemispheres. It is manifest that a broad invention in this art is well nigh impossible. Improvements may be made from time to time, but patents therefor must be strictly construed and the claims limited to the precise advances made by the inventor. *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. Rep. 181; *McCormick v. Talcott*, 20 How. 402; *Railway Co. v. Sayles*, 97 U. S. 564; *Harrow Co. v. Hanby*, 54 Fed. Rep. 493. The novel feature of the patent is the combination, which, in addition to the vertical motion

of the spring, permits a lateral motion to be imparted to the body of the cart, thus insuring comfort to the traveler and durability to the wheels. If confined to this feature the patent may be sustained.

In addition to the limitations made necessary by the prior art it will be observed that the language employed narrows the first claim to the precise mechanism of the patent. Every element is restricted by a reference later to the structure described and shown. A claim so explicit cannot be enlarged by construction. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. Rep. 376; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343; *Machine Co. v. Williams*, 44 Fed. Rep. 190, 194. The hooks F and loops G are not found in the defendants' cart. The body of their cart is secured to the cross bar by L-shaped bolts or hinges which do not permit lateral motion at that point. Certainly they do not permit the loose swaying motion of the patent. The complainant is not entitled to the benefit of the doctrine of equivalents, but even if it were, these bolts or hinges would not infringe the hook and loop connection of the patent.

Regarding the second claim it is thought that it is invalid for want of patentability. A spring having its ends connected to the shafts, and adjacent parts, by shackles, is old. Substantially the same construction is shown in the patents of Soule, Jenkins and Winecoff.

The third claim, if confined strictly to the mechanism described, is in the same predicament. There is no patentable novelty in a spring arranged as stated. A construction can, however, be placed upon this claim which will uphold it. It may fairly be construed to include the novel feature referred to, viz.: the devices which permit the swaying motion of the body of the cart. But if so construed the defendants do not infringe. They do not have the hooks and loops and their spring is not arranged between the pivoted connection and the axle.

The bill must be dismissed.

ROSS v. CITY OF FT. WAYNE.

(Circuit Court, D. Indiana. October 6, 1893.)

No. 8,742.

1. PATENTS FOR INVENTIONS — ASSIGNMENT PENDING INFRINGEMENT SUIT — PLEADING BY ASSIGNEE.

Where a patent, with all rights and claims under it, is assigned to a stranger pending suit for infringement, the assignee cannot obtain the benefit of the proceedings brought by the assignor, by means of a supplemental or amended bill, but he may do so by means of an original bill in the nature of a supplemental bill.

2. SAME—PLEADING.

Where a bill filed by the assignee contains all the material averments of an original bill, together with a statement of supplemental matter showing the assignment subsequent to the institution of the suit, it must

be considered as an original bill in the nature of a supplemental bill, notwithstanding that it is denominated by the pleader a "supplemental and amended bill."

8. SAME—EQUITY JURISDICTION—REMEDY AT LAW.

The owner of a patent brought a bill for infringement about two and one-half months before the same would expire, but made no attempt to secure a restraining order. Two months after the expiration of the patent he assigned it, and all rights arising under it, and the assignee set up his rights by an original bill in the nature of a supplemental bill. *Held*, that the same must be dismissed for want of jurisdiction, as the assignee took nothing but a claim for unliquidated damages, for which there was an adequate remedy at law.

4. SAME—INFRINGEMENT SUIT—NECESSARY AVERMENTS—DEMURRER.

Where a bill for infringement avers that the patentee was the original and first inventor of the device in question, and that the same was not known or used before said invention, and not, at the time of his application, in public use or on sale for more than two years, an omission to aver that the device had not been previously patented or described in any printed publication in this or any foreign country, while it renders the bill vulnerable to a special demurrer, is yet a defect rather of form than of substance, and may be cured by amendment.

In Equity. Suit by Nathan O. Ross against the city of Ft. Wayne for infringement of a patent. On demurrer to the bill. Sustained, and bill dismissed.

N. O. Ross and Parkinson & Parkinson, for complainant.

S. R. Alden, for defendant.

BAKER, District Judge. On the 21st day of April, 1892, Isaac C. Walker brought suit in this court against the city of Ft. Wayne for the alleged infringement of letters patent No. 165,438, issued to Robert Bragg on the 13th day of July, 1875, as the original and first inventor of a certain new and useful improvement in gong attachments for engine houses, and asking for an injunction and for damages. The particular infringement complained of consists in the defendant making, constructing, and using the gong attachments for its engine houses. The bill further charges that on the 17th day of December, 1885, Bragg, by a due assignment in writing, for a good and valuable consideration, sold, assigned, and transferred to the plaintiff his entire right, title, and interest in and to the letters patent and the invention and improvement secured thereby, together with all demands, claims, accounts, rights, and rights of action which had accrued thereunder since the issue of said letters patent. On the 4th day of November, 1892, Nathan O. Ross, with leave of court, filed in this cause a complaint against the city of Ft. Wayne which is denominated a "supplemental and amended bill of complaint." The bill is filed by the plaintiff in his own behalf, and as trustee for Elbert W. Shirk, Edward C. Egan, and Atwater J. Treat. It sets forth the same facts, except in respect of the title of Ross, exhibited in the original bill, and asks for an injunction and for damages, and that Ross may have the full benefit and advantage of the proceedings had in the suit of Walker vs. The City of Ft. Wayne. It shows that on the 14th day of September, 1892, Walker transferred to Ross his entire right, title, and interest in and to the letters patent, and in and

to all rights of action and recovery for past infringements thereof, and all rights of whatsoever kind in respect thereto. The defendant has interposed a special demurrer to this bill of complaint, alleging in detail numerous reasons why it should be held to be insufficient. These various grounds of demurrer may be grouped, for the purpose of disposing of the questions involved, under three different heads, as follows:

(1) That the assignment and sale by Walker to Ross operated to divest the former of all right to, and interest in, the matter in question, and disabled him from the further maintenance of the suit; and that the latter could not be admitted to file any bill or pleading to revive and continue the proceeding; and that the bill filed by the former ought to be dismissed, and the latter required to bring a new suit.

(2) That the bill is defective because it is not alleged therein that the improvement claimed in the letters patent has not been patented or described in any printed publication in this or any foreign country.

(3) That the bill is without equity because the plaintiff is entitled, on his own showing, to no relief except for the recovery of damages for past infringements, and because the term of the patent had expired before the present plaintiff acquired any right to or interest in the suit which he now seeks to revive and prosecute.

It is firmly settled that a suit in equity must be prosecuted by and in the name of the real party in interest. Where the sole plaintiff, suing in his own right, is deprived of his whole interest in the matters in controversy by an event subsequent to the institution of the suit, as where the plaintiff has assigned his whole interest to another, the plaintiff is no longer able to prosecute for want of interest; and, as the assignee claims by a title which may be litigated, the benefit of the proceedings by the assignor cannot be obtained by an assignee by means of a supplemental or amended bill filed by him. Story, Eq. Pl. § 349; 2 Daniel, Ch. Pl. & Pr. (4th Amer. Ed.) 1518, 1519; Mills v. Hoag, 7 Paige, 18; Sedgwick v. Cleveland, Id. 287; Van Hook v. Throckmorton, 8 Paige, 33; Mason v. Railroad Co., 52 Me. 82, 107. The benefit of the proceedings had by the assignor may be obtained by the assignee by filing an original bill in the nature of a supplemental bill. See authorities supra. The bill filed by Ross contains all the material averments of an original bill, with the statement of supplemental matter showing the transfer of the rights in question subsequent to the institution of the suit. It is in the fullest sense an original bill in the nature of a supplemental bill; nor is this conclusion varied by the fact that the pleader has designated it a "supplemental and amended bill." Its character must be determined by its frame and by the nature of its averments, and not from the name by which the pleader has designated it. The bill has been properly filed by Ross as assignee, and the suit cannot be dismissed nor the complaint held bad, on the sole ground that Walker has, since the institution of the suit, trans-

ferred his whole interest in the matters in question to the present plaintiff. The bill avers that Robert Bragg was the true, original, and first inventor of a certain new and useful improvement in gong attachments for engine houses, not known or used before said invention, and not, at the time of his application for a patent therefor, in public use or on sale for more than two years. It contains no averment that the improvement claimed had not been patented or described in any printed publication in this or any foreign country. The statute forbids the issuance of a patent for any improvement which has been previously patented or described in any printed publication in this or any foreign country. Rev. St. U. S. § 4886. And it has been held that the omission of an averment to the effect that the improvement had not been patented or described in any printed publication in this or any foreign country rendered the complaint demurrable where such defect was pointed out by special demurrer. *Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.*, 47 Fed. Rep. 894; *Coop v. Institute*, Id. 899; *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. Rep. 859; *Goebel v. Supply Co.*, 55 Fed. Rep. 825. The defect, however, is one going to the form, rather than to the substance, of the complaint, and in such case the defect may be cured by amendment.

The important and difficult question is whether the present plaintiff can maintain his bill on the equity side of the court. It is elementary that a party who has a plain, adequate, and complete remedy at law cannot successfully invoke the jurisdiction of a court of equity. The original plaintiff brought suit about two and a half months before the term of his patent expired. He prayed for an injunction in his bill, but took no steps to procure a temporary restraining order, or to bring the suit to a hearing, while he remained the party of record. While an application for a temporary restraining order might have been made before the term of his patent expired, yet, according to the course of procedure of the court, it would have been impracticable to have prosecuted the suit to final hearing and decree within that time. When the patent has expired, and the entire claim of the plaintiff against the defendant rests upon the infringing acts performed during the term, an action on the case for the recovery of damages generally affords a complete redress, and the only one to which the plaintiff is entitled. *Consolidated Safety Valve Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319; 3 Rob. Pat. § 1092. An adequate remedy at law exists in favor of the owner of the patent against the infringer whenever the sole relief required is compensation for past injury, provided the remedy can be afforded without equitable aid. When the plaintiff has chosen to seek his recompense for the enjoyment of his invention through an established license fee, and the infringing acts raise an implied acceptance of the offer, the sum which the plaintiff is entitled to recover is certain and fixed, and the remedy at law is adequate, and a court of equity is without jurisdiction; and, where the plaintiff has a mere right to the recovery of damages for past infringements,

equity is without jurisdiction. *Ulman v. Chickering*, 33 Fed. Rep. 582; *Burdell v. Comstock*, 15 Fed. Rep. 395; *Root v. Railway Co.*, 105 U. S. 189; *Spring v. Sewing Mach. Co.*, 13 Fed. Rep. 446; *Jenkins v. Greenwald*, 2 Fish. Pat. Cas. 37; *Hayward v. Andrews*, 12 Fed. Rep. 786. Where the bill is filed too late for a temporary injunction to issue before the expiration of the term secured by the patent, and the recovery of damages would afford adequate relief, jurisdiction in equity does not exist. *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. Rep. 217; *Mershon v. Furnace Co.*, 24 Fed. Rep. 741; *Davis v. Smith*, 19 Fed. Rep. 823; *Burdell v. Comstock*, 15 Fed. Rep. 395; *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. Rep. 367. It has been held that a bill filed four days before the patent expired should be dismissed. *Mershon v. Furnace Co.*, *supra*. Where a bill is filed five days before the expiration of the term, and no effort is made to obtain an injunction, the prayer for injunction will be held a mere pretext, and the case not of equitable cognizance. *Burdell v. Comstock*, *supra*. In *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, *supra*, where the bill was filed about two months before the patent expired, the court expressed grave doubt whether, under the rule in *Root v. Railway Co.*, 105 U. S. 189, jurisdiction in equity existed, and resolved the doubt by dismissing the bill without prejudice to an action at law. While it is certainly true that, if a bill in equity to restrain the infringement of letters patent is properly filed before the expiration of the term, the jurisdiction of the court is not defeated by the mere expiration of the patent by lapse of time before the final decree, (*Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. Rep. 1090,) yet where a bill is filed shortly before the expiration of the patent, and no application for a restraining order is made, and from the nature of the infringing acts complained of it is apparent that an action on the case would afford adequate relief, the bill ought to be dismissed. It is not necessary to determine whether the bill filed by Walker ought to have been dismissed, in the view that is taken of the rights of the present plaintiff. His rights were acquired by an assignment made two months after the patent had expired. It is true that the bill states that the improvement secured by the patent was transferred, but, as the patent had already expired, nothing remained capable of assignment except the mere right of action for the recovery of damages for past infringements. If the present plaintiff had filed an original bill to enforce his rights acquired under the assignment, made, as it was, after the expiration of the patent, a court of equity could not have entertained jurisdiction. He filed, nearly four months after the patent had expired, an original bill in the nature of a supplemental bill, exhibiting a right to recover damages for past infringing acts acquired under an assignment made two months after the expiration of the patent. By such assignment the plaintiff acquired the right to recover damages only for past infringements, because the patent right—the franchise—was incapable of transfer since it had ceased to exist. Walker had no vested right in the remedy which he could

sell and assign to the present plaintiff. For the recovery of damages for past infringements, which alone passed to the assignee, an action at law afforded the plaintiff adequate redress, and, in my judgment, the only redress to which he is entitled.

It follows that the demurrer should be sustained, and the bill dismissed. Let the bill be dismissed without prejudice to an action at law, if the plaintiff should be so advised.

AMERICAN BELL TEL. CO. v. BROWN TELEPHONE & TELEGRAPH CO. et al.

(Circuit Court, N. D. Illinois. October 18, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—IMPROVEMENTS—TELEPHONES.

The Bell telephone patent (No. 186,787) is infringed, in respect to claims 3, 5, 6, 7, and 8, by a machine which is perhaps a decided improvement in the addition of a second magnet, giving greater intensity and energy, but which does not change the operation of the parts.

2. SAME—INJUNCTION.

The fact that a patent is about to expire is no reason for refusing an injunction against an infringer who has invested his money in the business in the face of repeated adjudications sustaining the patent.

In Equity. Suit by the American Bell Telephone Company against the Brown Telephone & Telegraph Company and others for infringement of a patent. Injunction granted.

Bond, Adams, Pickard & Jackson and J. J. Storow, for complainant.

Lysander Hill and Charles C. Bulkley, for defendants.

JENKINS, Circuit Judge. This bill is filed to restrain the alleged infringement of the complainant's patent No. 186,787, granted on January 30, 1877. Upon the hearing I declined to consider the question of the validity of this patent, for the reason that it had been passed upon by the supreme court, and because I had previously ruled upon its validity. The defendants are charged with infringing claims 3, 5, 6, 7, and 8, respectively, of the patent. It is not necessary to enter into detailed investigation of those claims. The defendants' machine, in my judgment, contains all of the matters stated in those claims. It has what is claimed to be, and what perhaps is, a decided improvement in the addition of a second magnet. That addition, however, does not change the operation of the parts as declared in the complainant's patent, but is claimed to give to the magnet greater intensity and energy. Whether that be so or not, the defendants were not justified in the use of the inventions of Mr. Bell, secured to him by the letters patent referred to.

Nor do I find any reason in the arguments that have been pressed to me to withhold the issuing of an injunction. The fact that the patent has nearly expired is, to my mind, a greater reason for granting the injunction. These telephone patents, as I have had occasion heretofore to remark, have probably been more vigorously contested

than any other patents. The remaining time during which the inventor and his assigns may enjoy the fruit of the invention is short. After such a conflict the court ought not to permit infringement during the short remaining period. The defendants claim to have invested large amounts of money in their enterprise. They did it in the face of repeated adjudications sustaining the validity of the patent in question, and with their eyes open. If they must use the Bell invention to make operative the Brown improvement, they must await the expiration of the Bell patent.

An injunction will issue, as prayed for in the bill.

AMERICAN BELL TEL. CO. v. WESTERN TEL. CONST. CO. et al.

(Circuit Court, N. D. Illinois. October 18, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

One who invests his money in an infringing business, knowing that the patent has been sustained by the United States supreme court, will not be permitted to give bonds for damages, instead of submitting to an injunction, merely because the patent will expire in a few months.

In Equity. Suit by the American Bell Telephone Company against the Western Telephone Construction Company and others for infringement of letters patent No. 186,787, issued January 30, 1877, to Alexander Graham Bell, for improvements in electric telegraphy. Injunction granted.

Bond, Adams, Pickard & Jackson and J. J. Storrow, for complainant.

Joseph G. Parkinson, Robert H. Parkinson, and Adolph Moses, for defendants.

JENKINS, Circuit Judge. The validity and infringement of the complainant's patent are not disputed. The life of that patent expires on January 30, 1894. It is claimed that the defendants ought not now to be enjoined, but should be permitted to pursue their infringement upon giving bond to pay royalties to the complainant. The defendants, at the commencement of their enterprise, knew that this patent had been sustained by the supreme court of the United States. They were well informed of the complainant's rights under that patent. With that knowledge, they have pursued their infringement, with a view to entering into competition with the complainant in the use of this patented improvement. It is true that they have a right to enter into competition with the complainant and to use the invention of Mr. Bell covered by patents which have expired. To that extent, they are justified. But they have no right, in the prosecution of such competition, to use the inventions covered by his patent No. 186,787 until the expiration of that patent. They must await that time before they may use the invention thereby covered. If it be true that the defendants have invested large amounts of money in the prosecution of their enterprise, which will be prejudiced or injured by an injunc-

tion here, it need only be said that they went into the enterprise with their eyes open, and with deliberate design to infringe another's rights. In such case, they have no right to favorable consideration by a court of equity.

An injunction will issue, as prayed for.

HAMMOND BUCKLE CO. v. GOODYEAR RUBBER CO. et al.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—IMPROVEMENT IN SHOE CLASPS.

In view of the prior state of the art, the first claim in letters patent No. 301,884, granted July 15, 1884, to Hammond & King, for improvement in shoe clasps for arctic shoes, viz.: "In combination, the catch plate, the tongue pivoted directly to the tongue plate, and the tongue plate extending rearward of the pivot, and in contact with the catch plate when the parts are engaged," can only be sustained by reading into it the limitations that the tongue should be pivoted directly to the tongue plate, below its face, and between its bifurcated ends, and that the tongue should have a broadened position to combine with the elastic arms of the bifurcated ends, and, as thus modified, the invention is described in claim 4 of the same patent; and the patent is not infringed by a shoe clasp which has no broadened tongue, the lock of the tongue being secured by the use of flattened, laterally projecting pivots.

Appeal from the Circuit Court of the United States for the District of Connecticut.

In Equity. Bill by the Hammond Buckle Company against the Goodyear Rubber Company and others to restrain the infringement of letters patent No. 301,884, issued July 15, 1884, to Hammond & King, for an improvement in shoe clasps for arctic overshoes. Decree for complainant. Defendants appeal. Reversed.

C. H. Duell, for appellants.

George W. Hey, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The patent is for an improvement in shoe clasps of the kind used to fasten together the flaps of arctic overshoes. The particular claim is as follows:

"(1) In combination, the catch plate, the tongue pivoted directly to the tongue plate, and the tongue plate extending rearward of the pivot, and in contact with the catch plate when the parts are engaged, all substantially as described."

The patent contains three other claims, but they are not in question in this suit.

The defendants' clasp is made under letters patent No. 418,924, January 7, 1890, to John Nase.

The patent sued upon was construed by Judge Shipman in Hammond Buckle Co. v. Hathaway, 48 Fed. Rep. 305, 834, and the validity of this claim sustained. Application for a preliminary injunction in the suit at bar was made before the same judge. It was denied for the reason that infringement was not plain, but the validity of the claim was again sustained. Subsequently, when the case came

before Judge Townsend at final hearing, he followed the decision of Judge Shipman in the Hathaway Case, construing the patent, finding in such new evidence of anticipation as was not before the court in the earlier case no reason for reaching a different conclusion. He also found defendants' clasp to be an infringement of the claim, as thus construed.

The testimony shows a great variety of shoe clasps very similar in character. There has been much litigation between the owners of competing devices, (32 Fed. Rep. 791; 38 Fed. Rep. 602, 604; 41 Fed. Rep. 519, and 47 Fed. Rep. 452,) and an examination of the various patents introduced in proof, and of the opinions above cited, shows beyond a doubt that at the time the patent in suit issued the field of invention in that art was an extremely narrow one, and that a patent for a new combination of the well-known mechanical elements which went to make up shoe clasps of that kind, viz. the tongue plate, the tongue, and the catch plate, could only be sustained under a construction which would restrict its claims to the precise form and arrangement of parts described in the specification. The claim, as finally granted by the patent office, is broader than the state of the art would warrant. The parts of the combination,—“the catch plate,” the tongue pivoted directly to the tongue plate, “the tongue plate extending rearward of the pivot, and in contact with the catch plate,”—were not only all old devices, but had already been combined in a patent granted to Samuel G. Blackman, (No. 244,534,) July 19, 1881. The circuit court, however, found in the specification an improvement, with enough of invention in it to sustain a patent; limited the claim, by construction, to that particular invention; and, as thus limited, held it to be valid. The mechanical details of the complainant's clasp are very fully and clearly set forth in the opinion referred to. 48 Fed. Rep. 307:

“The tongue plate was a single piece of metal doubled upon itself, and was forked at its rear end, i. e. the end next the catch plate. The tongue swung in this bifurcation, the pivot of the tongue being located underneath the tongue plate. Indentations in the underfold of the tongue plate partially embraced the ends of the pivot pin, which was held between the two folds. The specification says:

“It will be observed that this construction of the tongue plate causes the tongue plate, or a portion of it, to extend rearward of the tongue, forming there a bearing surface for the catch plate; the result of which is, in use, that the whole structure is caused to move together when movement of the catch plate is had, which unity of motion in the parts of the shoe clasps preserves the two flaps of the shoe in a better relation to each other than in the case where the catch plate can be tilted downward independently of the tongue.”

“When the tongue pivots are formed solely underneath the tongue plate, the face of the plate may be made smooth. A crossbar or projection on the tongue plate back of the tongue made a stop which limited the backward play of the tongue. * * * The improvement consisted in having the body of the tongue plate extended on both sides of the tongue beyond the pivot so as to form a bifurcation at the inner end of the plate, in which the tongue plays; these extensions being for the purpose of forming supports upon which the catch plate is drawn as the tongue is closed, and which prevent the catch plate from changing its position. The pull of the tongue and the catch plate upon each other is more efficient when the pivot is below the fold of the tongue plate. It is plain that this buckle is a different thing, in the

way in which and the means by which the catch plate is made to be an efficient member of the buckle, from the preceding patents which have been described. [It may be noted, in passing, that the patents referred to by the learned judge as "before described" did not include the Blackman patent, which, more perfectly than any other, shows a rearward extension of the tongue plate, forming a support upon which the catch plate is drawn as the tongue is closed.] The difference consists in the efficient support of the catch plate, and this is accomplished by the bifurcated extensions of the tongue plate, which project rearwardly beyond the pivots. The question of importance is whether this improvement has the element of patentable invention. I do not think that the mere elongation of the tongue plate would have been patentable, but I am of opinion that the way in which lengthening was accomplished, and the support was given to the catch plate, viz. by the bifurcated extensions of the body of the tongue plate on both sides of the tongue beyond the pivot, in which extensions the tongue plays, and upon which the catch plate is supported in position, did show patentable invention. There was no invention in the production of smoothness of surface upon the face of the tongue plate. * * * Neither was there any patentability in the stop."

We concur with the learned judge in the conclusions that there was no invention in the clasp above-described, aside from the rearward extension, and that the mere elongation of the tongue plate rearwardly would not have been patentable. Such rearward extension, combined with a tongue pivoted below the tongue plate, already existed in the Blackman patent. But we do not agree with him in the conclusion that there was patentable invention in extending rearwardly by bifurcation, when the only function of the bifurcated extensions was to afford a support or resting place for the catch plate. The "efficient support" spoken of comes not at all because of the bifurcation, but because of the rearward extension. All the advantages derived from such an arrangement of the two plates—the prevention of the cloth of the overshoe being caught in the bight of the tongue while being fastened, and the "unity of motion in the parts of the shoe clasps," when once fastened—are, so far as the testimony shows, equally secured by an extension of the whole tongue plate, which was old in the art. The substitution of the bifurcations for the unbifurcated tongue plate, rearwardly extended, as in the Blackman patent, was a mere change of form; and unless such change of form accomplishes something,—introduces a new function, or a new method of performing the old function with greater excellence or economy,—it is not patentable invention. The bifurcation does not accomplish anything new in the way of more efficient support. The function of supporting the catch plate, and the mode of supporting, are entirely unaffected by the diversity of shape. The bifurcation does, however, subserve a useful purpose, which is described in the patent as follows:

"The bifurcations at the rear end of the tongue plate have a slight lateral elasticity, and the tongue is made, at the point, *e.* slightly broader than elsewhere; and its breadth is such that it must, in locking and unlocking the tongue, pass through said bifurcation, by springing the forks thereof apart. This insures a slight locking action, both when the tongue is opened, and when it is closed."

This additional element develops a function in the bifurcations which may be said to involve an exercise of the creative faculties,

and thus the entire combination, being apparently new in the art, may be patentable. It seems quite plain from the language of the patent that the inventor selected a bifurcated, rather than the unbifurcated, extension, to accomplish that very result,—the locking of the tongue. And we are of the opinion that, if the first claim is to be sustained at all, it can only be by reading into it, not merely the limitations suggested by the circuit court, viz. that the tongue should be pivoted directly to the tongue plate, and below its face, and between its bifurcated ends, but also the further limitation that the tongue should have the broadened position to combine with the elastic arms. As thus modified, however, the invention is described in claim 4 of the patent:

"(4) In combination, the catch plate, the tongue plate provided with the laterally elastic bifurcations extending rearward of the pivot, and the tongue swinging in the bifurcations, with a broadened portion which passes between the elastic arms as the tongue is swung, all substantially as described, and for the purpose set forth."

—Which is really all that the inventor was entitled to claim. The defendants' clasp, however, has no such broadened tongue,—the locking of the tongue being secured by the use of flattened, laterally projecting pivots,—and does not infringe complainant's patent, as it must be construed to sustain its validity.

The decree of the circuit court is reversed, and cause remanded, with instructions to dismiss the bill, with costs of both courts.

DELEMATER et al. v. HEATH.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

1. PATENTS FOR INVENTIONS—VALIDITY—PRIOR USE—WHAT CONSTITUTES.

A single unrestricted sale is sufficient to establish the defense of a prior public use, and, where a machine is sold unconditionally in the ordinary course of business for a substantial price, the fact that the maker's workmen made frequent visits to it in the purchaser's house, to make repairs, observe its workings, and see if any improvements suggested themselves, is not sufficient to prove that the use was experimental merely. *Elizabeth v. Pavement Co.*, 97 U. S. 126, distinguished.

2. SAME—LIMITATION OF CLAIMS—REFERENCE LETTERS.

A mere reference in a claim to a letter on the drawing does not of itself limit the claim to the precise geometrical shape shown in the drawing, even though the description in the specifications refers to the part by an adjective descriptive of its shape, unless that particular shape is pointed out by the specifications or is known by the state of the art to be the particular improvement the patentee claimed.

3. SAME—EQUIVALENTS—HOT-AIR ENGINES.

Attaching the pump plunger of a hot-air engine to the same oscillating beam to which the working piston is connected, but further from the center of oscillation, so as to give a longer stroke, is mechanically the same thing as attaching it further from the center of oscillation to an arm at one side of the beam, parallel with it, fastened to the same axle, and describing the same arc; and a claim for the former includes the latter.

4. SAME—PRIOR USE.

The Ericsson reissue patent No. 9,414, for a hot-air engine, is invalid, because of prior public use of the machine.

'Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by William Delemater and another against Marcellus C. Heath for infringement of a patent. The court below dismissed the bill, and complainants appeal. Affirmed.

Statement by LACOMBE, Circuit Judge:

This is an appeal from a decree of the circuit court in the southern district of New York, dismissing a bill in equity brought for the infringement of reissued letters patent No. 9,414, granted to the assignees of the late John Ericsson on October 24, 1880, and assigned by mesne assignments to the complainants. The original patent was granted March 30, 1880, being numbered 226,052. The patent is for an improved hot-air engine, and contains four claims. Infringement of all these claims is charged in the bill and denied in the answer. The evidence, however, clearly shows that defendant's engines are covered by all the claims, and the fact of infringement is practically conceded. The principal defense is that the machine had been in public use and on sale for more than two years prior to the application, February 19, 1880. The circuit court sustained that defense, and it is assigned as error by the appellants that said court did not hold (1) that the prior use or sale was for purposes of experiment only; (2) that the invention recited in claim 2 was patentably distinguishable from the structures held to have been in public use; and (3) that the invention recited in claim 3 was similarly distinguishable.

William C. Witter, for appellant.

S. A. Duncan, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge, (after stating the facts.) Of the defense of prior use and sale, as shown by the proof in this case, it is to be said that much of the perplexity which usually accompanies such a defense is not present. There is no question as to the measure of credit to be given to the unaided memory of individuals as to remote dates, or as to the structure of a machine seen years before. Of the four or five engines that were sold and used two are exhibits in the case, and it is not disputed that the others so sold and used were of the same model, while the dates on which they were sold are shown in complainants' own proofs. Upon their filed brief it is admitted that the Delemater, Thorne, Francke, and Hoadley engines (so called on the argument, after the names of the respective purchasers) were sold and used prior to February 19, 1878. The evidence points strongly to the conclusion that a fifth engine, the Appleton, was also sold and used before that date. The complainants seek, however, to avoid this prior use by showing that it was an experimental one only, within the principal enunciation by the supreme court in *Elizabeth v. Pavement Co.*, 97 U. S. 126.

An extraordinary mass of testimony has been introduced in support of this contention. It has been shown that it was very desirable that the engine should be made the subject of experiment, not only in the shops, but also in private houses, where it might be operated by unskilled hands; that the workmen and employes of the manufacturer "believed" or "supposed" or "considered" that the use was experimental; that some of the persons to whom the engines were sold were personal friends of the inventor, or of the owners

of the patent; that frequent visits were made to the engines by their employes, and the results of such visits reported to the makers; that the engines were repaired by them from time to time, sometimes without charge; that improvements suggested by watching the engines in operation were made; that, although a substantial price was paid for each of the engines so sold, it was not high enough to be remunerative of the cost of production; that no effort was made to press the sale of the engines, and that they were not exhibited, price-listed, or advertised. All this evidence would be valuable and persuasive if it were coupled with even a scintilla of proof that the sales of the machines were restricted. But not only is the case barren of evidence in support of that proposition, but the converse is shown by direct and positive proof, certainly in one instance, probably in others; and a single instance is quite sufficient to make out the defense. *Egbert v. Lippmann*, 104 U. S. 333.

A mechanical invention can be put to use only when embodied in a concrete machine, and it is as much embodied in one such machine as in a thousand. Whether, when thus put to use, it is put "in public use," is a fact to be determined, not by the number of machines in which it is so embodied, nor by the length of time they are run, but by the extent of use to which such inventor allows such embodiment to be put. He may retain his control over the machine which embodies his invention, and reserve to himself the right to select the individuals who shall use it, or secure to himself right of access to it for the purpose of conducting his experiments; but when he parts with such machine unreservedly, so that thenceforth the right to take, and hold, and use, and sell it is free to the public, that machine, and the invention it embodies, is by him put in public use. And he does so part with it when he sells it under a contract which not only allows the individual purchaser to use it, but leaves him free to transfer machine and use to whom he will. Whether the purchaser choose to resell it or not is immaterial; he has the power to do so, and that is enough. If the inventor wishes to keep control of the machine which embodies his invention, to secure his own access to it for examination, and to keep it in the friendly hands of those who, he intends, shall aid him by practical experiment, he must make such restrictions a part of the contract of sale, and the court cannot assume them to exist in the absence of proof.

It will not be necessary, therefore, to refer to more than the Hoadley engine. Mr. Hoadley, in the spring of 1877, bought a house, No. 11 West Forty-Ninth street, and immediately began to overhaul the plumbing, preparatory to occupying it. A pump was needed to fill a tank in the upper story. He objected to a hand pump, because the working of it took up so much of the coachman's time. The master plumber, who had the house in charge, called his attention to "these hot-air engines." One of them had been placed in Mr. Thorne's house October, 1875, and another, February, 1877, in Mr. Francke's house, No. 2 West Fiftieth, nearly in rear of Mr. Hoadley's. To this last-named engine his attention was called by the plumber. Hoadley did not go to Francke's house, however,

but to Delemater's office and salesroom, where, upon stating his business, the engine was shown and explained, and its advantages described. Either at that time or upon a subsequent visit he concluded the purchase of one of the engines. He puts the date some time in June, 1877, but cannot give it precisely, which is immaterial, as appellants concede it was sold and put up in his house prior to October, 1877. He testified that it was not a gift; that he purchased it in the ordinary course of business, and paid the price asked, after an ineffectual effort to secure some abatement; that the price was, as he remembered, \$250, but, not having receipt or check at hand, he could not state positively as to that. Certainly he paid a substantial sum for it, and appellants do not contend that less than \$200 was so paid; that being about the price paid for the other engines sold within the period in question. The record is barren of any evidence to show that this was a restricted sale. The circumstances that the engine was frequently visited by employees of the complainants "to see if it was all right, and make a kind of study of it, to see if any little thing could be improved on," that besides repairs which were made by an outside party there were some which were made by complainants; that of these repairs so made by complainants some were charged against Hoadley, and collected from him, some charged against him, and not paid, because he thought the amount excessive, and some made without charge,—are in no way inconsistent with an unrestricted sale. There is not a scintilla of evidence to show that Hoadley was not, as any ordinary purchaser of a machine would be, entitled to exclude complainants from any access to his premises, to have repairs made by whom he chose, to carry the machine wherever he pleased, to use it as he saw fit, and sell it to any one. One of complainants' firm testified generally, as to all the engines sold prior to 1880, that "they regarded the money paid for them as a sort of trust, and that, if the engines had not been of some practical value to the parties, the money would have been refunded." And in 1884, the Hoadley engine being out of repair, they sold him a new one for \$260,—\$100 in cash, and \$160 as allowance for the old machine, which they took back. But there is no evidence that any agreement to take back the engine was embodied in the contract of sale, nor even that there was any guaranty of its efficiency. The very phraseology of the witness above quoted is persuasive to the conclusion that the contract of sale was as Hoadley testified, "in the ordinary course of business," the complainants' intentions in case the machine proved a failure being locked up in their own minds, and not communicated to the purchaser.

The opinions of the supreme court in *Fruit Jar Co. v. Wright*, 94 U. S. 92; *Egbert v. Lippmann*, 104 U. S. 333; *Hall v. MacNeale*, 107 U. S. 90, 2 Sup. Ct. Rep. 73; and *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122,—abundantly sustain the proposition that proof of a single unrestricted sale is sufficient to establish the defense of prior public use; and the case at bar is plainly distinguishable from *Elizabeth v. Pavement Co.*, 97 U. S. 126. There the inventor obtained permission from the corporation owner of a
v.58f.no.2—27

public toll road, in which he was a stockholder and treasurer, to lay a section of his pavement, 75 feet in length, on the road adjoining the toll house, where he could observe the effect upon it of public travel. The corporation did not buy his pavement, nor acquire any right to resell it to others, nor even to put it to use elsewhere than where he laid it.

That the invention embodied in the Hoadley engine was in public use for more than two years prior to the inventor's application, within the meaning of section 4886, Rev. St. U. S., is established by the proof.

Complainants contend, however, that in two respects that engine was patentably distinguishable from the machine claimed in the patent, claims 2 and 3.

Claim 2 is as follows:

"(2) The combination of the working pistons, A, B, beam, C, connecting rod, D, crank, E, connecting rod, F, bell-crank lever, G, and rods or yoke, H, all substantially as described."

The differences are in the "rods or yoke, H." Briefly stated, these rods are used to connect a crank lever, which plays outside of the cylinder, and near its lower end, with a piston called the "exchange piston," which plays vertically above the cylinder. In the engines sold prior to February, 1878, these rods were straight, and at a sufficient height above the cylinder to allow of free motion. They were connected by a straight horizontal crosspiece, to the center of which the head of the exchange piston was fastened. In the drawings annexed to the patent these rods are curved; that is, for so much of their length as is parallel with the cylinder they are straight, but at a distance above the cylinder head sufficient to clear the rest of the mechanism they are curved inwardly till they meet, forming an arch, to the center of which the exchange piston head is fastened. It is insisted that this latter construction is an improvement over the straight crosspiece, because in the latter form there is developed an "axial twist" when the machine is in action. The evidence supports the contention that the change was a beneficial one, but the difficulty with the complainants' case is that the new construction was not regarded either in the specification or the claim as a patentable one. It is true that the rods are shown arched in the drawing, and once in the specification they are referred to as "arched side rods," forming an "arched yoke." But nowhere in the specification is there pointed out any advantage arising from their shape. There is no suggestion that anything depends upon their forming an arched yoke instead of a straight one, and the claim itself does not even refer to them as "the arched rods or yoke, H." A mere reference in a claim to a letter on the drawing does not of itself limit the claim to the precise geometrical shape shown in the drawing, (*Reed v. Chase*, 25 Fed. Rep. 100,) even though the description of the drawing in the specification refers to the part thus lettered by an adjective appropriate to the form shown in the drawing, unless that particular form is pointed out in the specification, or was known by the state of the art to be the particular improvement the inventor claimed. Claim 2, as phrased, covered not

only arched rods and arched yoke, but also the old and well-known equivalent of such a device for moving pistons, namely, the straight rods and crosspiece of the Hoadley type of engine.

Claim 3 is as follows:

"(3) The combination with the working cylinder and piston of an air engine, and a beam with which the said piston is connected, of a pump, having its piston or plunger connected with said beam at a greater distance from the center of oscillation thereof than the connection of the working piston, substantially as and for the purpose herein described."

The purpose described in the specification is to "obtain the well-understood advantage of a long stroke for the pump which is further from the center of oscillation, and a short stroke of the working piston of the engine," which is nearer to such center of oscillation. In the patent the piston of the pump is connected directly with the beam, which is prolonged in a straight line from the center of oscillation; and, in order that it may work both pistons, the pump is located, so to speak, beyond the cylinder, both pistons being in the same vertical plane in which the beam moves. In the machines of the Hoadley type the piston of the pump is not attached directly to the beam, but to an arm which is fixed rigidly to the same axle as is the beam; lies horizontally in the same plane as the beam, and moves with it, rotating within precisely the same angle as the beam. Mechanically the structure is the same as if the beam were a wide one, the working piston attached to its medial line, the piston of the pump to its outer edge. In this variety of structure, of course, the two pistons are no longer in the same plane as in the other one, and in the testimony and briefs the pump is generally referred to as being "at the side" of the cylinder. While in one way this statement is true, it is misleading; it would seem to indicate that the pump was located 90°, measured on the cylinder, from its location as shown in the patent. As matter of fact it falls substantially short of that distance, and in consequence its piston is located at a greater distance from the center of oscillation than is the working piston, thus securing the very advantage which the patent described,—a difference in the length of stroke of the two pistons. That the piston in one case is fastened directly to the main beam, in the other to the arm, is immaterial; the methods of attachment are mechanical equivalents. The difference in length of stroke is not so great in the one form as in the other, but it exists, and is produced in the same way, viz. by arranging the two pistons at different distances from the center of oscillation. Both varieties of model are within the claim of the patent.

We concur, therefore, with the circuit judge in the conclusion that the straight rods and the beam with arm attachment are equivalents, respectively, of the arched rods and the straight beam; that the Hoadley engine embodied the invention of the patent, and, being in public use more than two years prior to the application, invalidated the patent.

The decree of the circuit court dismissing the bill is affirmed, with costs.

PACIFIC CABLE RY. CO. v. BUTTE CITY ST. RY. CO.

(Circuit Court, D. Montana. November 6, 1893.)

No. 19.

1. PATENTS FOR INVENTIONS—EQUIVALENTS—CABLE CAR TURNABLES.

Two cable car turntables, having slots underneath the surface platform wide enough at the ends to permit the table to turn a quarter round without interfering with the cable, are equivalent structures, when each is composed of a surface platform comprising two semicircular parts, with a slot between for the passage of the griper shank, such parts resting upon supports, which, in the one case, are attached below to a secondary table supported by a vertical spindle stepped in a bearing at the bottom of the pit, and, in the other case, to end timbers running crosswise beneath the cable, and resting upon semicircular rails, which travel upon pulleys journaled into the bottom of the pit.

2. SAME—METHOD OF OPERATION—DESCRIPTION

A patent for turntables for transferring cable cars from one track to the other, in which the only method of operation described requires the use of duplicate tables operated simultaneously, does not cover the use of a single table for that purpose, although the claim may be sufficient, in itself, to include it, and the single table is an equivalent structure to each table of the patent.

3. SAME—PRIORITY—DATE OF APPLICATIONS—EVIDENCE.

A patentee, who, by evidence, carries back the date of his invention beyond the date of the application for a rival patent, which was first issued, will be adjudged the first inventor, when there is no evidence to carry back the rival invention.

4. SAME—PARTICULAR PATENTS.

Letters patent No. 181,817, issued September 5, 1876, to Joseph Britton, for cable railway turntables for transferring cars from one track to the other, is limited to the use of duplicate tables, and does not cover the use of a single table to accomplish the same function.

In Equity. Suit by the Pacific Cable Railway Company against the Butte City Street Railway Company for infringement of a patent. Bill dismissed.

Wm. F. Booth and C. P. Drennen, for complainant.

Geo. H. Knight, F. T. McBride, and Geo. Haldorn, for defendant.

KNOWLES, District Judge. In this case, plaintiff brings suit in equity against defendant, asking that it be enjoined from using a certain turntable in connection with its Butte City Street Railway, Mont., and for an accounting of profits derived from such use. The ground of plaintiff's claim is that it owns a patent for this turntable, dated September 5, 1876, the same being numbered 181,817. The patent was issued to one Joseph Britton, and, it is alleged, assigned to plaintiff by him. It is alleged in the bill that defendant is infringing the following two claims in said patent:

Claim 2: "A turntable provided with a slot and passage or chamber extending across it above the point of support of said table, and below its surface, where said chamber is made wide enough at each end to permit a propelling rope or cable to pass through it, and at the same time permit the table to make a quarter rotation without interfering with the rope or cable, substantially as and for the purpose set forth."

Claim 3: "A turntable consisting of the two upper sections, B, B, con-

nected with secondary tables or platforms, C, C, on alternate sides of the center, so as to leave a free space beneath the opposite halves of the sections, B, B, substantially as and for the purposes set forth."

If the patent of plaintiff can be so construed as to apply to a single turntable, it would appear that defendant had infringed the same. The turntable used by defendant is constructed, I think, substantially as one of the tables, taken alone, specified in plaintiff's patent. It has a surface composed of two semicircular platforms. Between them is a slot, along which the gripping device of the cable car can pass. Beneath this surface, the cable passes to a point beyond the table, to a sheave, around which it passes. In defendant's table the front and back timbers are placed a sufficient distance below the surface of the car as to allow the cable to pass over them. These timbers are connected to the surface platforms by means of columns; on the sides of the tables are timbers attached to the surface thereof, and extending latterly between the columns, and attached thereto. Below the timbers are semicircular rails or timbers attached thereto, and these travel upon pulleys journaled into the bottom of the pit in which the turntable is placed. Plaintiff's table is thus described in the specifications in the patent:

"In constructing these tables, I make the upper portion of each in two sections, B, B, and these sections I connect with a secondary table or platform, C, which is supported at a short distance below by a vertical spindle or shaft, d, which steps in a suitable bearing, e, at the bottom of the excavation, so that it can rotate horizontally. The table sections, B, are made in the form of a semicircle, and are placed at a short distance apart, so that when they are connected with the platform, C, on the same plane, they form a circular table, with a slot or opening, f, between them. The two sections of each turntable are connected with the platform, C, beneath, by a connection, G, upon opposite sides of the center, leaving a free or open space beneath the opposite half of each section."

It appears to me that the end timbers below the surface in defendant's table occupy the place and perform the functions of the lower platform, C, C, in plaintiff's table, and that the pulleys journaled into the bottom of the pit, in connection with the semicircular rails, in defendant's table, perform the same function as the spindle in plaintiff's table.

The question then arises, are they mechanical equivalents for the devices in plaintiff's patent? An "equivalent" is defined in Walker on Patents (sections 352-354) as a device "which performs the same function as another," and "in substantially the same way as by the thing of which it is alleged to be an equivalent." In the case of *Imhaeuser v. Buerk*, 101 U. S. 656, the supreme court says of equivalents:

"Hence, it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination, is an infringer, if the substitute performs the same function as the ingredient for which it is substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use."

Again, in the case of *Meter Co. v. Desper*, Id. 335, the supreme court says:

"It is equally well known that if any of the parts is only formally omitted, and is supplied by a mechanical equivalent performing the same office, and producing the same result, the patent is infringed."

It will be seen from this that, in such a mechanical device as the tables under consideration, an equivalent is not the same thing, but something that performs the same function. In some cases, a spring catch has been held the equivalent of a catch that operates by means of a gravity weight. In some other cases, a lever has been termed the equivalent of a screw. Walk. Pat. § 353.

In the case of defendant's device, the end timbers, as I have called them, hold, by their connection with the connecting columns, the two semicircles together, and constitute them one machine, the same as the lower platform in plaintiff's patent, by means of the connecting columns attached thereto, connecting it with the semicircle sections at the surface, constitute that one table or machine. The pulleys journaled into the bottom of the pit, and the curved rails, perform the same function as the spindle in plaintiff's patent. The table rests upon them, and is turned around thereon.

In Walker on Patents, there is a contention as to whether the equivalents should have been known at the time of the application for a patent, or not. There is no point made upon this question, in this case, and, considering the nature of the equivalents, I don't see how it could arise.

It is claimed, however, that plaintiff's patent is void for the reason that it was covered by a prior invention made by one William Eppelsheimer, for which he received a patent before the date of plaintiff's patent, and for which he made an application on June 28, 1875. It would appear, however, from undisputed evidence, that Britton invented his patented device, and constructed tables embracing the same, which was put into practical use on the Clay Street Hill Railway, in San Francisco, Cal., prior to the application of Eppelsheimer for his patent. We cannot go back of the date of the application of Eppelsheimer, in this case, to determine when he invented his device. There is no evidence upon this point. I, therefore, must find that Britton was the prior inventor of the table in controversy, and, although the Eppelsheimer patent was prior in date to plaintiff's, it does not supersede or avoid the same.

From this discussion, I am led to the point where I must construe plaintiff's patent, and determine what it is entitled to thereunder. Section 4888 of the Revised Statutes provides that the applicant for a patent "shall file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, and concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected to make, construct, compound, and use the same; and in the case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions."

In sustaining a claim in a patent, the description should always be consulted, and it should be construed in the light of the description. Walk. Pat. § 182; New American File Co. v. Nicholson File Co., 31 Fed. Rep. 289; Lull v. Clark, 13 Fed. Rep. 461. In the beginning of the description of Britton's device, in his patent, Britton, says:

"My invention relates to improvements in turntables, such as are used for transferring cars from one railway track to another, where an endless wire rope is used for propelling the cars along the track or tracks. The only instance, that I am aware of, where duplicate turntables have been used for this purpose, is in the Clay Street Hill Railway, in San Francisco, Cal."

Of these duplicate tables, again, he says:

"These are to be connected by gearing so that both platforms will be rotated simultaneously by power applied to rotate either one of them."

The manner in which they are to be used is thus described:

"When the car has been drawn upon the table, and the rope released from the griper, it is also evident that the table can be turned one-quarter of the way around without disturbing the rope, as the free space under the opposite ends of the sections will allow the table to turn that far without interfering with it. It is further evident that, when both tables are given a quarter turn the slots and tracks, which were before parallel, will be brought in line with each other, so that the car can pass from one table to the other without raising the griper from the tube, as its shank will move in the slots, thus avoiding the necessity of elevating the gripping device during the transfer. The car can then be run upon the opposite track by turning the table upon which it has been transferred until its track is in line with the main track."

It will be observed in all this that the only description in the patent given as to the way these tables were to be used was in connection with both tables or duplicate tables. Nowhere in the description is it pointed out how one of these tables could be used for the purpose of transferring a car from one track to another. In a letter written to Britton by H. H. Bates, an examiner of applications for patents in the United States patent office, dated July 17, 1886, and to whom Britton's application for a patent was referred, he says, "The function here being secured, not by one turntable, but by a specific combination of two turntables, which turn simultaneously." This letter is part of what is termed the "file wrapper," in evidence in this case. In turning to Britton's evidence, it will be found that two tables were used in the Clay Street Hill Railway, and to this he refers in his application as being the only place where his invention had been used.

In turning to the statute above quoted, it will be seen that the manner of using an invention must be given in the description in such full, clear, and concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to use the same. While the claim may be broad enough, there is no description of how one table is to be used, except in connection with the other. In the claims, after describing a table, it is said it is substantially as and for the purposes set forth. This must refer to the description, and there it is set forth that the table constructed and de-

scribed is to be used in duplicate. If a claim is not properly described in a patent, the claim is of no validity. *Gunn v. Savage*, 30 Fed. Rep. 366.

For the reason that the patent contains no description of how one turntable is to be used by itself, for transferring a car from one track to the other, I find for the defendant; and it is hereby ordered that the bill be dismissed, as to it, and it have judgment for its costs herein expended.

JOHNSON v. BAUGH & SONS CO.

(District Court, E. D. Pennsylvania. November 14, 1893.)

No. 35.

1. SHIPPING—WHARFAGE—CHARTER PARTY—CONSTRUCTION.

A stipulation in a charter party that cargoes are "to be brought to and taken from alongside, at charterer's risk and expense, and, should there be any lighterage or wharfage, this to be also for charterer's account," makes the charterer, or the consignee, (who stands in his place,) responsible for wharfage in unloading, as well as in loading.

2. SAME—ADMISSION OF MASTER—WHAT CONSTITUTES.

Where, under the proper construction of a charter party, the consignee is liable for wharfage, the fact that the master, immediately after unloading, affixes his name to the wharfage bill, is not an admission of liability as between himself and the consignee, when he denies liability at the time, and it appears that such signature is necessary to a settlement between the consignee and charterer, as a certification that the wharfage charge is correct in amount.

3. SETTLEMENT—PAYMENT OF ADMITTED SUM TO CLERK.

One who pays money admitted to be due to the creditor's clerk, knowing that the clerk is without authority to accept the same as settlement in full, is not thereby freed from liability for a further disputed amount.

In Admiralty. Libel by Nicholas O. Johnson, master of the bark Barranca, against the Baugh & Sons Company to recover freight. Decree for complainant.

John Q. Lane, for libelant.

J. Warren Coulston and Alfred Driver, for respondent.

BUTLER, District Judge. The respondent was consignee of a cargo carried by libelant to Philadelphia. The suit is for balance of freight—\$125. The defense is payment. The freight, as per charter, was \$2,418.56, of which \$2,293.56 were paid—\$125 being retained on account of wharfage, and \$97.80, for services furnished the vessel. The latter sum is not in dispute. If the charter does not exempt libelant from charges for wharfage the retention on that account was proper. In my judgment it does exempt him. Its terms, in this respect, are: "The cargoes to be brought to and taken from alongside, at charterer's risk and expense, and, should there be any lighterage or wharfage this to be also for charterer's account;" that is to say, the charterer will bring the merchandise to and take it from the vessel's side. The argument intended to show that this language applies only to *loading* is far from satis-

factory. The terms apply as distinctly to unloading as to loading. It is common language in charters, and must receive the usual interpretation. If a charterer wishes to avoid the consequences he must not use the language. The vessel was entitled to necessary wharfage unless the consignee chose to receive the cargo in lighters. The latter method would be more expensive, and he therefore ordered her into dock. He is under the same obligation for wharfage as he is for freight. He stands in the charterer's place respecting both. His bill of lading is drawn subject to the charter, and both instruments were delivered to him at the same time, before the cargo arrived. He has the same remedy against the charterer for repayment of the one as for the other.

The respondent further contends, however, that the libelant admitted responsibility for the wharfage, and paid it. If this is so the settlement should stand. The proofs do not, however, show it to be so. They show that the master wrote his name on the bill directly after unloading; but this signified no more than that the wharfage charged was correct in amount. He distinctly denied liability to pay it, at the time. The acknowledgment was doubtless necessary to a settlement between respondent and the charterer. He subsequently went in company with Wesenberg & Co.'s clerk to collect the freight, and when payment was declined (without the deduction claimed) he again denied liability and left. The clerk afterwards called, accepted a check for \$2,293.56, receipted for the freight, and received a receipted bill for the wharfage, saying, in effect, at the same time, (and it is immaterial whether before or after the check was delivered,) that the master would not be satisfied, but would hold the respondent liable for the balance retained. He had no authority to do more than receive and receipt for the check—which was for an amount admitted to be due. The receipt for wharfage did not reach libelant. If the respondent had supposed the clerk's authority extended further, and delivered the check in consequence, the fact would be unimportant. It was his plain duty to pay this sum, in any event. He admitted it to be due, and could not properly retain it to coerce payment of his bill, nor for any other purpose. If misled he was not misled to his disadvantage, and could not complain, therefore, even if libelant was responsible for the clerk's conduct. But he was not misled. The libelant's repeated denial of liability for wharfage before, and the clerk's declaration at the time, that the master would hold him liable for the money retained, precluded misunderstanding.

The libel must be sustained, and a decree be entered accordingly.

THE BARGES 2 AND 4.

McMULLEN v. BARGES 2 AND 4.

(District Court, S. D. New York. June 9, 1893.)

LIENS FOR REPAIRS—NOTES—APPROPRIATION OF PAYMENTS.

Where several notes have been given for different bills of repairs, and some of the notes paid in full, and others in part, the appropriation of

the notes upon the bills should be made in their chronological order, in the absence of any other proof of intention, and the payments upon the notes also applied in the same way.

In Admiralty. Libels on domestic liens for repairs. Decrees for libellant.

Hyland & Zabriskie, for libellant.

W. J. Weldon, for claimants.

BROWN, District Judge. I cannot find in this case any evidence that the libellant, after filing his specifications of lien, by accepting the four notes of September 10th "in settlement," intended to waive the security which the statute gave him upon his specifications of lien filed in July previous. There are no special circumstances showing any such intention; and I shall follow in that regard the rulings in the case of *The Alabama*, 22 Fed. Rep. 449; *The D. B. Steelman*, 48 Fed. Rep. 580, and *The John C. Fisher*, 1 C. C. A. 624, 50 Fed. Rep. 703, and other cases.

A question arises, however, on the application of payments. On July 13, 1892, specifications were filed for claims to the amount of \$655.40 for repairs on barges 2 and 4 completed within 30 days prior to that date. On August 3d work amounting to \$9 was done for barges 2 and 3 belonging to the same owner without any separate designation, and on August 13th work amounting to \$82.35 was done on No. 3. For neither of the last two items was any specification of lien filed. On September 10, 1892, the libellant received from the owner four notes of that date "in settlement of bills for repairs on barges 2, 3, and 4." Three of the notes were for \$186.69, maturing respectively 1, 2, and 3 months from their dates; and the fourth for \$186.68 maturing four months from the same date. The two notes maturing first were paid in full. \$86.69 was paid on the 3-months note, and the balance of \$100 due on that note was included in two subsequent notes embracing other work; while the fourth note remains wholly unpaid.

For the claimants it is contended that as the four notes of September 10th embraced \$91.35 for which no lien was filed, the different debts were so merged and consolidated that the different claims can no longer be separated, nor any specific lien claimed upon either of the barges, because it is impossible to determine how much is due from either. *The Klersage*, 2 Curt. 421; *Read v. Hull* of a New Brig, 1 Story, 250; *The Pacific*, 1 Blatchf. 569, 573.

In the present case, however, there was no general contract covering the various boats, except as to the single item of nine dollars, nor any such confusion or general credit for work on different boats under one charge as appeared in the cases cited. Nor is there any difficulty, as it seems to me, in making the application of the notes, or of the payments made upon the notes, in such a manner as to accord with the presumed intention of the parties. The notes of 1, 2, 3, and 4 months respectively, and the amounts paid upon those notes, should be applied as payments of cash would have been applied, had there been no notes given; namely, chronologically. This

accords with the natural course of dealing; and the evidence does not afford the least reason to suppose that the parties had any different intention. The *A. R. Dunlap*, 1 Low. 350, 361, 362; The *Mary K. Campbell*, 40 Fed. Rep. 906. The repairs done in August amounting to \$91.35 constitute the last items; and they must, therefore, be held to be embraced in the note at four months which matured last and is still wholly unpaid. The sums paid upon the other three notes must, in like manner, be applied chronologically on the earlier items which are covered by the specifications filed in July. After applying the amount of money thus paid, namely, \$460.07 upon the July specifications, which amounted to \$655.40, there remains a balance of liens unpaid amounting to \$195.33, for which the libellant is entitled to decrees against the two barges, to be apportioned as the bills indicate, with interest from the maturity of the notes.

LA NORMANDIE.

LA COMPAGNIE GENERALE TRANSATLANTIQUE v. O'SULLIVAN
et al., (two cases.)

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

1. COLLISION—FOG—EXCESSIVE SPEED.

A speed of over 10 knots an hour, in a dense fog, near the entrance to New York harbor, is excessive, and renders the steamer liable for a collision, unless it is affirmatively shown that such speed did not contribute to the collision. 43 Fed. Rep. 151, affirmed.

2. SAME—SUFFICIENCY OF CREW.

If the number of officers and crew of a vessel on deck when a collision is impending is sufficient to perform all the duties required of her, it is immaterial that more are not there.

3. SAME—EVIDENCE—FINDINGS—APPEAL.

The finding of the trial court, on the testimony of the officers and crew of a vessel, that she was sounding her fog horn and showing lights at the time of an impending collision, will not be reversed on appeal merely because the officers of the other colliding vessel, however alert, failed to see or hear such signals through the dense fog.

4. SAME—STEAM AND SAIL—SAIL HOLDING COURSE.

A sailing vessel is under no duty to disregard the rule requiring her to hold her course merely because, being in a dense fog, the bearing of an approaching steamer, as ascertained by her fog signals, does not perceptibly change.

5. SAME—DAMAGES—TOTAL LOSS.

Where a New York harbor pilot boat is sunk by a collision which cuts her half through on the port bow, the utter refusal of one wrecking company to attempt raising her, and of another to do so except for \$3,000 contingent on success, without regard to value when raised, is sufficient to warrant a finding that she is a total loss.

6. SAME—VALUE—HOW DETERMINED.

Where a vessel sunk in a collision is of a kind which is seldom bought and sold, so as to establish a market value, as in the case of harbor pilot boats, which are of little use for other purposes, its value may be established by evidence as to original cost, age, probable future life, and the like.

7. ADMIRALTY—DISCRETION OF COURT—TWO LIBELS FOR SAME CAUSE.

It is within the discretion of an admiralty court to entertain two libels for the same cause of action,—one in personam, and the other in rem,—where it renders a decree in favor of libelants in the former, and suspends the entry of a decree in the latter until it is ascertained whether it will be necessary to recur to the security given in the suit in rem.

8. COLLISION—PILOT BOAT—STRANGER ON BOARD.

A vessel which, through its own sole fault, collides with a pilot boat, is liable for consequent loss of property belonging to a person on board the latter as a passenger for his own pleasure, free of charge.

Appeals from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel in personam by James O'Sullivan and others against La Compagnie Generale Transatlantique, owner of the steamship La Normandie, for the loss of libelants' pilot boat, Charlotte Webb, by collision with the steamship; also, libel in rem by the same libelants and one Green against the steamship for the same collision. The suits were tried together in the district court, and a decree for libelants was rendered in the suit in personam, while in the suit in rem a decree for libelant Green only was rendered, and the entry of any decree in favor of the other libelants was suspended until the further order of the court. See 40 Fed. Rep. 590; 43 Fed. Rep. 151. Respondent appealed to the circuit court, which affirmed, pro forma, the decrees of the district court; and respondent again appeals to this court. Affirmed.

Mr. Govin, for appellant.

Mr. Ledyard, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The first of these causes is an action brought by the owners of the pilot boat Charlotte Webb, and by her crew, against the owner of the steamship La Normandie, in personam, for loss of said pilot boat, and of their personal effects thereon, which were sunk in a collision between the Charlotte Webb and the said steamship about eight miles east of Sandy Hook light-ship. The district court entered a decree for the total sum, including costs, of \$15,246.32, against the respondent.

La Normandie is one of a regular line of steamers plying between New York and Havre, and is owned by La Compagnie Generale Transatlantique, a French corporation. She is an iron steamship of the first class, 459.3 feet long, and about 9,000 tons displacement. Her average speed, when loaded, is about 16 knots per hour. About midnight of the 18th of May, 1889, she was proceeding on a voyage from New York to Havre, having left a temporary anchorage a little outside of Sandy Hook, where she had stopped on account of fog, at 10 P. M. Her course was east by south. Her lights were properly set and burning. Her steam siren was sounded regularly. The captain and first lieutenant were on the bridge. She had two lookouts forward on the bow, another just abaft of them, and a

fourth aloft on the fore yard. There was a dense fog, and the speed of *La Normandie*, according to her own testimony, was between 10 and 11 knots per hour. The district judge found it "not much less than twelve knots." She was navigating in the track of vessels inward and outward bound to and from the port of New York, and but a few miles from its entrance; a place where, in view of the magnitude of that commerce, there is always danger of meeting or overtaking other craft. There was a light wind from about the southeast, blowing a two-knot breeze. At midnight, those engaged in the navigation of the steamer heard a sharp explosion of a bomb, accompanied by rapidly successive blasts of a fog horn, proceeding from right ahead. When he first heard this alarm, the captain of *La Normandie* ordered the engines slowed. Afterwards, upon hearing the fog horn more distinctly, and nearer, he had the engines put full speed astern. On hearing the first signal from the pilot boat, the course of the steamer was changed to starboard. Before her headway could be fully arrested, however, she collided with the *Charlotte Webb* at about right angles, striking her in the forward rigging on the port side, from the effects of which she almost immediately sank, two of the persons on board of her being drowned.

The district judge held that the steamer was in fault (1) for excessive speed; and (2) for not reversing immediately on hearing the sounds ahead of her,—to both of which findings, appellant assigns error. Discussion of the second of these assignments of error is unnecessary, as the undisputed facts of the case abundantly sustain the finding that the speed of the steamer—over 10 knots per hour through a dense fog—was excessive. However individual opinions may differ, whatever may be the judgment of experts, however foreign tribunals may have decided similar cases, this question of high speed in a fog is no longer an open one in the federal courts, when the steamer is navigating in a place where the presence of other vessels may reasonably be expected. *The Pennsylvania*, 19 Wall. 125; *The Bolivia*, 1 C. C. A. 221, 49 Fed. Rep. 169. The steamer failed affirmatively to show that her high rate of speed in no way contributed to the collision, and the district judge rightly held her in fault.

The appellant contends that the pilot boat was in fault because (1) she was sailing shorthanded in a dangerous place; (2) she did not have a sufficient lookout; nor (3) sound a fog horn as required by law; nor (4) carry and exhibit the lights required by law; and (5) did not, after discovering the steamer, take any precaution to avoid the collision.

A great deal of testimony was taken in the district court; most of the witnesses, including the more important ones, being examined in court. The district judge has elaborately discussed that testimony, and, as no new evidence was introduced in this court, that branch of the case may be briefly disposed of.

When the first whistle of the steamer was heard, there were but two persons on the deck of the *Charlotte Webb*,—Capt. Scott, who was at the wheel, and in charge of the watch, and Olsen, who was

the lookout, and blowing the fog horn. But there can be little doubt, upon the evidence, that the first whistle was heard 15 minutes or more before collision, and Scott testifies that, after six or eight of these signals were heard, (they were concededly sounded at intervals of about a minute,) Pilot Hammer was called up, and he called up Pilot Hines. Upon hearing the steamer's whistle, the duty of the sailing vessel was to hold her course, to give her own signals, and to keep a careful lookout. If the number of her officers and crew on deck and available were sufficient to perform all the duties required of her, it is immaterial that more of them were not there. The main conflict of evidence in the case is as to whether or not the signals which the law requires were given by the pilot boat. The respondent's witnesses testify that no signal was seen or heard until just a few minutes before *La Normandie* actually struck her. But the testimony of the libelants is direct, positive, and circumstantial that the fog-horn signals were sounded,—the pilot boat replying regularly to the steamer's whistles,—and that, besides the bomb whose explosion was heard on the steamer, another bomb was fired from one to three minutes earlier; that after each bomb a flash light was shown on the port side; that the pilot boat used a mechanical fog horn; and that the bearing of the steamer was correctly noted, and her approach through the fog carefully watched for. Upon this state of the proof, the conclusions of the trial judge, before whom the more important witnesses were examined, are not to be set aside because those in charge of the navigation of the steamer, however carefully they may have been discharging their duties, heard no signal and saw no light, especially when the existence of a dense fog may well have operated to deaden the sound and obscure the light. Nor are we satisfied that the pilot boat is to be condemned because, after hearing or after sighting the steamer, she did not change her own course. The twenty-third rule required her to keep her course; and although there are cases when the navigator of a sailing vessel meeting a steamer is warranted in departing from that rule, and when good seamanship requires him to do so to avoid immediate danger, they are much clearer ones than this, where the location of the steamer was to be made out by the bearing of her signals through the fog, and where, although that bearing had not perceptibly changed, no one could tell but what the very moment chosen by the schooner for a change of course would be the same moment when the steamer, appreciating at last the presence of the schooner, would change her own; and when still less could any one foresee whether such change by the steamer would be to port or to starboard. We are of opinion, therefore, that the steamer, alone, was in fault for the collision.

The appellant further contends that the commissioner erred in reporting, and the district court in confirming the report, that the pilot boat was a total loss, assessing her value at \$11,500. The vessel was sunk in the Atlantic ocean, some seven miles east by south of Sandy Hook light-ship, in 13 fathoms of water, after a blow by the steamer's bow which cut into her port side, and pene-

trated about halfway through her. One wrecking company, to whom the managing owner applied, declined to undertake to raise her. Another one refused to do so for any percentage of her value when raised, but offered to make the effort for the sum of \$3,000, contingent upon success, and without regard to the value of the vessel as saved. We do not find in the evidence sufficient to differentiate the case from *Pratt v. The Havilah*, (2d Circuit,) 1 U. S. App. 138, 1 C. C. A. 519, 50 Fed. Rep. 331. The vessel being a total loss, the owners were entitled to her value at the time of the destruction.

Where purchases and sales of property are sufficiently frequent to give a market value, the ascertainment of that market value is the usual and most convenient way of determining the actual value. In the case at bar, we are of opinion, however, that the evidence entirely warrants the conclusion of the commissioner that pilot boats, such as the *Charlotte Webb*, are very rarely sold and very rarely change hands, unless shipwrecked or stranded; such vessels being, as one of the steamer's witnesses testified, "really not serviceable for any purpose but pilot boats, whereas most other vessels can be utilized for other purposes." In such cases there is no hard and fast rule prescribing the method in which the actual value shall be computed. It is always a difficult question to decide, and in the case at bar the conclusion reached by the commissioner, after taking a great deal of testimony as to the cost of such a vessel, her adaptability for the service in which she was employed, her condition at the time of the collision, the value of her equipment, her age, and probable future of useful life, viz. that she was worth \$11,500 on the night of the collision, seems to us reasonable.

The second of these causes is a proceeding in rem brought against *La Normandie* by the parties libellant in the first suit, and an additional libellant, one Green, who was on the *Charlotte Webb*, not as one of the ship's company, nor as a passenger for hire, but, upon the invitation of one of the owners, as a voyager for pleasure. The circumstances under which this second proceeding was brought are these: The collision happened while *La Normandie* was outward bound. Promptly thereafter the libellants proceeded against her owners, who were found here, and duly served. Inasmuch as, in that suit, they were unable to obtain any special security for the amount of their possible recovery, they subsequently, when *La Normandie* returned to this port, filed a libel in rem against her, (in which libel, Green, who was not a party to the first proceeding, joined,) and thus compelled the giving of security. The appellant objected to the maintenance of two suits for the same cause of action, moved for a stay of proceedings in the suit in personam, and filed exceptions to the libel in the suit in rem. The district court overruled all such objections and exceptions in an opinion which is reported 40 Fed. Rep. 590. We do not deem it necessary to discuss the questions thus raised. Both suits were pending before the same judge in the same court. He tried them together, and, upon completion of the proof, entered a decree in the suit in personam in favor of the libellants in that suit, as above indicated, and a decree

in the suit in rem in favor of Green, only, for \$381.60, including costs, suspending the entry of any decree in that suit in favor of the other libelants until the "further order of the court," should failure to realize the fruits of success in the suit against the owners make it necessary to avail of the security given for the ship in the suit in rem. Thus, there has been but one decree in favor of any libelant, and there can be but one satisfaction. We cannot see that any rights of the appellant have been violated by this disposition of the suits, which was a matter of discretion in the district court, as to its own procedure.

The objection to the testimony of the lookout, Olsen, taken in the proceeding in rem before a commissioner, is highly technical, and without merit. And the same may be said of the contention that Green is not entitled to recover because he was not one of the ship's company, nor a passenger in a public conveyance; that the pilot boat ought not to have had such a person as Green on board at all; and that the navigators of the steamer had no reason to suppose any such person would be found in such a vessel. We know of no rule of law which forbids the owners of vessels to carry whom they please with them, whether the persons so carried pay for their carriage or not. Nor do we see upon what principle the vessel whose negligent navigation is the sole cause of a catastrophe involving the destruction of another vessel, and all the property on board of it, is to escape liability for the consequent loss to one of the owners of that property, who may be sailing the high seas in such other vessel for his own health or pleasure, and without paying for his voyage. The cases cited touching the liability of a railroad to a person traveling in its cars on a free pass, or riding in a freight car contrary to regulations, or walking upon its track, are wholly inapplicable.

We see no reason to disturb the commissioner's finding as to the value of the personal effects belonging to Green which were lost with the pilot boat. While the evidence was not sufficient to support his full claim, there is abundant to warrant the conclusion that they were worth \$250. The commissioner discredited the witness' estimate as to the amount of cash he had with him, and thought his valuation of his property excessive, but that is no reason why he might not, as he did, credit the statement that he lost the property he described; and the commissioner's valuation, as found, seems reasonable.

The decrees of the circuit court are affirmed, with interest and costs.

CHICAGO, M. & ST. P. RY. CO. v. EVANS.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 301.

CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTION.

The circuit court of appeals has no jurisdiction of a writ of error in which the only question presented is whether a state statute contravenes the constitution of the United States; for under the fifth and sixth sections of the judiciary act of 1891 such cases must be taken direct to the supreme court. *McLish v. Roff*, 12 Sup. Ct. Rep. 118, 141 U. S. 661, and *Crabtree v. Madden*, 4 C. C. A. 408, 54 Fed. Rep. 426, distinguished.

In Error to the Circuit Court of the United States for the Northern District of Iowa. Writ dismissed.

W. J. Knight, for plaintiff in error.

D. J. Lenehan, (D. E. Lyon, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. From the record before us, it appears that in the month of August, 1891, the defendant in error engaged transportation for himself and two valuable trotting horses over the railroad of the Chicago, Milwaukee & St. Paul Railway Company from Dubuque, Iowa, to Winona, Minn. While in transit the car in which the plaintiff and his horses were riding collided with another car and an engine of the railway company, in consequence of which the plaintiff and his horses sustained injuries. For the injuries so sustained the defendant in error brought an action against the railway company in the United States circuit court for the northern district of Iowa. The complaint was in the ordinary form, and in one count, wherein the plaintiff claimed damages both for his personal injuries and for the injuries sustained by his stock. By way of defense to the action, the defendant pleaded that the horses in question were transported by it under and subject to the provisions of a special contract with the plaintiff, which was made at Dubuque, Iowa, on the 24th day of August, 1891, and that the defendant had fully performed everything to be done or performed by it to carry out the terms and provisions thereof. The contract was attached to the answer as an exhibit, and with reference thereto it is only necessary to say that it contained stipulations whereby the defendant company limited its liability for injuries that might be sustained by the horses to the amount of \$100 per head, and for personal injuries that might be sustained by the owner or person in charge of said stock to the sum of \$500. The plaintiff filed a reply to said answer, wherein he admitted that he signed the foregoing special contract, but alleged that the railway company required such agreement to be entered into for the sole purpose of limiting its liability as a common carrier, and that the agreement was contrary to the laws of Iowa, and therefore void. On the trial of the case the defendant below offered the contract in evidence to support its defense. It was objected to by the plaintiff, on the ground that

it was in violation of the Iowa statute, which declares that "no contract, receipt, rule or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Vide McClain's Ann. Code Iowa 1888, p. 518, § 2007. This objection appears to have been sustained by the trial court, and the contract was thereupon excluded. The plaintiff thereafter recovered a verdict on which a judgment was entered against the railway company. To reverse that judgment the company has brought the case to this court.

The only error assigned which is relied upon for a reversal has reference to the action of the lower court in excluding the aforesaid special contract, and that ruling is challenged, solely on the ground that the Iowa statute above quoted is itself invalid under the federal constitution, in so far as it attempts to prohibit a common carrier from entering into a contract, like the one at bar, limiting its common-law liability with respect to the transportation of freight and passengers from a point within to a point outside of the state of Iowa. It will thus be seen that the issue presented by the record is whether a law of the state of Iowa is in contravention of the constitution of the United States, and that is a question which this court, by virtue of the act under which it is organized, is without jurisdiction to decide.

The fifth section of the act creating the United States circuit courts of appeals provides,—that appeals or writs of error may be taken from the district and circuit courts of the United States direct to the supreme court of the United States in six classes of cases, among which are cases involving the construction or application of the constitution of the United States, and cases in which a law of a state is claimed to be in contravention of the constitution of the United States. The sixth section of the act gives the circuit courts of appeals jurisdiction to review by appeal or writ of error final decisions in the district and circuit courts "in all cases other than those provided for in the preceding [fifth] section of the act, unless otherwise provided by law." 26 Stat. 826. There is no other provision of law, so far as we are aware, which gives this court the right to hear and determine a constitutional question such as arises in the case at bar.

In the case of *McLish v. Roff*, 141 U. S. 661, 668, 12 Sup. Ct. Rep. 118, it was held that, when a party questions the jurisdiction of a district or circuit court of the United States, he may at his option, after final judgment, prosecute an appeal or writ of error either to the United States supreme court or to the circuit court of appeals. In such cases, if the record is removed to the supreme court, the question of jurisdiction will alone be considered. But, if it is removed to the circuit court of appeals, all questions arising upon the record may be determined. To the same effect was the decision of this court in *Crabtree v. Madden*, 4 C. C. A. 408, 54 Fed. Rep. 426. But these decisions fall short of supporting the contention that in every case tried before a district or circuit court of the United

States an appeal or writ of error may be taken by the losing party, at his election, either to the supreme court or to the circuit court of appeals. The jurisdiction of the supreme court and of the circuit court of appeals is not thus dependent upon the choice of the parties to a suit. That view is wholly inconsistent with the provisions of the act creating the circuit courts of appeals, which was evidently intended to vest the supreme court of the United States with exclusive jurisdiction to entertain appeals and writs of error for the review of cases which present constitutional questions such as are enumerated in the fourth, fifth, and sixth subdivisions of the fifth section of the act; and the same remark may be made with reference to the cases mentioned in the second and third subdivisions of the same section. *U. S. v. Sutton*, 2 C. C. A. 115, 47 Fed. Rep. 129; *Hamilton v. Brown*, 3 C. C. A. 639, 643, 53 Fed. Rep. 753. It is only where the jurisdiction of the trial court is in issue, or is challenged, that a party has the right to prosecute an appeal or writ of error after final judgment either to the supreme court or to the circuit court of appeals. In the case at bar the sole question presented for our consideration is whether the Iowa statute contravenes the constitution of the United States, and as this court has no jurisdiction to determine that question, especially when it is the sole issue presented by the record, it follows that the writ of error should be dismissed; and it is so ordered.

WARNER v. GEORGE.

(Circuit Court, D. Oregon. November 3, 1893.)

No. 1,808.

RES JUDICATA—PLEADING—COUNTERCLAIM.

Where the payee of notes secured by a chattel mortgage on a planing mill and lumber takes possession under the mortgage, works up the lumber, and sells the product, this is matter of defense to a suit on the notes, and is not a proper counterclaim; and if, therefore, the maker fails to set it up in such suit, a judgment against him for the full amount of the notes is conclusive, and constitutes a bar to any subsequent suit by him for an accounting as to the mortgaged property.

In Equity. Bill by James G. Warner against M. C. George, administrator of the estate of James H. B. McFerran, deceased, to enjoin an action at law, and for an accounting. Heard on a plea in bar. Plea sustained.

George H. Williams, for plaintiff.

William M. Gregory, for defendant.

BELLINGER, District Judge. The administrator of James H. B. McFerran brought an action in this court upon a judgment rendered in Colorado in 1883 for \$6,593.30, with interest. Thereupon, Warner, the judgment debtor, brought this suit to restrain the action upon the Colorado judgment, and for an accounting. The facts alleged as the ground of suit are these: In 1882 Warner ex-

ecuted and delivered to McFerran two promissory notes, each for \$6,750, making a total of \$13,500, and at the same time, to secure their payment, gave a chattel mortgage on certain personal property, of the aggregate value of \$21,986.22. On the 10th day of January, 1883, McFerran took possession of the mortgaged property, which included a planing mill and lumber yard, in operation at the time, and he continued the business of the mill; buying and selling other lumber, mingled with that mortgaged. On the 11th day of January, 1883, McFerran brought an action upon one of said notes, and secured the judgment in action in this court. Warner alleges that he made no defense in such action in Colorado because at the time he did not know, and could not ascertain, how much McFerran would realize from the mortgaged property in his possession, and because he hoped that McFerran would use or dispose of such property so as to fully satisfy the judgment sought, and the amount due upon the other of said notes, and would not claim anything more than the property so mortgaged. It is also alleged that, if the proceeds of such property had been accounted for, it would have fully paid the entire indebtedness, and that the same has, in equity, been fully paid.

To this complaint, McFerran's representative files his plea, in which he sets out so much of the laws of Colorado as are applicable to cases like that in which the judgment now sued on was rendered, including the following:

"Sec. 60. The defendant may set forth by answer or cross complaint, as many defenses and counter claims or set offs, as he may have, whether the subject matter of such defenses be such as were heretofore denominated legal or equitable, or both—they shall be separately stated; and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

The plea then avers that, in the action in Colorado, the defendant, Warner, filed his answer alleging that he had fully paid the debt sued upon, and later in the case he was allowed to file a supplemental answer, which he did, and in which he alleged that since the filing of his original answer the plaintiff had become indebted to him in the sum of \$5,000 on account of common lumber which the plaintiff in that action had secured and sold to the use and benefit of the defendant; in the further sum of \$5,000 on account of paints, oils, glass, doors, sashes, and blinds and other building materials, which said defendant had received and sold; and in the still further sum of \$5,000 on account of other goods, wares, chattels, merchandise, and moneys had and received as aforesaid. And, in addition to such counterclaims, it was alleged that the plaintiff was indebted to Warner in the sum of \$6,000 for planing mill machinery, tools and hardware, belting, and other fixtures belonging to said planing mill machinery, making a total counterclaim of \$21,000, for which Warner demanded judgment; that such supplemental answer was stricken out by order of the court; and that thereafter, Warner, by leave of the court, withdrew his original answer. The plea avers that the lumber, paints, oils, and other goods and wares mentioned in said supplemental answer, were the same chattels

described in the bill of complaint herein as having been mortgaged by Warner to McFerran to secure the notes mentioned.

The question to be decided is as to the sufficiency of this plea as a bar to the cause of suit stated in the complaint. The facts relied upon to defeat a recovery upon the Colorado judgment were available to prevent the recovery of that judgment. This is admitted, but the contention is that such facts constituted a counterclaim, and that Warner had the option of setting them up to defeat a recovery in the Colorado action, or of making them the subject of an independent suit. Such a course is open to a defendant in all cases of counterclaim, which is always a separate and independent cause of action. Pom. Rem. § 804. The property mortgaged and delivered to McFerran, as averred in the plea, was, in effect, a payment on the debt secured. From its character and use, there was an implied power of sale in the mortgage. The property consisted of a business in operation, and the stock used in the conduct of that business. The net product of the business, necessarily, went to satisfy the debt. McFerran's obligation was to pay the debt with the proceeds of the property, and account for any residue there might be. Warner could no more maintain an independent suit on account of this property than he could, if, instead of chattels pledged, the property had been money paid to be applied on the debt; and, when he was being proceeded against in the Colorado action, he was as much bound to make the defense of payment by means of the mortgaged property as he would have been if the payment had been in money directly paid. In the latter case, he could with as much reason excuse himself for not making the defense of payment as he attempts to do now, by saying that he hoped McFerran would use or dispose of the property so as to fully satisfy the judgment, and that he would never claim anything more than the property he had received. A defendant who relies on that kind of a hope has no standing in equity to escape the judgment which he might have prevented. As already stated, if he had paid the debt in money, but omitted to make the defense of such payment in the hope that his creditor would apply the money in satisfaction of the judgment, and would never claim anything more, his case would not be different from what it is.

The judgment in question is a finality as to all the matters contained in the bill of complaint, and the plea must therefore be held good.

PRENTICE v. DULUTH STORAGE & FORWARDING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 252.

1. QUIETING TITLE—WHO MAY SUE—EJECTMENT SUITS.

One or more owners of lots in severalty under a common source of title may maintain a bill for themselves and all others similarly situated who may become parties, to quiet title to real estate against an adverse claim alleged to be superior to the title of their common grantor, but repeatedly adjudged invalid in ejectment suits.

2. SAME—VACANT LAND—STATE STATUTE—FEDERAL COURTS.

A right given by state statutes to a claimant of vacant lands to sue to quiet title may be enforced in the federal courts.

3. DEEDS—RULES OF CONSTRUCTION.

In construing a deed the court may put itself in the place of the grantor for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him, consider how the terms of the deed may affect the subject-matter.

4. SAME—INTENTION CONTROLLING.

When the intention is manifest it will control in the construction of a deed without regard to technical rules of construction.

5. SAME—DESCRIPTION—INDEFINITE INDIAN SELECTION.

An Indian, entitled by treaty to select a section of land, made a declaration in writing that he selected a tract "one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point;" Minnesota point being a well-known landmark. *Held*, that this selection was too indefinite to form the basis for a conveyance of any specific land. *Prentice v. Railroad Co.*, 43 Fed. Rep. 274, followed.

6. SAME—SPECIFIC DESCRIPTION—FLOATING RIGHT.

A deed which refers to an indefinite Indian selection of a tract of land under a treaty as the basis of title, but which describes specific land by definite boundaries, the same appearing from a contemporaneous contract to be the exact land intended to be conveyed, cannot be construed to transfer a floating right to any interest the Indian might acquire under the treaty, so as to cover other lands, not included in the specific description, which were subsequently set off to the Indian in lieu of his selection. 50 Fed. Rep. 878, affirmed.

7. SAME—RECORDING—DEEDS MADE IN OTHER STATES.

A deed of lands in Minnesota territory, executed before a magistrate of another state, but not certified by the clerk of the county court of such state to be "executed and acknowledged according to the laws" thereof, as required in such case by the Minnesota statute, (Rev. St. Minn. 1851, c. 46, § 9,) was not entitled to record in Minnesota, and hence, although copied into the record book, was not recorded according to law. *Lowry v. Harris*, 12 Minn. 255, (Gil. 166,) followed.

8. SAME—INVALID RECORD—CONSTRUCTIVE NOTICE.

The record of a deed is not constructive notice of its contents when it is not entitled to be recorded under the registry statutes. *Parret v. Shaubhut*, 5 Minn. 323, (Gil. 258,) followed.

9. SAME—BONA FIDE PURCHASERS—GRANTEES BY QUITCLAIM.

One who, prior to the statute of Minnesota of 1875, acquired title to Minnesota lands by a quitclaim deed purporting to convey the lands themselves, was entitled to the benefit of the rule in favor of innocent purchasers for value, although it was held by the supreme court of Minnesota, up to that time, that a grantee under a quitclaim in common form could not be considered an innocent purchaser without notice, the common form being a release of all the grantor's "right, title, and interest" in the lands.

Appeal from the Circuit Court of the United States for the District of Minnesota.

In Equity. Suit by the Duluth Storage & Forwarding Company and the Duluth Street-Railway Company, for themselves and for all others similarly situated who might become parties, against Frederick Prentice, to quiet title to lands. There was a decree for complainants in the court below, (50 Fed. Rep. 878,) and defendant appeals. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree quieting the title to certain lots in the city of Duluth, Minn., in the appellees, and enjoining the appellant from asserting his adverse title.

The treaty of September 30, 1854, which was approved January 29, 1855, between the United States and the Chippewa Indians of Lake Superior and Mississippi river, contained this stipulation: "It is agreed that the chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct." Immediately after the treaty was signed, and on the same day, Chief Buffalo signed a written instrument, which, after reciting this clause of the treaty, contains the following declaration: "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point; and I direct that patents be issued for the same according to the above recited provision to Shaw-Bwaw-Skung or Benjamin G. Armstrong, my adopted son; to Matthew May-Dway-Gon, my nephew; to Joseph May-Dway-Gon and Antoine May-Dway-Gon, his sons, one quarter section to each."

This instrument was deposited in the office of the commissioner of Indian affairs, February 20, 1856. On September 17, 1855, the other beneficiaries under this instrument conveyed all their right, title, and interest therein or thereunder to Benjamin G. Armstrong, and directed that all patents for lands to which they might have been entitled according to the directions of Chief Buffalo should issue to him. On September 11, 1856, Armstrong and his wife made a deed to the appellant of the undivided half of a tract of land described thus: "Beginning at a large stone or rock at the head of St. Louis river bay, nearly adjoining Minnesota point; commencing at said rock and running east one mile, north one mile, west one mile, south one mile, to the place of beginning, and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents."

The deed was executed in the state of Wisconsin. It was acknowledged before a justice of the peace. The statutes of Minnesota territory required a deed thus executed to have attached to it a certificate of the clerk or other proper certifying officer of a court of record of the county or district where the deed was executed that it was executed and acknowledged according to the laws of the state in which it was executed, in order to entitle it to record. Rev. St. Minn. 1851, c. 46, §§ 8-10, 23. This deed had no such certificate, but it was recorded in the office of the register of deeds of St. Louis county, November 4, 1856. On the day the deed was made, the appellant, Prentice, made a written agreement with Armstrong that in consideration of this deed he would furnish the latter what money or provisions might be necessary to enable him to go upon and erect a house on this land, to furnish what provisions should be necessary for his family while he was employed on the land, to take the general supervision of the whole tract, to pay all expenses of litigation about, and to do all in his power to perfect, the title of said land, and, when the title should be perfected, to get the land platted, and assist Armstrong in selling his interest. Armstrong agreed on his part to remove into the house and reside there as long as should be required to make such improvements as they thought necessary. This contract contains the same description found in the deed. Armstrong never built the house or resided on the land, and there was a substantial failure of both parties to do anything concerning the land or its title in accordance with this contract.

That portion of the description in the deed which gives the metes and bounds was written by the scrivener at the dictation of Armstrong, and the remainder of it at the dictation of the appellant. The rock mentioned in this description is well identified. It stood near the west shore of St. Louis bay, a short distance southwesterly from the base of Minnesota point, and was a well-known landmark. The mainland at the base of Minnesota point rises rapidly for the distance of a mile. The mile square bounded by the courses and distances given in the deed would extend across the base of

Minnesota point and "adjoin" it, but it would not cover any of the lots here in dispute, or any of the land subsequently patented to the beneficiaries under the treaty, and nearly one-half of it would be under the waters of Lake Superior. If the first course read west and the third course east in this description, a mile square would be described which would not "adjoin" Minnesota point, which would depart from the shore of the bay except at one corner, but which would cover about half the land subsequently patented to the beneficiaries, and the lots involved in this suit. All these lands were situated in St. Louis county, Minnesota territory, and Armstrong had no interest in any other land than that to which he was entitled under the treaty when he made this deed. He then supposed the mile square specifically described in his deed was the section Buffalo had selected. The government survey of these lands was not then made, and when made in 1857, the surveyed lines did not correspond with the courses named in this deed, and the lands adjoining Minnesota point and extending up the hill from it were claimed by traders who were in possession of them. Thereupon the officers of the department of the interior selected 662.62 acres of land in four tracts adjoining each other, and all lying east, and within two miles, of a north and south line passing over the rock. These tracts did not form a mile square in compact form, and none of them adjoined Minnesota point, but on October 23, 1858, the United States issued patents to these four tracts in severalty to the four beneficiaries named by Chief Buffalo in satisfaction of the treaty stipulation.

On March 13, 1859, the patentees of these lands, other than Armstrong, executed deeds of conveyance of the lands respectively patented to them to Charlotte Armstrong, the wife of Benjamin G. Armstrong, and these deeds were recorded in St. Louis county, May 17, 1859. On October 22, 1859, Armstrong and his wife conveyed an undivided half of all these lands to Daniel S. Cash and James H. Kelly, by warranty deed. On August 31, 1864, Armstrong and his wife "remised, released, and quitclaimed" the undivided half of all these lands to John M. Gilman by a deed which was duly recorded in St. Louis county, September 12, 1864. Mr. Gilman paid a valuable consideration for this conveyance, and had no actual notice of the deed to appellant, or that he claimed any of this land, until 1870. The appellees are immediate or remote grantees of Mr. Gilman. Their lots are either occupied by them, respectively, or are vacant, and they are not held by them jointly, but in severalty. The lands described in the deed to Mr. Gilman are in the city of Duluth. More than 500 buildings, including railroad depots, hotels, wholesale houses, and residences, stood upon this land when this action was commenced. The appellant was never in possession of any of this land, never demanded possession of any of it until 1883, and never paid any taxes upon it. On August 27, 1872, Armstrong and wife assigned and quitclaimed all their right, title, and interest in these lands to the appellant. In 1883 he brought an action of ejectment for the undivided half of part of these lands which were held by the defendants in that action under the deed to Mr. Gilman, and after a trial of the merits Mr. Justice Miller ordered judgment for the defendants. *Prentice v. Stearns*, 20 Fed. Rep. 819. This judgment was affirmed by the supreme court in 1885. 113 U. S. 435, 5 Sup. Ct. Rep. 547. In 1890 another action of ejectment for another portion of these lands held under the same title was tried before Mr. Justice Miller with the same result. *Prentice v. Railroad Co.*, 43 Fed. Rep. 270.

In 1890, two of the appellees filed the bill in this case on behalf of themselves and all others similarly situated who should become parties to the suit to quiet the title of their common grantor, Mr. Gilman, to the lots the appellees held, and to enjoin the appellant from prosecuting any claim to said lots by suit or otherwise. The bill alleged the jurisdictional facts, the title of Mr. Gilman to the undivided half of the 662.62 acres, and that the appellees had succeeded to his title to certain lots which are a part of those lands, and that they held these lots in severalty. It also set forth the deed to the appellant, alleged that none of the lands conveyed to Mr. Gilman were described in that deed, but that the appellant claimed to be the owner of the undivided half of them under it; that he had never taken possession of any

of the lands, and that they were all in the possession of those claiming under Mr. Gilman, or vacant and unoccupied. The bill then set forth the actions of ejectment the appellant had brought, and that he threatened to bring a large number of separate actions against different persons claiming to own lots in severalty under the Gilman deed. After the commencement of this suit more than 500 persons similarly situated to the complainants became parties complainant. The defendant demurred to the bill, and his demurrer was overruled. The suit was heard on the merits, and a decree for complainants entered.

Emanuel Cohen, (Stanley R. Kitchel, Frank W. Shaw, John F. Dillon, Elihu Root, and Samuel B. Clarke, on the brief,) for appellant.

William W. Billson and George B. Young, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

That this suit was well and wisely brought admits of no discussion. Owners of lots in severalty in possession under a common source of title may join in a bill of peace to quiet their title and to enjoin the prosecution of an adverse claim repeatedly adjudged invalid in suits in ejectment, the validity of which depends entirely upon the superiority of the title of their common grantor. The law and the facts which determine the validity of the title of one such owner also determine the validity of the title of every such owner. While they are owners in severalty, they are united in interest in the sole question at issue in such a case,—the validity of the title of their common grantor. A suit based upon such a bill is of general equitable cognizance. It prevents a multiplicity of suits, and affords the only adequate remedy for such a multitude of several owners as occupy the heart of a great city when their common source of title is assailed. *Osborne v. Railroad Co.*, 43 Fed. Rep. 824; *Crews v. Burcham*, 1 Black, 352, 358.

The objection that some of the lots in controversy are not in the possession of any of the complainants, but are vacant and unoccupied, is without merit. The statutes of Minnesota provide that any person in possession of real property, and any person claiming title to vacant and unoccupied real estate, may alike bring a suit against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, and the rights of the parties respectively. Gen. St. Minn. 1878, c. 75, § 2. These statutes also provide that whenever two or more persons claim lots or tracts of land in severalty under conveyances from the same grantor as the common source of title, and a claim of title thereto is made by any one as against the title of such grantor, any one claiming under such grantor may bring an action on behalf of himself and all others who may come in and become parties to such action against the person claiming adversely to have the title of such grantor quieted as to the real estate claimed by the complainant and those who become parties to the action; and that any person who claims title under the common grantor, and whose title

is controverted by the same defendant upon the same ground as that of the complainant, may come in as of course, and become a party in such action, by filing a statement of these facts. *Id.* § 4. If a bill of peace by one out of possession to quiet a title that had never been adjudicated in an action at law to which he was a party could not have been maintained in the federal court before the enactment of these statutes, then they create a right to a valuable remedy which the complainants might avail themselves of in that court. Rights created by state statutes may be enforced in the federal courts when those statutes prescribe methods of procedure which by their terms are to be pursued in the state courts of original jurisdiction, and there is nothing of a substantive character in the methods prescribed which makes it impossible for the federal courts to substantially follow those methods. *Clark v. Smith*, 13 Pet. 195, 203; *Fitch v. Creighton*, 24 How. 159; *Stark v. Starrs*, 6 Wall. 402, 410; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Railway Co. v. Whitton*, 13 Wall. 270, 286; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; *Ex parte McNiel*, 13 Wall. 236, 243.

The assignment of error chiefly relied on by the appellant, however, is that the court below decreed that the deed from Armstrong and wife to the defendant, Prentice, describes, and was intended to describe, a defined tract of land no part of which is included in any of the lands described in the pleadings of the complainants herein, and that it was not operative to affect the title to any of said lands. The treaty vesting in Chief Buffalo the right to select a section of land to be conveyed to his appointees was approved January 29, 1855. The deed in question from Armstrong and his wife to Prentice was made September 11, 1856, before the government surveys had been made, and it described the property conveyed as the undivided half of a tract of land—

"Beginning at a large stone or rock at the head of St. Louis river bay, nearly adjoining Minnesota point; commencing at said rock and running east one mile, north one mile, west one mile, south one mile, to the place of beginning, and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents."

At the time this deed was made there was no tract set off to Buffalo, and no description among the government documents describing this land, other than the treaty and Buffalo's declaration in these words:

"I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point."

The rock referred to in the deed is identified as a well-known landmark, and it is conceded that the tract described in the deed by metes and bounds does not include any of the lands here in question, but appellant contends—First, that the effect of this deed was to convey one-half of all the rights Armstrong then had or might thereafter acquire to any land under the treaty and under

Buffalo's appointment; and, second, that if this position is not sustained, the court should find that by mistake the first course in the description reads east when it should read west, and the third course west when it should read east, and that it should by construction so change these courses and thus reach the land of the appellees.

The first contention rests upon the proposition that a deed should be made operative if possible, and that a liberal construction should be adopted to effect that object, and to enforce the original design. It is supported by the facts that Armstrong owned no interest in any other land than that which he was entitled to under this treaty; that about one-third of the square mile described by metes and bounds was covered by the waters of Lake Superior; that he must have known that the boundary lines of his claim were subject to readjustment; that the deed was not made in view of the lands or upon the marking of any monument, and that the clause of the deed which follows the description by metes and bounds expressly states the land conveyed to be that set off to Chief Buffalo under the treaty. Upon these facts it is forcibly argued that Armstrong must have intended to convey half his right to any land he might be or become entitled to under the treaty, wherever situated, and whenever patented, and not merely the square mile he bounded.

The rules applicable to the construction of deeds have been collected in the briefs of counsel with commendable industry, but, in the view we take of the evidence presented by this record, it will be necessary to apply but two of them to the facts here presented, and these are (1) that the court may place itself in the place of the grantor for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him at the time of the execution of the instrument, consider how the terms of the deed may affect the subject-matter; and (2) that when the intention is manifest it will control in the construction of the deed without regard to technical rules of construction. *Witt v. Railway Co.*, 38 Minn. 122, 127, 35 N. W. Rep. 862; *Driscoll v. Green*, 59 N. H. 101; *Johnson v. Simpson*, 36 N. H. 91; *Walsh v. Hill*, 38 Cal. 481, 486, 487.

We proceed to apply these rules. On September 11, 1856, Armstrong was the sole beneficiary under the reservation of the section in the treaty for the appointees of Chief Buffalo. He was poor and without influence. Prentice was wealthy and influential. The tract selected by Chief Buffalo was undefined and undefinable from the memorandum he had made. It was somewhere on the western shore of St. Louis bay, above and immediately adjoining Minnesota point. On this point there was quite a settlement. The mainland rose rapidly for the distance of a mile northwest from the base of the point, and this land was frequently spoken of as above the point. On this land, just above and adjoining the point, George E. Nettleton and his brother William had cleared the land, and established a trading post. The shore of the bay and of the lake extended from the southwest to the northeast, and Minnesota point divided the bay from the lake. About 500 feet southwest of

Minnesota point, on the shore of the bay, was the large rock, 40 feet square, referred to in the deed. It was a well-known landmark, an altar on which the Indians sacrificed to their deity, and at the base of which they landed from their canoes. Near the base of the point was the "little portage" where they landed and carried their canoes across Minnesota point when they were traveling from the lake to the bay or from the bay to the lake. The rock, this portage northeast of it, and Minnesota point itself, were undoubtedly familiar objects to Chief Buffalo when he made his memorandum of selection, and it seems probable that the land he intended to describe was a mile square lying along the shore of the bay and across the base of this point, extending back up the hill, and being in that manner immediately adjoining and above the point. His attempted selection is, however, clearly too indefinite and uncertain to form the basis of any conveyance of specific land, and for that reason the second clause of the description in the deed must be held to be void as an independent or cumulative description, as declared by Mr. Justice Miller in *Prentice v. Railroad Co.*, 43 Fed. Rep. 274. Its only effect was to make a reference to the title under which the mile square was claimed, unless in connection with the first clause in the deed it can be construed to effect a conveyance of one-half of all the rights Armstrong had under the treaty.

We proceed with the consideration of that question. The great rock was universally reputed among the few settlers about Minnesota point to be the southwest corner of the Buffalo tract. Armstrong had repeatedly declared it to be so, and he supposed when he made the deed that the tract described by metes and bounds was the section selected by Buffalo under the treaty. The southwest corner of this tract was on the St. Louis river bay. It extended across the base of, and immediately adjoined, Minnesota point, and extended up the hill directly above it. But the Nettletons claimed a portion of this section. Litigation with them would probably result from pressing any claim to it, and Armstrong had neither the ability nor the means to conduct it. Under these circumstances he made this deed to Mr. Prentice of an undivided half of the square mile he claimed, including therein the lands and improvements of the Nettletons, and agreed to build a house upon and live on this land. He described the land by a natural and well-known landmark and by courses and distances that make it unmistakable. In consideration of this deed Mr. Prentice agreed to pay the expenses of building the house, to furnish the necessary supplies for Armstrong's family while they lived on the land, to take charge of the whole tract, to pay all the expenses of the expected litigation with the Nettletons, and do all things proper to perfect the title to this land, and, when it was perfected, to plat it, and assist Armstrong to sell his remaining half. This agreement was written and signed by the parties on the day the deed was executed. It contains the same description as the deed, and was a part of the transaction in which the deed was executed. When this suit was tried in the court below that court had held in two cases that had been previ-

ously tried, in which this contemporaneous contract was not produced, that the description contained in this deed covered only the specific tract of land bounded in it by courses and distances, and that it did not convey one-half of all Armstrong's rights under the treaty. *Prentice v. Stearns*, 20 Fed. Rep. 819; *Prentice v. Railroad Co.*, 43 Fed. Rep. 270. In the former case the court found the fact to be that the tract selected by Buffalo extended northeasterly of the rock, and embraced that part of the section bounded in this deed not covered by water, and that it did not cover any of the lands patented to the relatives of Chief Buffalo, and on that finding its decision was affirmed by the supreme court in *Prentice v. Stearns*, 113 U. S. 435, 5 Sup. Ct. Rep. 547. In the latter case it found the fact to be that Buffalo's selection extended southerly from the rock and covered some of the lands subsequently patented to these relatives, and none of the lands bounded in the deed. It is no longer material to determine whether or not either of these findings was correct. The production of the contemporaneous contract, in our view, concludes this discussion, and renders the determination of this question unimportant. In its absence the court below and the supreme court construed this deed to convey no right or interest of Armstrong in any other land than that specifically bounded in the first clause of the description. That construction seems to us to be warranted without reference to the contract under the evidence in this case, for the reasons stated in the opinions in the cases referred to. But an examination of this contemporaneous agreement demonstrates the correctness of that construction. It was not upon a floating right to some unknown land that Armstrong was to erect his house and live. It was upon this specific tract, one mile square, whose southwest corner was the well-known rock. It was not the title to a right to some land under the treaty somewhere that Prentice was to litigate and perfect, (for no one disputed that right,) but it was the title to the specific square mile bounded in the deed and contract that he was to litigate with the Nettletons and establish. It was not a floating right to some unknown land that he was to plat, but this specific square mile at the base of Minnesota point. If Mr. Prentice had performed his agreement, if he had litigated and perfected the title to this land, his deed would have been effective and valuable; and it is plain from the terms of this contract that it was the intention of the parties that it should be valid on that condition, and on that condition only. He failed to perform it. He did not litigate the title with the Nettletons. He did not perfect the title to the land. He abandoned his deed and his contract for 15 years, and Armstrong abandoned the land to the other claimants. The United States so far disregarded the attempted selection of Chief Buffalo that it patented to his appointees, and they received, in satisfaction of the treaty, lands that are not above and immediately adjoining Minnesota point. Armstrong conveyed these lands to third parties, and neither he nor Mr. Prentice seems to have thought of their abandoned deed until 14 years after these patents were issued.

Under these circumstances it is not doubtful that this deed does

not describe or convey, and that it was never intended to describe or convey, anything more than the square mile bounded by the first clause of the description.

In regard to the second position urged upon us by the appellant,—that the first clause in the description should be so construed that the first course should read east and the third west,—it is sufficient to say that there is no evidence in this case that either the grantor who dictated this description or the scrivener who wrote it did not respectively dictate and write just what they intended. There is no evidence of any mistake, nor is the grantee, Prentice, who failed to perform the agreement which was the consideration of the deed, in a position to ask a court of equity to correct such a mistake if there was one.

The result is that there was no error in the decree of the court that the description in this deed to Mr. Prentice, construed in the light of the surrounding circumstances at the time the deed was made, and of the contemporaneous contract made on that day, did not cover or describe any of the lands claimed by the complainants or any right of the grantor, Armstrong, to any other land than the square mile specifically bounded in the first clause of its description.

Moreover, if the deed to appellant had contained a sufficient description to convey one-half of Armstrong's right to the land subsequently patented to the relatives of Buffalo, it could not prevail over the title of Mr. Gilman. At the time this deed and the subsequent deed to Mr. Gilman were executed the statutes of Minnesota provided:

First. That any deed executed in any other state, territory, or district of the United States "may be executed according to the laws of such state, territory or district." Rev. St. Minn. 1851, c. 46, § 9; Pub. St. 1858, c. 35, § 9.

Second. That in cases where deeds are executed in any other state, territory, or district, unless the acknowledgment is taken before a commissioner appointed by the governor of the territory for that purpose, such deeds shall have attached thereto a certificate of the clerk or other certifying officer of a court of record "that the deed is executed and acknowledged according to the laws of such state, territory or district." *Id.* § 10.

Third. That to entitle any deed to record it must have "a certificate of acknowledgment * * * as provided in this chapter, and in cases where the same is necessary, the certificate required by the tenth section of this chapter." *Id.* § 23.

Fourth. That "every conveyance of real estate within this territory hereafter made, which shall not be recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance was first duly recorded." *Id.* § 24.

The deed to the appellant was executed in Wisconsin, and acknowledged before a justice of the peace in that state. There was attached to it the certificate of the clerk of the county court, but this certificate failed to state that the deed was "executed and acknowledged according to the laws of Wisconsin." Under the con-

struction given to these statutes by the highest judicial tribunal of the state of Minnesota, which is a rule of property in that state, and which the federal courts are bound to follow, this deed was not entitled to record, and hence was not "recorded as provided by law." *Lowry v. Harris*, 12 Minn. 255, (Gil. 166.) See, also, *Morton v. Smith*, 2 Dill. 316, 319; *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. Rep. 274; *Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. Rep. 433; *Ely v. Wilcox*, 20 Wis. 551, 556; *Fisher v. Vaughn*, 75 Wis. 609, 615, 44 N. W. Rep. 831, 833.

Mr. Gilman had no actual notice of the record of this deed before he paid for the land, and, as the deed was not entitled to record, the record of it was not constructive notice of its contents, or of any claim of the appellant under it. *Parret v. Shaubhut*, 5 Minn. 323, (Gil. 258, 261;); *Cogan v. Cook*, 22 Minn. 137, 143; *Carpenter v. Dexter*, 8 Wall. 513, 532, and cases cited.

He was a bona fide purchaser for value without actual notice of this deed or of any claim of Mr. Prentice under it to the lands described in the deed to himself. The record of the Prentice deed was, as we have seen, no notice of that claim. The deed of Mr. Gilman was duly executed and acknowledged, and was duly recorded in 1864. And under the provisions of section 24, *supra*, the deed to Mr. Prentice, even if it had described this property, would have been void as against Mr. Gilman, as a subsequent purchaser in good faith and for a valuable consideration, whose conveyance was first duly recorded.

In reaching this conclusion we have not overlooked the fact that in 1864, and until the course of decision was changed by statute in 1875, it was the settled rule in Minnesota that one claiming title by a quitclaim deed in the form in common use in that state could not to be regarded as a bona fide purchaser without notice. *Martin v. Brown*, 4 Minn. 282, (Gil. 201;); *Hope v. Stone*, 10 Minn. 141, (Gil. 114;); *Everest v. Ferris*, 16 Minn. 26, (Gil. 14;); *Marshall v. Roberts*, 18 Minn. 405, (Gil. 365.) The same rule prevailed in the supreme court for many years, but has lately been abolished by that court, and declared to rest upon no sound reason. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 426; *U. S. v. California, etc., Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. Rep. 458. The rule which prevailed in Minnesota in 1864 must, however, govern in this case if it is fairly applicable; but, in view of the fact that it has since been abrogated by the state and by the nation, it ought not to be applied to cases not clearly within it. When this rule was established the statutes of Minnesota provided that "a deed of quitclaim and release, in the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." Pub. St. Minn. 1858, c. 35, § 3. The deed of quitclaim and release in the form in common use was a conveyance of all the grantor's "right, title, and interest" in the land described in the deed. It was not a conveyance, quitclaim, or release of the land itself. An examination of the Minnesota cases that establish this rule discloses the fact that all the deeds under consideration in those cases were of this form. The argument upon which the rule was first estab-

lished was: The deed to the subsequent purchaser does not purport to convey the land, but only the interest the grantor has in the land, and "when, therefore, a person relies on a mere quitclaim of the interest which a party may have in property, he does so at his peril, and must see to it that there is an interest to convey. He is presumed to know what he is purchasing, and takes his own risk." Chief Justice Emmett in *Martin v. Brown*, 4 Minn. 282, (Gil. 201.) In *Marshall v. Roberts*, 18 Minn. 409, (Gil. 365,) where the subsequent purchaser under such a deed sought to take advantage of that provision of the recording act which declares a prior unrecorded deed void as against any subsequent bona fide purchaser for value of the same real estate who first records his deed, the court said:

"It is only the purchaser of the same real estate, or any portion thereof, who by his priority of record cuts out the title of a prior purchaser; for when the second purchaser obtains by his quitclaim deed only what his grantor had (his grantor's right, title, and interest) at the time when such deed was made, he is not a purchaser of the same real estate (or any part thereof) which his grantor had previously conveyed away, and therefore no longer has."

The deed to Mr. Gilman is not a quitclaim deed of the form in common use in Minnesota. It is not a conveyance of the "right, title, and interest" of the grantor, but a conveyance of the land itself. The purchaser under such a deed is a purchaser of the same real estate previously conveyed by his grantor by the same description. The supreme court of Minnesota has never applied this rule to a purchaser under such a deed. The reasoning on which that rule rests has, in our opinion, no application to it, and we are constrained to hold that Mr. Gilman and his grantees are entitled to the benefit of the registry statute under this deed.

We have carefully examined the assignments of error relative to the admission of the evidence, and think there was no error in this regard in the rulings of the court below. These assignments are unimportant, and do not require a more extended notice.

The decree below is affirmed, with costs.

POND v. MINNESOTA IRON CO.

(Circuit Court, D. Minnesota, Fifth Division. November 14, 1893.)

DEEDS—CONSTRUCTION—INDIAN SELECTIONS.

Where one entitled to select a quantity of land under an Indian treaty makes a deed of such quantity of lands by specific description, adding that "this description is intended to include any land or rights to land secured or intended to be secured" to the grantor by the treaty, and thereafter files a survey thereof in the general land office, stating that he has selected the described lands, but fails to receive a patent therefor, the deed must be construed to convey only the specific lands, and will not cover other lands selected and patented many years later.

At Law. Action of ejectment brought by Winthrop Pond against the Minnesota Iron Company. Judgment for defendant.

Charles N. Bell, H. C. Eller, and Harvey Officer, for plaintiff.

Draper, Davis & Hollister, (J. H. Chandler, of counsel,) for defendant.

NELSON, District Judge. This is an action of ejectment in which both plaintiff and defendant claim title from a common grantor, Francis Roussain, and by stipulation of parties the case is tried to the court without a jury.

I find the facts to be as follows: By article 5 of a treaty between the United States and the Bois Fort band of Indians, concluded April 7, 1866, and proclaimed May 5, 1866, Francis Roussain was entitled to select a tract of land not exceeding 160 acres, and to receive a patent therefor from the government. On May 5, 1866, Francis Roussain executed and delivered to Peck, Miles, and Ware, in the city of New York, for a paid consideration of \$3,000, a certain warranty deed, the descriptive clause of which is as follows:

"All the right, title, and interest which the said Francis Roussain, Senior, has, or which he is entitled to, or may hereafter acquire, in and to the tract of land now occupied by him as a trading post on Lake Vermillion, in the county of St. Louis and state of Minnesota, aforesaid, embracing one hundred and sixty (160) acres of land, be the same more or less, with all the improvements thereon; this description being intended to include any land or rights to land secured or intended to be secured to the said Francis Roussain, Senior, by act of congress or of treaty with the United States."

Though Roussain had been in possession of this trading post for some time previous to the making of the deed, no survey of the lands had been made by the government. In the latter part of June, 1866, Peck had the premises surveyed, and in accordance therewith the following memorandum was prepared by him, and signed by Roussain:

"Description of Property Conveyed in the Foregoing Deed.

"Be it known that the land conveyed in the above deed is that of my old trading post, and is bounded as follows: Commencing at northeastern extremity of a point of land in Vermillion Lake, Minn., known as 'Roussain's Point,' and from which said northeasterly [extremity] a small island containing 5 64-100 acres, and included in this survey, bears north [here follow certain field notes] to lake on north side of point; thence eastwardly along the shore to place of beginning; containing, with small islands as shown on accompanying map, 160 acres.

"Attest: D. Geo. Morrison.

Francis ^{his} X Roussain."
mark.

This memorandum was delivered to Peck, and thereupon Roussain surrendered and Peck took possession of the premises. July 14, 1866, the deed, together with the memorandum, was recorded in the office of the register of deeds for St. Louis county, Minn. On the same day Roussain, by a letter under his own hand, notified the commissioner of the general land office at Washington, D. C., that he had made choice of the lands to which he was entitled under article 5 of the treaty of April 7, 1866; that they were located on the neck of land projecting into Lake Vermillion, which had been theretofore occupied by himself as a trading post; that a survey had been made of the same; that the lands so chosen were distinctly indicated by a map forwarded to the commissioner in the letter; that he had filed the original map of the survey in the land office at Duluth, and asked that a patent issue to him. A map was forwarded with the letter, and the description of the lands so se-

lected by Roussain is the same as that in the memorandum. It does not appear that any further steps were taken by the general land department concerning this selection, and no patent was issued to Roussain for this land. Fourteen years afterwards, on August 27, 1880, Roussain selected and entered at the land office at Duluth the N. W. $\frac{1}{4}$ of section 33—62—15, which is the land in dispute, claiming to enter the same under the treaty above named; and he obtained a receipt from the receiver therefor, which was on August 31, 1880, duly recorded in the office of the register of deeds for St. Louis county, Minn. August 28, 1880, Roussain and wife executed and delivered to Charlemagne Tower and Samuel A. Munson a full warranty deed of the last-described land for the paid consideration of \$640, which deed was duly recorded August 31, 1880. In due course of time the government issued a patent for this land to Roussain, which was recorded May 31, 1882. This land—the N. W. $\frac{1}{4}$ of 33—62—15—is not the land which was occupied by Roussain as a trading post, nor the land surveyed by Peck, but is distant therefrom some two and a half miles, and is not on Lake Vermillion. Defendant and its grantors have been in possession of the land in dispute since 1880, and claim title under the deed from Roussain of August 28, 1880. Plaintiff claims title under the terms of the conveyance to Peck, Miles, and Ware of May 5, 1866, and commences this action of ejectment.

I find as conclusions of law:

1. That the patent issued to Roussain was a valid execution of the terms of the fifth article of the treaty giving him 160 acres of land.

2. That the deed from Roussain to Peck, Miles, and Ware did not convey any other land than the trading post, of which a survey was made, and possession surrendered to Peck; and that the deed did not convey any interest in or right to the N. W. $\frac{1}{4}$ of section 33—62—15, the land described in the patent to Roussain and in the deed to Tower and Munson.

3. That the plaintiff is not entitled to recover in this action, and judgment is ordered for the defendant, with costs and disbursements.

Mem. The question is as to the effect and construction of the deed of May 5, 1866, from Roussain to Peck, Miles, and Ware. The first clause, "the tract of land now occupied by him as a trading post on Lake Vermillion, in the county of St. Louis, and state of Minnesota," speaks for itself. It purports to convey a tract of land called "Roussain's Trading Post," the exact location of which was determined by metes and bounds, and recorded with the deed. The real point in issue is as to the effect of the second clause: "This description being intended to include any land or right to land secured or intended to be secured to the said Francis Roussain by act of congress or treaty with the United States." The contention of plaintiff is that this latter clause conveys whatever interest Roussain might thereafter acquire, not only in the trading post, but, failing the acquisition of that property, in any tract which

Roussain might select in the future under the terms of the treaty of April 5, 1866; and the question presented is, does a fair, reasonable construction of the deed carry with it the right claimed by the plaintiff? In order to determine that, the intention of the parties is of vital importance. "If a question of law arises upon the construction of a deed it is the province of the court to construe it, and to decide from the language what the intention of the parties was. When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to. The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law." 2 Devl. Deeds, § 836. Did Peck, Miles, and Ware intend to purchase not only the trading post, but was it in the minds of themselves and Roussain that, if the trading post should not be deeded to the latter by the government, then, in that event, they were to have conveyed to them whatever other tract of land Roussain might in the future select? Unless this can be fairly deduced from the terms of the deed, plaintiff must fail. Taking into consideration the provisions of the deed, and the situation of the parties, it seems to me clear that Peck, Miles, and Ware intended to purchase, and Roussain intended to sell, the trading post occupied by the latter on Lake Vermillion, St. Louis county, Minn., for the acts of the parties seem to point to no other conclusion. Here we find the sum of \$3,000 paid for a hundred and sixty acres of land described as a trading post, a survey of the property made by one of the grantees, an acknowledgment by the grantor that the survey covers the premises named in the deed, a selection made, the original map of the survey filed in the land office at Duluth, also notice given by Roussain to the general land commissioner that the trading post, which was described by metes and bounds, with an accompanying map, had been selected by him under the treaty of April 7, 1866, and, finally, possession surrendered by Roussain and taken by Peck. The conclusion seems irresistible that the minds of the parties met; that Peck and others received what they intended to buy, and Roussain delivered what he intended to sell. They never negotiated for or purchased the N. W. $\frac{1}{4}$ of 33—62—15. The language used in the deed is clear, plain, and unambiguous, and I am of opinion that the acts of the parties thereafter unmistakably express their intention. I do not think that under any reasonable construction of the deed it can be said that Peck, Miles, and Ware proposed to purchase any 160-acre tract that Roussain might select in the future, but that they purchased for a consideration certain, by absolute description, the tract of land set out and described in the deed as "Roussain's Trading Post."

In *Prentice v. Forwarding Co.*, 58 Fed. Rep. 437, the court says: "When the intention is manifest, it will control in the construction of the deed, without regard to the technical rules of construction." See, also, *Hamm v. City of San Francisco*, 17 Fed. Rep. 124; *Steinbach v. Stewart*, 11 Wall. 576; *Prentice v. Stearns*, 20 Fed. Rep. 819.

In order to sustain the contention of the plaintiff it becomes necessary to reject the entire first clause of the description, which, to my mind, clearly describes the particular land which it was the intention of the parties should be conveyed. I am of the opinion that the plaintiff cannot be permitted, after a lapse of 14 years, to repudiate the first clause of the deed, and, under the second clause, cover the land deeded to the defendant's grantors on August 28, 1880. In this view of the case, the question of notice has no bearing on the decision, and therefore is not passed upon.

Let judgment be entered for the defendant, with costs.

MEMPHIS LAND & TIMBER CO. v. FORD.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 275.

1. REGISTRY STATUTES—CONSTRUCTION—INNOCENT PURCHASERS.

A registry statute (Mansf. Dig. Ark. § 671) invalidating, as against subsequent purchasers for value without notice, all unrecorded instruments conveying lands, or "affecting the title thereto in law or equity," applies to assignments of swamp-land certificates, and deeds of the lands represented thereby, although the naked legal title is still in the state. *Coleman v. Hill*, 44 Ark. 452, distinguished.

2. SAME.

The protection of such a statute is not limited to bona fide purchasers from the same person who made the unrecorded conveyances, but extends to innocent purchasers from any one who appears from the records to be the owner of the title and interest which such grantor had when he made the unrecorded deed. *Ralls v. Graham*, 4 T. B. Mon. 120; *Hancock v. Beverly*, 6 B. Mon. 531; and *Hill v. Meeker*, 24 Conn. 211,—disapproved.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Reversed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree dismissing a bill brought by the appellant, the Memphis Land & Timber Company, to remove the cloud of the record of certain assignments of swamp-land certificates, and of certain deeds to the appellee, Mary S. Ford, from the title to some 17,000 acres of land in the state of Arkansas, which the appellant claimed to own. The appellee filed an answer in the nature of a cross bill, alleging that she was the equitable owner of the lands, and praying that the appellant be decreed to hold the legal title to them in trust for her. The lands were a part of the grant of swamp lands to the state of Arkansas under the act of congress entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850, (9 Stat. c. 84, p. 519.) The legislature of the state of Arkansas provided that these lands should be sold by the state land commissioner, and that upon their sale he should issue certificates thereof to the purchaser, which were held to vest the entire equitable estate in the lands in such purchaser, and to entitle him to a conveyance of the legal title from the state upon a surrender of the certificates.

On January 2, 1855, the land commissioner of the state of Arkansas issued such swamp-land certificates of purchase for the lands in question to Q. C. Atkinson. On December 29, 1856, Atkinson and his wife conveyed the land described in these certificates, by deed, to W. G. Ford. On November 12,

1860, Atkinson indorsed a written assignment to the appellee upon each of the certificates, in the form prescribed by the Arkansas statutes, and delivered them to her. On April 17, 1872, W. G. Ford conveyed the land in question, by deed, to the appellee, Mary S. Ford. None of these deeds or assignments were filed for record until the year 1887, and none of the certificates of purchase were presented to the land commissioner until after the purchase by the appellant, hereinafter mentioned.

Meanwhile, Atkinson died, in the year 1864, and R. A. Parker had been duly appointed by the proper court, and was in the year 1883 acting as, receiver of his estate, fully empowered to sell and convey all the interest of said estate, legal or equitable, in lands in the state of Arkansas. The statutes of Arkansas provided that it was the duty of the state land commissioner, "on being furnished with proofs deemed sufficient by him, to issue duplicate certificates of entries made by persons under any of the acts heretofore passed for the entry and sale of the swamp and overflowed lands; and in such cases he shall recite when such entry was made, by whom made, and the fact that such certificate was given by him in lieu of one averred and proved to be lost by such person applying for such duplicate; and in all cases the duplicate shall be deemed, taken and considered, for all and every purpose whatever, as in lieu and cancellation of said original certificate." Mansf. Dig. § 4202. In May, 1883, R. J. Morgan, who was the attorney for the estate of Atkinson, and had all the papers of said estate, and of the estate of his wife, in his possession, made affidavit of the entry of these lands by Atkinson, that he had examined all his papers, that the original certificates could not be found, that he believed that they were lost or mislaid, and asked that the land commissioner issue duplicate certificates in the name of Atkinson. In August, 1883, the Memphis Land & Timber Company, the appellant, examined the records in the office of the recorder in the county in which the lands were situated, and purchased the same of said Parker, as receiver of the Atkinson estate, and paid over \$5,000 therefor, without any actual notice of the assignment of the original certificates, or of the conveyance of the lands to any one, by Atkinson, in his lifetime. Parker, as receiver, at the same time assigned and delivered the duplicate certificates to the appellant, and conveyed the lands to it, and in January, 1884, the company surrendered the certificates, and obtained from the land commissioner the deeds of the state of Arkansas to itself for these lands. The company paid a large amount of back taxes, and on the 20th of May, 1884, recorded its deeds, and has since continued to pay the accruing taxes upon the land. In 1887 and 1888, the appellee, Mary S. Ford, first recorded her assignments and deeds, and it is the cloud created by this record that the appellant seeks to remove.

John B. Jones, for appellant.

L. C. Balch and C. S. Collins, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is necessary to consider but a single question in the determination of this case, and that is, can one who, ever since the year 1860, has held original swamp-land certificates issued by the state of Arkansas, and assignments thereof from the original grantee, and who, ever since the year 1872, has held title by deed to all his interest in the land described in the certificates, but who never recorded any of these title papers until 1887, maintain any claim to an equitable interest in such lands, under the registry laws of the state of Arkansas, as against one who in 1883 purchased, in good faith, for value, and without notice of this claim, from a receiver of the

estate of the original grantee named in the certificates, the apparent title of the estate to the same lands?

The original swamp-land certificates vested in Atkinson, to whom they were issued, the entire equitable estate in the land they described, but left the naked legal title in the state. *Coleman v. Hill*, 44 Ark. 452. The case just cited is relied on by counsel for appellee in support of their contention, but it has no bearing upon the question here at issue, under the registry laws, because the holder of the original certificate in that case immediately took and continuously held possession of the land described in the certificate, and thus gave notice of his claim to all subsequent purchasers. Atkinson and his wife, by their deed to W. G. Ford on September 29, 1856, in terms, conveyed, with a full covenant of warranty, the land, "the title of which was derived by certificates Nos. 1510 to 1517," (the numbers of their original certificates,) and relinquished to their grantee "all claim" to these lands, which they derived from the state of Arkansas. On November 12, 1860, a written assignment, in the following words, was indorsed on the back of each of the certificates, and signed by Atkinson: "For value received, I hereby assign and transfer to Mary S. Ford, and to her heirs and assigns, all my right, title, interest, and claim to the within-described lands. Given under my hand and seal this 12th day of November, A. D. 1860." The certificates, with these indorsements, were then delivered to the appellee. On April 17, 1872, W. G. Ford conveyed his interest in the lands to the appellee by deed. The statutes of Arkansas provided "that all deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected at law or in equity," should be acknowledged or proved before a proper court or officer (Mansf. Dig. §§ 656, 657;) that the assignments of swamp-land certificates should be in the form indorsed on these in question, and that every such assignment "shall be witnessed by two respectable subscribing witnesses, and proven or acknowledged in the manner authorized by law for deeds of conveyance," (Id. § 4206;) and that "no deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate, for a valuable consideration; without actual notice thereof, * * * unless such deed, bond or instrument duly executed, acknowledged, or proved as is or may be required by law, shall be filed for record in the office of the clerk and ex officio recorder of the county where such real estate may be situated." Id. § 671. It is plain that, as between Atkinson and the appellee, the deeds and assignments she holds had the effect to convey to her the entire beneficial interest—all the equitable estate—in these lands, leaving nothing but the naked legal title in the state for her benefit. Indeed, that they had this effect is the only ground of her claim in this court; but her counsel insist that the registry statutes are inapplicable to these instruments, and that they were not required to be recorded, because they did not convey or affect the legal title to the land. The statutes themselves are a conclusive answer

to this contention. The assignments were expressly required to be acknowledged or proved by the act of the legislature which authorized the transfer of the certificates by assignment. The deeds were required to be acknowledged or proved, because by them real estate was "to be affected * * * in equity," (sections 656, 657, supra,) and both the deeds and the assignments were expressly declared to be void against any subsequent bona fide purchaser for value and without notice, by section 671, supra, because by them the title to the real estate in question might be "affected * * * in equity." *Digman v. McCollum*, 47 Mo. 372; *Insurance Co. v. Shriver*, 3 Md. Ch. 381; *Bellas v. M'Carty*, 10 Watts, 13; *Doyle v. Teas*, 4 Scam. 202, 252; *Powell v. Jeffries*, Id. 387, 390; *Bishop v. Newton*, 20 Ill. 175, 181.

The evidence is conclusive that, before any of the instruments under which the appellee claims were recorded, the appellant purchased, for value, the equitable interest of the estate of Atkinson (who died in 1864) in these lands; that this interest was properly conveyed to it by the receiver; that it presented the duplicate certificates to the land commissioner; and that the company obtained deeds of the lands from the state, and duly recorded them, in good faith, without notice that Atkinson had ever conveyed his equitable estate. It is, however, objected to the title thus obtained by the appellant, that it is only a subsequent purchaser from the same grantor that is protected by the registry statutes, and that a purchaser from the heirs or legal representatives of such a grantor can take no benefit from their provisions. It is not contended that the receiver was not fully empowered to convey all the title and interest in these lands that could have been conveyed by all the devisees under the will of Atkinson and all his creditors, but the argument is that the purchaser from the heir or from the receiver of the estate of a deceased grantor takes only the title or interest of which the deceased died seised; that he buys at his peril; and that as the deceased, in this case, died seised of no interest in these lands, the appellant took nothing by the conveyances of the receiver. This argument is more specious than sound. Many years ago it met the approval of the supreme court of Kentucky in *Ralls v. Graham*, 4 T. B. Mon. 120, and *Hancock v. Beverly*, 6 B. Mon. 531, and was adopted by a divided court in *Hill v. Meeker*, 24 Conn. 211; but the opinion of the dissenting judge in the case last mentioned has since met with general approval. The argument may be used with equal force to entirely annul the statute, and to show that the purchaser from the same grantor takes nothing by a subsequent deed, for it may be said that such a grantor can convey only the title or interest he has, and, as he has none after making his first deed, he can convey nothing, and the subsequent purchaser can take nothing. This argument loses sight of the policy and purpose of the registry statutes. It is the purpose of those statutes to make the title that appears of record—the apparent title—superior, in the hands of an innocent purchaser for value, to the real title that is not of record. The grantor who has conveyed away his land by an

unrecorded deed, it is true, has no title or interest remaining in himself; and yet, his deed to an innocent purchaser for value avoids, by virtue of the registry statute, the prior conveyance, and vests the title in the subsequent purchaser. If Atkinson, before his death, had conveyed his apparent equitable estate in these lands to such a purchaser, the unrecorded deeds and assignments held by the appellee would have been void as against the subsequent conveyance, because that would have carried the apparent title. After he died, and the receiver of his estate was empowered to convey the equitable estate in these lands, which Atkinson appeared to have had at his death, the receiver's deeds or assignments appear, from an examination of the records, to convey as perfect a title as the deed of Atkinson would have conveyed before he died. A purchaser from such a vendor seems to be clearly within the reason and policy of the statute. To deprive him of its benefits, and to compel every purchaser from an estate to take notice of unrecorded deeds and instruments, and the private and secret transactions of the deceased in the lands which he appears by the records to own when he dies, would greatly depreciate the value of every estate in the land, and benefit none but the negligent and careless. The benefits of the statute are not, by its terms, limited to a subsequent purchaser from the same grantor; and such a limitation would, in our opinion, deprive it of much of the efficacy intended to be given to it by the legislature. Undoubtedly, the term "subsequent purchaser," in this statute, does not include a purchaser from an apparent stranger to the title of the grantor in the unrecorded deed; but it does include, not only the purchaser from the grantor himself, but every subsequent purchaser from one who appears from the records to be the owner of, or to be authorized to convey, the title and interest that the grantor had when he made the unrecorded deed. This view is sustained in well-reasoned opinions, and by the weight of authority. *Kennedy v. Northup*, 15 Ill. 148, 157; *Bowen v. Prout*, 52 Ill. 354, 357; *Youngblood v. Vastine*, 46 Mo. 239, 242; *Powers v. M'Ferran*, 2 Serg. & R. 43, 47; *Earle v. Fiske*, 103 Mass. 491, 494.

The conclusion we have reached renders it unnecessary to consider whether the duplicate certificates were properly issued by the state land commissioner. Whether they were so or not, the conveyances of the receiver vested in the appellant the apparent equitable interest of the estate of Atkinson in these lands, and the state subsequently conveyed to it the legal title. If no duplicates had ever been issued, the conveyances of the receiver would have entitled the appellant to the deeds from the state, as against the appellee, whose assignments and deeds are made void by the registry statutes; and as she has no equitable estate in the lands, and no legal title, she cannot be heard to assail the title of the appellant.

The decree below is reversed, with costs, and the cause remanded, with directions to enter a decree in favor of the appellant, in accordance with the views expressed in this opinion.

SCHEFTEL v. HAYS.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 295.

1. RESCISSION OF SALE—FRAUD—DILIGENCE.

A vendee entitled to rescind his contract for fraud must act promptly, especially in times of great speculative activity; and where, on discovering the fraud, he merely notifies the vendor of an intention to claim damages, and does not elect to rescind until the lapse of three years, when the land has depreciated to a fraction of its former speculative value, it is then too late to avail himself of this remedy.

2. SAME—RATIFICATION—ACQUIESCENCE.

A victim of a fraudulent sale who has received notice sufficient to put him on his guard cannot evade the duty of speedy and diligent inquiry by merely calling on the chief perpetrator, whose interest it is to conceal the facts, to reiterate or prove his false statements; and such reiteration does not prevent the vendee's delay from operating as a ratification of the contract, or interrupt the running of limitations, when a diligent inquiry at independent sources would have fully disclosed the fraud.

3. SAME—FEDERAL COURTS—STATE STATUTES OF LIMITATION.

A federal court, sitting in equity, will not rescind a fraudulent sale when the vendee has remained quiescent after discovering the fraud for a period longer than that fixed by the state statute of limitations.

Appeal from the Circuit Court of the United States for the District of Kansas. Affirmed.

J. D. Houston and W. H. Boone, for appellant.

R. R. Vermillion and Kos Harris, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing a bill brought by Adolph Scheftel, the appellant, to rescind a contract of purchase of 320 acres of land from the appellee, Leopold Hays, and to recover the purchase money, \$27,200. The purchase was made April 19, 1887. The land purchased was 320 acres eight miles southeast of the city of Wichita, in the state of Kansas. The appellant was a leather dealer in New York city, and was accustomed to dealing in stocks and bonds of corporations and other property. The appellee was a dealer in leather at Wichita, and a customer of the appellant. In the autumn of 1886 the appellant had purchased 40 acres of land a few miles distant from the city of Wichita for \$200 an acre, at the suggestion of the appellee, under an agreement with him that he should have 45 per cent. of the profit, and should bear 45 per cent. of the loss, resulting from the purchase and resale of the tract. This tract had been sold again for \$400 an acre before the purchase of this 320 acres was made. In the years 1886 and 1887 there was an era of wild speculation in lots and lands in and around Wichita, and their price was not measured by their intrinsic value, but by the height of the speculative fever that possessed the purchasers.

March 5, 1887, the appellee purchased the land in suit of one W. J. Brown, through the latter's agents, Hardy Solomon & Co., for \$50 an acre, but he obtained and recorded a deed to himself which recited a consideration of \$75 an acre. About April 19, 1887, the appellee told the appellant that he had paid \$75 an acre for this land; that it was within five miles of the center of the city of Wichita, when it was in fact eight miles distant from that point, and that it was very cheap at \$85 an acre, and thereby induced him to purchase it at that price, under an agreement that the appellee should have one-third of the profits, and bear one-third of the losses, resulting to the appellant from the purchase. At some time before May 3, 1887, the appellant was informed by a Mr. Lambert, who was a brother-in-law of the appellee, that the latter had paid but \$50 an acre for this land, and that he was a big scamp, a scoundrel, and a cheat. Mr. Scheftel immediately investigated the transaction, and had the land appraised by several parties, all of whom reported before June 7, 1887, that this land was hardly worth \$50 an acre. The appellant and his confidential clerk wrote three letters to the appellee in May and June, 1887, in which they informed him that Mr. Scheftel had been told that he (Hays) had paid but \$50 an acre for the land, and that Mr. Scheftel had had the appraisals we have mentioned made, and that he would claim to recover the difference between the \$50 and the \$75 an acre for the misrepresentation if the information he had received proved correct. June 16, 1887, the appellee wrote a letter to Mr. Scheftel in which he reiterated the statement that he paid \$75 an acre for the land, and inclosed a false certificate to that effect, which he had procured from W. J. Brown, his vendor. About the same time he caused Mr. Solomon, the agent who sold the property to him, to write to the appellant that the record correctly disclosed the transaction. The appellant testified that these letters removed his suspicions, and that thereafter, until shortly before this suit was commenced, he believed that the appellee had told him the truth. He admitted, however, that in a conversation with the agent, Solomon, in the fall of 1888, he tried to find out from him what Mr. Hays paid for this land, and that Solomon refused to tell him, because he said he intended to run for mayor of Wichita, and did not want to make enemies. Solomon himself testified that the appellant told him in a conversation in October, 1887, that Hays had defrauded him; that he had found out that the land was seven or eight miles from Wichita, and that Hays paid only \$50 an acre for it. A Mr. Levy also testified that the appellant made the same statements to him in a conversation in January, 1888. From 1887 until the commencement of the suit the appellant leased this land, received the rents from it, and paid various liens upon it as they became due, to the amount of several thousand dollars. Meanwhile the fever of speculation at Wichita gradually subsided. In 1887 and 1888 prices remained unchanged, but there were few sales. On November 13, 1890, the market value of this land had receded to that of ordinary farm land, about \$25 an acre. There

was no sale for city lots, and no speculative value to lands about the city of Wichita, and the appellant then brought his suit to rescind his contract of purchase.

The glaring fraud perpetrated on the appellant gave him the right the moment he discovered it to rescind this purchase. There was, however, no obligation upon him to exercise that right. He had the option to reconvey the land, and recover his purchase money, or to retain the property and affirm the contract. Justly and wisely the law gives him his choice, but at the same time it imposes on him the duty of making his election speedily. It not only imposes this duty, but it compels its performance. If he elects to rescind, it demands that he shall return the property he has obtained, and give notice of his election promptly upon the discovery of the fraud, to the end that the parties may be placed in statu quo. Nor can he avoid an election by delay or inaction, for silence and acquiescence are fatal to the right to rescind. They are an election to ratify the contract.

There are no cases in which the effect of the application of this principle is more salutary than in those involving speculative investments. A court of equity rescinds a fraudulent contract, on the ground that it can work no injustice to place both parties in the situation in which they were before the contract was made. Where the value of property is largely speculative and subject to rapid changes, this can only be perfectly done soon after the sale is perfected. If the fraud is discovered while the value of the property remains substantially as it was when the sale was made, a rescission of the contract then is just and equitable. But if the purchaser waits for years after he discovers the fraud, and until the property has greatly depreciated in value, and then first seeks rescission, he asks the court to burden his vendor with an unnecessary loss caused by his own inaction. Thus, in the case before us, in May, 1887, when the appellant discovered the fraud of which he complains, the land in dispute might undoubtedly have been readily sold for \$50, perhaps for \$75 an acre. If he had then given notice of his election to reconvey the land, and sought a return of his money, the appellee might have sold the land, and have repaid the purchase money without serious loss. But in 1890, after three years of depreciation, the land could not have been sold for more than 50 per cent. of its market value in 1887, and a rescission then made must entail upon the appellee a loss of thousands of dollars that is the direct result of the appellant's delay.

Nor is the reason for this delay difficult to divine. Under date of June 6, 1887, the appellant notified Mr. Hays that, if the report that he had bought the property for \$50 instead of \$75 an acre was correct, he would certainly claim the difference, \$25 an acre, from him. Evidently he did not then intend to rescind this contract, but to affirm it, and trust to the law for his damages, because he undoubtedly then thought that the rapidly advancing prices of real estate would soon make the land more valuable than the money he had paid for it. If his anticipations had been real-

ized, if the market value of the land had advanced in 1887 as it did in 1886, he would probably never have changed his mind,—he would never have elected to rescind. Indeed, he never did do so until his agent had informed him, in 1890, that this land had depreciated to \$25 an acre. Then it was that for the first time he concluded that this was a losing speculation, and that he preferred the \$27,200, and interest, to the depreciated property. For more than three years after his discovery of the fraud, and for three years too during which the fever of speculation at Wichita was succeeded by the chill of depression, and the market value of this and like land depreciated at least 50 per cent., he attempted to speculate on his option. He stood holding the land, and receiving its rents, determined to realize a profit if its value advanced, yet ready to rescind the purchase, return the land, and charge the appellee with its loss if its value receded. Its value did recede, and he now asks a court of equity to impose upon the appellee the loss which the risk he took entailed. The answer is that good faith and reasonable diligence are indispensable to obtain relief in equity; that it is neither just nor equitable thus to impose upon a vendor the losses of an unfortunate risk the vendee voluntarily took in order to secure to himself its possible benefits; and that a vendee who is defrauded has no right to speculate on his option to rescind the purchase. He cannot by silence and inaction, after discovery of the fraud, secure to himself the possible profits of the purchase through a series of years, and when the chance of profit is gone, and losses are assured, successfully appeal to a court of equity to impose the latter upon his vendor. Delay, vacillation, silence, or acquiescence for any considerable period of time after the discovery of the fraud are fatal to the right to rescind a fraudulent contract. They effect an irrevocable ratification of the agreement. It was too late for the appellant, three years after he discovered the material facts that disclosed this fraud, to revoke the ratification his acquiescence had effected. *Rugan v. Sabin*, 3 C. C. A. 578, 53 Fed. Rep. 416, 418; *Kinne v. Webb*, 4 C. C. A. 170, 54 Fed. Rep. 34, 38; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29; *Grymes v. Sanders*, 93 U. S. 55, 62; *Oil Co. v. Marbury*, 91 U. S. 587; *Hayward v. Bank*, 96 U. S. 611, 618; *Follansbe v. Kilbreth*, 17 Ill. 522, 526, 527; *Jones v. Smith*, 33 Miss. 215, 268; *Estes v. Reynolds*, 75 Mo. 563, 565; *Johnston v. Mining Co.*, 39 Fed. Rep. 304.

There is another fatal objection to the maintenance of this bill. This is a suit of which the court below has concurrent jurisdiction with the courts of the state of Kansas. In such a case the national courts, sitting in equity, will not be moved to set aside a fraudulent transaction where the complainant has remained quiescent after the discovery of the fraud for a period longer than that fixed by the statute of limitations of the state. *Rugan v. Sabin*, 3 C. C. A. 578, 53 Fed. Rep. 420; *Wagner v. Baird*, 7 How. 234, 237; *Godden v. Kimmell*, 99 U. S. 201, 210; *Burke v. Smith*, 16 Wall. 390, 401; *Kirby v. Railroad Co.*, 120 U. S. 130, 139, 7 Sup. Ct. Rep. 430; *Boone*

Co. v. Burlington & M. R. R. Co., 139 U. S. 684, 692, 11 Sup. Ct. Rep. 687.

The statutes of Kansas provide that no civil action for relief on the ground of fraud (other than for the recovery of real property) shall be brought unless it is commenced within two years after the discovery of the fraud. Gen. St. Kan. 1889, par. 4095. The fraud in this case was discovered in 1887. No action was commenced until November 13, 1890. The suit was barred in the courts of Kansas by this statute of limitations, and the court below properly refused to permit it to be maintained there.

It has not escaped our notice that counsel for appellant seek to avoid the effect of the rules to which we have adverted on the ground that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals the facts that would disclose it, and that the letter of Hays repeating his false representations, and inclosing the false certificate of his vendor, together with the false statement he caused the agent, Solomon, to make in his letter to the appellant, did prevent the latter from discovering the facts until 1890. This ground, however, is untenable for at least three reasons:

First. Notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. The appellant admits that as early as June, 1887, he was informed that the appellee had paid but \$50 an acre for this land; that he was a scamp, a scoundrel, and a cheat; and that he then caused several parties to appraise the land, all of whom agreed that it was hardly worth \$50 an acre. This was ample notice to put an ordinarily prudent man on inquiry, and if the inquiry had then been prosecuted with the diligence exercised in 1890, after the property had depreciated in value, it would undoubtedly have disclosed the same facts now proved. *Rugan v. Sabin*, 3 C. C. A. 578, 53 Fed. Rep. 419, and cases cited.

Second. The victim of a fraud, who has received notice enough to excite his attention and put him on his guard, cannot evade the duty of speedy and diligent inquiry by merely calling on the chief perpetrator, whose interest it is to conceal the facts, to reiterate or prove his false statements. He can no more escape a ratification of the contract and the bar of the statute of limitations by obtaining a repetition of the misrepresentation and fraudulent proofs in support of it from him who made it, and then refusing to verify them from independent and proper sources of information, than he can by relying on the truth of the first misrepresentation, and refusing to make any inquiry after notice of facts and circumstances indicating a fraud. A diligent inquiry is an honest inquiry,—one reasonably calculated to discover, not to conceal, the facts,—and an inquiry of the perpetrator of the fraud alone is one plainly calculated to conceal them. *Rugan v. Sabin*, supra, 421; *Singer v. Jacobs*, 11 Fed. Rep. 559, 563; *Wood v. Carpenter*, 101 U. S. 135, 139, 143.

Third. A careful and patient examination of all the evidence convinces us that the appellant was not in fact lulled into security by the letter and fraudulent proofs of Hays in 1887. It convinces us that he was fully notified in that year of all the material facts regarding this fraud that are proved in this suit. He testifies himself that after he received the letter of June 16, 1887, from the appellee, the certificate of his vendor, and the letter of the agent that the record correctly disclosed the transaction, he still tried to find out from this agent in conversation what Hays had really paid for the land, and the agent refused to tell him, because he said he wanted to be a candidate for mayor of Wichita, and desired to make no enemies. This is very persuasive evidence that Mr. Schefftel's suspicions had not been allayed, and this answer of the agent certainly did not much tend to allay them. Two disinterested witnesses testified that, in the autumn and winter of 1887-88, Mr. Schefftel told them that Hays had swindled him in the sale of this land; that he had represented that he had paid \$75 an acre, when he paid but \$50 an acre for it; and that he had represented that it was from two to four miles nearer the city than it actually was. This testimony, and the undisputed facts that he was notified of the misrepresentation regarding the price Hays paid for the property, and that he caused appraisals of it to be made in May and June, 1887, in our opinion, conclusively establish the fact that he fully discovered the fraud in that year.

The decree below is affirmed, with costs.

WARD v. KOHN et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1893.)

No. 319.

1. ATTORNEY AND CLIENT—ACTION FOR SERVICES—EVIDENCE.

In an action by an attorney residing in a large city to recover for professional services rendered therein, testimony as to the value of similar services in a small city in another state, after proof that the fees usually obtained were the same in both places, is secondary evidence, and as such is inadmissible.

2. SAME.

Such evidence is likewise immaterial where uncontradicted evidence has been given of the established and usual charges for such services at the place of their rendition.

3. SAME—PROVINCE OF JURY.

In an action by an attorney to recover compensation for professional services on the quantum meruit, the financial ability of the defendant may be considered by the jury; not to enhance the fees above a reasonable compensation, but to determine whether or not he is able to pay a fair and just compensation for the services rendered.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

At Law. Action by Aaron Kohn and others, attorneys, and co-partners under the firm name of Kohn, Baird & Speckert, against Zeb Ward, for professional services. Judgment for plaintiffs. Defendant brings error. Affirmed.

John W. Blackwood and J. E. Williams, for plaintiff in error.
U. M. Rose, W. E. Hemingway, and G. B. Rose, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. In 1890, Zeb Ward, the plaintiff in error, employed Mr. Aaron Kohn, of the firm of attorneys styled Kohn, Baird & Speckert, the defendants in error, to assist in defending him against several indictments found against him in the Jefferson county circuit court at the city of Louisville, in the state of Kentucky, and to assist him in the conduct of a certain civil action in which he was interested in that city. These indictments and this action grew out of a charge against the plaintiff in error, who had a contract with the city of Louisville, that he had conspired to defraud and had defrauded that city out of \$53,000. He was successfully defended against this charge, but declined to pay Mr. Kohn or his firm for his services. Mr. Kohn was a practicing lawyer, residing in Louisville, and the services were all rendered in that city. There was no contract fixing the compensation this attorney was to receive, and the defendants in error brought an action in the court below for the amount he deserved, and recovered a judgment on the verdict of a jury.

The first error assigned is that the court rejected the testimony of attorneys as to the value of such services as those of Mr. Kohn in the city of Little Rock, in the state of Arkansas, after it had been proved by the testimony of several lawyers that the fees usually obtained by attorneys in Little Rock were the same as those usually obtained by attorneys in Louisville. This ruling was correct. In the absence of a contract price, attorneys are entitled to receive what they deserve for their services. The amount of their compensation must vary with the place in which their services are rendered, for the same services are of more value in a large and prosperous commercial city than in a small country town; with the character and standing of the lawyer who renders them, for the services of an attorney of ripe experience, great learning, eminent ability, and high reputation deserve and command better compensation than those of the tyro in the profession; with the importance of the matters involved in the litigation, for the same services deserve more compensation where life, liberty, character, or large amounts of property are at stake than where but a few dollars are in dispute; and with the results attained, for success earns a better reward than failure. The amount that should be received by an attorney for his professional services in any case must be measured by the fees usually obtained by attorneys of similar experience and standing for like services in the same courts or in the same vicinity in which the services are rendered. Witnesses who know what the usual fees for such services are in the locality in which the services are rendered, and who are familiar with the character and standing of the attorney who renders them, and with the services he has rendered, are competent to give an opinion of the value of such services. The

record shows that several attorneys practicing in Louisville testified, in view of all the considerations to which we have adverted, what the customary charges and receipts of attorneys in Louisville were for like services to those rendered by Mr. Kohn, and what, in their opinion, a reasonable compensation for his services would be. No objection was taken, and there was no valid objection, to this testimony. Louisville is a large city. There could have been no difficulty in procuring many competent witnesses to prove the amounts usually obtained in that city by attorneys of the rank of Mr. Kohn for such professional services as he rendered to the plaintiff in error. The testimony of such witnesses was the best evidence the subject permitted. The testimony of the value of such services in Little Rock was at best but secondary evidence. It was the opinion of one set of lawyers, based upon the opinion of other lawyers, that the usual charges for fees in the two cities were the same. Its admission would have been a violation of the fundamental rule that the best evidence attainable, to the exclusion of all secondary evidence, must be produced. It could have been made competent only by proof that there were no customary charges for such services in Louisville, or that all the witnesses who knew the fees usually obtained for such services in that city and its vicinity were in some way incapacitated to testify.

Moreover, the testimony on which it was sought to base the rejected evidence was utterly immaterial. It made no difference what the fees of attorneys in Little Rock were, as long as there was uncontradicted evidence that there were established and usual charges for such fees in Louisville. *Stanton v. Embrey*, 93 U. S. 557; *Elfelt v. Smith*, 1 Minn. 125, (Gil. 101); *Vilas v. Downer*, 21 Vt. 424; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Durst v. Burton*, 47 N. Y. 167; *Jones v. Railway*, 53 Ark. 27, 13 S. W. Rep. 416.

The counsel for plaintiff in error requested the court to instruct the jury that:

"No greater fee or amount would be reasonable against a wealthy man than a poor man for the same services, and you will not allow the wealth of the defendant to influence your finding as to what would be a reasonable fee for the services, unless the same increased or diminished the burden of the services of the plaintiffs."

They also requested the court to instruct the jury that:

"You will not allow the wealth of defendant to influence your finding as to what would be a reasonable fee for the services, unless the same increased or diminished the burden of the services of the plaintiffs."

The court refused to grant these requests, and instructed the jury as follows:

"The court instructs the jury that in ascertaining the reasonable value of the services of plaintiffs you will consider the nature of the litigation, the amounts involved, and the interest at stake, the capacity and fitness of plaintiffs for the required work, the services and labor rendered by plaintiffs, and the benefit, if any, derived by the defendant from the litigation; and you are further instructed to look to all of the evidence in the case, and to exercise your sound discretion and judgment thereon, and to allow plaintiffs such reasonable amount as you may believe from the evidence that they are justly entitled to, not to exceed the amount claimed in their complaint."

"(a) The plaintiffs are entitled to recover just such sum as Mr. Kohn's services, and no one else, was worth to the defendant, Zeb Ward, and to no one else, in the city of Louisville, and nowhere else, and in that particular case.

"(b) As to the wealth of the defendant, referred to in the case, the court has nothing to say except that when a party employs another he has a right to take into consideration the ability of the employer to pay.

"(c) A man that can and does demand and receive large fees by reason of his skill and ability in his profession has a right to demand more for his services than one that cannot.

"(d) You are not to be governed by hearsay evidence, but only by matters testified to that are known to the witnesses."

Counsel for plaintiff in error excepted to paragraphs a, b, c, and d of this charge.

From a deposition of William L. Jackson, Jr., the judge of the Jefferson county circuit court, before whom the indictments were pending, the following question and answer were read to the jury in the trial without objection.

"Q. I will ask you, judge, whether or not fees of an attorney at law are gauged and estimated by the amount of time actually consumed, either in the court or in the preparation of the case. A. I have not so understood it. I have understood that the fees were regulated by the ability of the lawyers, and the skill required in the management of the cases, and the ability of the defendant to pay a reasonable and fair compensation, and also from the results procured."

On cross-examination he testified:

"A. What influence upon your mind, in coming to the estimate of fees you have, did the financial condition of Col. Ward have? A. Oh, it has a very great effect. Of course, as practicing attorney myself, I know I always fix the fees in accordance with the services rendered, and the ability of my client to pay. Q. Well, in the case of a wealthy man, or a man who is not wealthy, would the actual labor and service of a lawyer be any more? A. No more at all. That would have been the same, and his duty as a lawyer would have been the same; but the ability of the client to pay would have made the services of the lawyer worth more. Q. Why? A. Well, that is just a general rule that attorneys have in fixing their fee, and I think a very good rule. Of course, as I say, his duty to a poor client is just the same as to a rich client, but the duty of the client to pay and the liability of the client to the lawyer becomes much greater in a rich than a poor man."

Several other lawyers testified on their cross-examination to the existence of this general rule in the city of Louisville, and this testimony was uncontradicted.

Under the evidence in this case we think it was not error for the court below to refuse to instruct the jury that the wealth of the defendant should have no influence in determining what would be reasonable compensation for the professional services of Mr. Kohn, and for these reasons:

First. It goes without saying that a larger amount is reasonable compensation for the same professional services where the amount at stake is \$50,000 than where it is \$50. It is also clear that a conviction under indictments charging the plaintiff in error with defrauding the city of Louisville of \$53,000, was a far more serious matter to him if he was able to refund the money than it was if he was unable to respond in damages, for such a conviction

was morally certain to be followed by an action to recover the money. It follows that there was in reality \$53,000 more involved in this litigation if the plaintiff in error was financially able to repay this amount than if he could repay none of it.

Second. It is proved by the evidence of Judge Jackson and of several eminent lawyers practicing in Louisville that it is the usual practice in that locality to consider the ability of clients to pay a fair and reasonable compensation in fixing the fees of attorneys for professional services; and as, under the law, the compensation Mr. Kohn deserves must be measured by the fees usually obtained by attorneys in that city for like services, we see no escape from the proposition that the jury were entitled, under this evidence, to weigh the same considerations ordinarily considered at Louisville in fixing the usual fees for such services.

The wealth of a defendant cannot be considered in any case to enhance the fee for professional services above a reasonable compensation for the service actually rendered. It cannot be considered to make a fee extortionate or a compensation unreasonably large. But every judge and every gentleman of the bar knows that much severe professional labor is rendered by practicing attorneys without any compensation, and much more for compensation so small as to be entirely inadequate. It is as difficult to defend the poor as the rich from a groundless charge of murder. It requires as much learning, labor, and professional skill to recover or save from attack property of little value, that may be the entire estate of the poor man, as it does to recover thousands of dollars for the wealthy. The duty of the lawyer to defend the former and maintain his rights is as great as it is to the latter, and to the honor of the profession it may be said that it is performed with equal zeal and fidelity. But it is the general practice of the gentlemen of the bar to fix the fees for such services far below a fair compensation or to charge no fee at all,—to measure their fees more by the inability of such a client to pay a fair compensation, or to pay at all, than by the value of the services they render. When, on the other hand, a client who has the means to pay what professional services are fairly worth employs an attorney, it is right and just that he should pay a fair and reasonable compensation for the service he obtains. In other words, the fees the attorney deserves from such a client should not be measured by the inadequate compensation and small fees the gentlemen of the bar usually receive from those who are unable to pay at all or to pay a fair compensation, but they should be measured by the fees usually obtained by attorneys for like services from those who are able to pay just compensation for the service rendered. In this sense it was not improper for the jury to consider the wealth of the plaintiff in error to determine whether he was financially able to fairly compensate Mr. Kohn for his services. This was the effect of the charge of the court, and we think it fairly presented the accepted rule upon this subject. The rule is well stated by Judge Jackson in his testimony quoted, *supra*. In *Wilson v. Fowler*, 3 Ark. 464, it appears that Mr. Albert Pike testified in that case "that fees of attorneys in criminal cases vary ac-

according to the magnitude of the cause and the ability to pay." In *Lombard v. Bayard*, 1 Wall. Jr. 196, Judge Grier said:

"Every gentleman of the bar knows that there cannot be any one rule of charges in the nature of a horizontal tariff for all cases. Often, where the parties are poor, and the matter in contest is small, counsel receive but very inadequate compensation for their exertion of body and mind; and for myself I know that for some of the most severe labor of my professional life I have been the least well paid. In other cases, where the parties are wealthy, and the sum in controversy large, they will receive a tenfold greater compensation for a tithe of the same labor. In some cases the whole sum in dispute would be poor compensation. In others five per cent. of it will be very liberal. Hence, in all cases, professional compensation is gauged not so much by the amount of the labor as by the amount in controversy, the ability of the party, and the result of the effort; and this is perfectly just."

We think the true rule is that in an action by an attorney to recover compensation for professional services on the quantum meruit, the financial ability of the defendant may be considered by the jury, not to enhance the fees above a reasonable compensation, but to determine whether or not he is able to pay a fair and just compensation for the services rendered.

That there was no error in the other paragraphs of the charge to which exception was taken sufficiently appears from what we have already said.

An exception was taken by the plaintiff in error to the refusal of the court to give one other request to charge the jury, but an examination of the charge shows that the substance of that request was given by the court in another paragraph of the charge, and it is unnecessary to notice it further.

The judgment of the court below is affirmed, with costs.

IN re WORTHEN.

(Circuit Court, S. D. Ohio, W. D. January 10, 1891.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATIONS.

The Ohio statute of March 7, 1890, prohibiting the manufacture or sale of oleomargarine unless it be manufactured and sold in separate and distinct form, and in such manner as will at once advise the consumer of its real character,—free from any coloring matter or other ingredient which would cause it to look like butter,—is invalid as a regulation of interstate commerce, in so far as it would prevent the sale of oleomargarine, colored to look like butter, in the original packages in which it is imported from other states. *Leisy v. Hardin*, 10 Sup. Ct. Rep. 681, 135 U. S. 100, followed.

John W. Herron, for relator.

Matthews & Cleveland, for the sheriff of Hamilton county.

SAGE, District Judge, (orally.) The respondent was convicted under an act of the legislature entitled "An act to prevent deception in the sale of dairy products, and to preserve the public health," passed March 7, 1890.

That act prohibits the manufacture or sale of oleomargarine unless it be manufactured and sold in separate and distinct form,

and in such manner as will at once advise the consumer of its real character,—free from any coloring matter, or other ingredients which would cause it to look like butter, etc.

It appears from the testimony that the respondent, as the agent of Friedman & Swift, oleomargarine manufacturers at Chicago, is engaged, at the corner of Front and Main streets, in the city of Cincinnati, in disposing of original packages of oleomargarine, shipped from Chicago by his principals, and disposed of by him in the original packages.

The oleomargarine so shipped is composed of neutral lard, 50 per centum; oleo oil, 35 per centum; natural butter, 10 per centum; and cream and milk, 5 per centum; to which is added a sufficient quantity of salt and coloring matter, (an article called "annotto,") which, according to the testimony, is precisely what is used in coloring creamery butter.

This oleomargarine is a compound having the appearance, and almost exactly the taste, of butter; so nearly so that they cannot be distinguished, or that they can be distinguished only upon a careful inspection; and it is an article not deleterious as food.

Now, as I look at the decision of the supreme court in the case of *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, there is scarcely a question left open for the consideration of this court.

The Ohio statute does not merely regulate or throw a guard about the sale of the product shipped by the manufacturers to the respondent, and sold by him; but it positively prohibits the sale.

Counsel for respondent rely upon the following passage from the decision in *Leisy v. Hardin*, 135 U. S., at page 122, 10 Sup. Ct. Rep. 681:

"These decisions [with reference to the police power of the states] rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it prohibits, directly or indirectly, the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is, therefore, void."

Near the close of the opinion in this case, near the foot of page 124, 135 U. S., and page 689, 10 Sup. Ct. Rep., the chief justice says:

"Up to that point of time [when the property would become mingled with the common property within the state] we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That is, by way of illustration, if there should be an importation of dynamite, it could not, in defiance of the local law, be stored within the limits of the city of a state. The opinion continues:

"To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to the majority of the people of the state, represented by the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in congress; and its possession by the latter was considered essential to the more perfect Union which the constitution was adopted to create."

Now, by the act of congress of August, 1886, oleomargarine was undoubtedly recognized as an article of commerce, and put under the control of a national law, regulating its sale; following it not only through the course of manufacture, and regulating that, but following it also into the hands of the wholesale dealers; requiring that it should be so branded and marked as to make it impossible to practice upon any one able to read any fraud with reference to its character; and following it further into the hands of the retail dealer, requiring him to take out a license under the authority of the United States, and to brand the packages and mark them so as to prevent the deception of purchasers as to the real character of the article.

It is clear to my mind that it is the duty of this court to assume that this act will be enforced, and that the provisions which the legislative department have made to prevent fraud will be effective. The oleomargarine brought into the state in the original packages is within the protection of the constitution of the United States, and it can be sold in the original packages, entirely independently of the provisions of the state statute, and subject only to the provisions of the national statute.

But the instant an original package is opened, and its contents exposed for sale at retail, they thereby, to adopt the language of the supreme court, "become mingled with the property of the state, and subject in every respect to its law."

It would be practically a nullification of the provisions of the constitution of the United States to hold that the state, while it may not interfere with the importation within its limits of any article of commerce which it deems hurtful to its people, may, immediately upon its importation, throw its prohibition about it, and prevent its sale; and so, by defeating the object of the importation, effectually prevent the importation itself.

I do not say that the state statute is unconstitutional; on the contrary, I think that it is constitutional when applied to sales within the state of all oleomargarine there manufactured, and of the sale of broken packages of oleomargarine imported from other states or from foreign nations. I do not think that the federal constitution interferes in the least with the power of the state of Ohio to regulate or prohibit the manufacture or sale of oleomargarine in this state, or imported into this state, after once the original package has been broken; but the state law does not apply to, and can-

not be enforced against, sales in the original packages of oleo-margarine imported into the state.

My conclusion, therefore, is that the respondent has not been within the reach of the Ohio statute, and that it does not apply to the case made against him, and that he must be discharged.

EIFFERT et al. v. CRAPS et al.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.)

No. 46.

1. EQUITY JURISDICTION—REMEDY AT LAW.

A bill to recover land, alleging that the same belonged to complainant's father, and was sold under a decree of the court of ordinary without jurisdiction of the subject-matter or of complainants, is not maintainable in equity, as it shows that the legal title has never been divested out of plaintiffs, and may therefore be enforced by action of ejectment. Hipp v. Babin, 19 How. 277, followed.

2. EQUITY—LACHES—WHAT CONSTITUTES.

One who relies for the recovery of lands on a fraud 40 years old must be held guilty of laches, when it appears that the fraud might have been discovered at any time after its perpetration by the inspection of a single deed, recorded where the record of title of the land was to be looked for, and that the original purchaser under the deed has been dead 12 years, and the land devised by his will sold in partition, and resold several times.

Appeal from the Circuit Court of the United States for the District of South Carolina.

In Equity. Suit by James J. Eiffert, John Jacob Eiffert, and Henry A. Eiffert against Samuel P. Craps and others to set aside a deed, and recover lands. There was a decree dismissing the bill. Complainants appeal. Affirmed.

Statement by MORRIS, District Judge:

The complainants, alleging themselves to be children and heirs of John H. Eiffert, on April 9, 1890, filed their bill of complaint, in equity, to set aside a deed charged to be fraudulent, and to recover possession of about 90 acres of land in Lexington district, in South Carolina. They allege that their father, John H. Eiffert, being in possession and seised in fee of the land, died prior to 1850, the complainants being then from 6 to 12 years old; that they were taken by their mother to the far west, and have ever since resided out of the state; that about 1850 one Mitchell administered on the estate of their father, and, by collusion and fraudulent contrivance with one Henry Craps, pretended to procure an order of the court of ordinary of the district, for the sale of the land, and had the land sold by the sheriff, and by collusion and fraud turned the land over to Henry Craps, who took possession, and continued in possession until his death, in 1878; that the fraud was perpetrated by Henry Craps falsely representing to the court of ordinary that he was one of the heirs and distributees of their father, and petitioning the court to sell the land for partition; that after Henry Craps' death, in 1878, the land remained in possession of the devisees under his will, until, under a decree for partition, it was sold in 1883 to one of his daughters, who has since sold it in parcels to the other defendants, who are now in possession; that all the devisees of Henry Craps, and their grantees, the defendants, have had full knowledge of the fraudulent character of Henry Craps' title. They allege that the deed from the sheriff to Mitchell in 1850 is void, and passed no title, because, if a sale was really ever decreed by the court of ordinary, that court was without jurisdiction to order a sale, both because Craps was

not an heir of John H. Eiffert, and because no notice, by advertisement or otherwise, was served on the complainants. As the reason why complainants have been prevented from sooner asserting their rights, they allege that about 1856 the complainant John Henry Eiffert returned to South Carolina, and inquired of Mitchell about their father's land, and was informed by him that it had been sold for debt by the sheriff of Lexington district; that the fraud has only quite recently come to their knowledge, having been fraudulently concealed from them; and that, since they have learned of the fraud, one of the complainants has visited South Carolina, and seen the old people who might have knowledge of the matters, and has examined the records in the clerk's office. The bill prays that the deed from the sheriff to Mitchell may be set aside, and declared void; that the title be declared vested in the complainants; that an account of rents be taken, and a writ of possession granted.

The defendants answered, denying the alleged frauds, and claiming to be innocent purchasers for value. They pleaded the statute of limitations, and the laches of the complainants in asserting their claim of title, and that the complainants have an adequate remedy at law.

The bill coming on to be heard, the court (Judge Simonton) held that it appeared from the allegations of the bill that the complainants had a plain, adequate, and complete remedy at law, and dismissed the bill. The court, as appears from its opinion, proceeded upon the ground that as it was alleged that the court of ordinary was without jurisdiction of the subject-matter, and its order of sale was unauthorized by law, and none of the heirs of Eiffert were parties to the proceeding, or bound by the order, and therefore, as alleged, that the title to the land had never been divested out of them, the case was, in fact, an attempt to enforce a merely legal title by a bill in chancery, instead of by action or ejectment. The court cited *Hipp v. Babin*, 19 How. 277, as controlling authority that such a bill must be dismissed.

G. T. Graham, J. C. Blair, and F. C. Blair, for appellants.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

MORRIS, District Judge, after stating the case as above, delivered the opinion of the court.

In the case of *Hipp v. Babin*, 19 How. 271, cited in his opinion by the learned judge of the court below, the children of a testator filed a bill in equity to recover possession of lands of their father, which had been sold by his executrix during their minority by virtue of an order of court empowering her to make the sale. The complainants relied upon the invalidity of that order, and the consequent nullity of the sale. The supreme court held that the remedy at law, by ejectment, was plain, adequate, and complete, and that the bill in equity was rightly dismissed. It was held, also, in *Phelps v. Harris*, 101 U. S. 375, that, if a deed is invalid upon its face, it is to be repelled by an action at law, and not in equity.

But the complainants in the present case allege, and assign as error in the decree dismissing their bill, that there is also a matter extrinsic the deed itself, or the proceedings in the court of ordinary, viz. the fraud of representing to the court that Craps was an heir and distributee of their father, which gives a court of equity jurisdiction to set aside the deed procured through the fraud. The defendants have set up as a defense the complainants' laches, and the staleness of their claim. If, therefore, it be conceded that their allegations of fraud do make a proper case of equity jurisdiction, it is necessary to examine the bill to see how the complainants ac-

count for the long delay from 1851 to 1890, a period of 39 years, and what it is they aver has prevented them from earlier asserting their claim of title. According to the statement of the bill, the youngest of the complainants must have arrived at 21 years of age in 1866. The bill states that the complainant John Henry Eiffert came to South Carolina, in 1856, to inquire about this land, and was told by Mitchell that it had been sold by the sheriff for debt. He appears to have made no inquiry as to what had become of the proceeds, how it had been sold, or who was in possession. The deed from the sheriff to Mitchell was then on record, the first line of which begins with the recital:

"Whereas, Henry Craps, one of the heirs and distributees of John H. Eiffert, deceased, filed a petition in the court of ordinary," etc.

All that is alleged in the bill could have been learned in 1856, by the examination of one recorded deed, and by asking who was in possession of the property. The averment of the bill is that:

"Some time last fall, your orators were put upon the track of these frauds, and since that time one of them, at much expense, has visited different places in South Carolina, saw the old people who might have knowledge of the matter, examined the records of the clerk's office, and, by all diligence, have sought to acquire the information contained in this bill. They submit that no laches or imputation of negligence in asserting their claim can be charged against them, as the whole transaction was fraudulently concealed from them."

The only concealment averred is that Mitchell stated in 1856 that the land had been sold for debt. The only allegation which contradicts the statement said to have been made by Mitchell is the recital in the sheriff's deed, and that deed was just as open to inspection in a public record in 1856 as it was 34 years afterwards, in 1890. After so great a lapse of time, after the original purchaser has been dead 12 years, and the land, by a decree for the partition of the estate devised by his will, has been sold at public sale, and resold several times, it is too late to rely upon a fraud 40 years old, which could have been discovered as soon as it was perpetrated, by the inspection of a deed recorded where the record title to the land was to be looked for. In denying relief in the case of *Norris v. Haggin*, 136 U. S. 392, 10 Sup. Ct. Rep. 942, the supreme court said:

"It is a part of this general doctrine that to avoid the lapse of time, or statute of limitations, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud, as alleged in the bill, were open and public acts. The note and mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings, which were open to everybody's examination, and which were probably well known in the entire community."

The salutary rule of courts of equity for discouraging antiquated demands requires that the bill shall set forth why the complainant has remained so long ignorant of his rights, and if his averments show that he could have learned his rights at any time, if he had

chosen to inquire, or to examine a public record, his bill is to be dismissed. *Badger v. Badger*, 2 Wall. 95; *Marsh v. Whitmore*, 21 Wall. 185; *Brown v. County of Buena Vista*, 95 U. S. 157; *Naddo v. Bardon*, 2 C. C. A. 335, 51 Fed. Rep. 493. In *Stearns v. Page*, 7 How. 829, it was said by the supreme court:

"And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

See, also, *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, and *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. Rep. 833.

Considering how easily all the facts alleged in the bill could have been discovered at any time since March, 1851, when the sheriff's deed was recorded, it cannot be said that ordinary diligence has been exercised; and considering that Henry Craps resided on the property for 27 years,—until his death, in 1878,—and the changes and the sales of the property since that date, it is clear that the time for the complainants to have attacked the sheriff's deed was certainly not later than during the 27 years which Henry Craps lived after he took possession, and that they have stated no fact sufficient to relieve them of the imputation of laches.

Our conclusion is that the circuit court was right in dismissing the bill without prejudice to an action at law, and the decree is affirmed, with costs.

BOUND v. SOUTH CAROLINA RY. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.)

No. 48.

1. MORTGAGES—FORECLOSURE—PLEADING—ESTOPPEL.

The owner of second consolidated railroad mortgage bonds filed a foreclosure bill, and, according to the prayer thereof, the court appointed a receiver, required all lienholders to come into the cause, and enjoined them from asserting their claims in any other case. All the lien claimants, including the holders of prior and subsequent mortgage bonds, filed cross bills, asking affirmative relief and the sale of the property. For nearly three years the court dealt with the suit as a consolidated case, and finally decreed a sale free of all liens. *Held*, that it was too late for any party to object to the decree that it was not in conformity to the prayer of the original bill, or to contend that because the lienors had filed cross bills, instead of obtaining leave to file original bills, the pleadings were irregular.

2. SAME—PETITION TO REDEEM—PREREQUISITES.

In a foreclosure proceeding, a petition of junior lienors to be allowed to redeem prior mortgages should contain a formal offer to pay whatever sums the petitioner admits to be due; and a prayer that the prior mortgages be required to deposit their securities in court, in order that the petitioner "may have the privilege of redeeming" them, is insufficient.

3. SAME.

The trustees of a first consolidated railroad mortgage, having declared the mortgage due before maturity for default in interest, pursuant to a provision thereof, filed a cross bill in a pending foreclosure suit, brought by second consolidated mortgage bondholders, and also prayed a foreclosure. After other lienors praying for a sale had come in, which were

prior to the first consolidated mortgage, and were past due, a majority of the first consolidated mortgage bondholders filed a cross bill, in which they repudiated the action of their trustees declaring the mortgage due, and prayed the court to order a sale subject to all incumbrances prior to the second consolidated mortgage, and to direct the payment out of the proceeds of all arrears of interest on the first consolidated mortgage bonds, and on certain mortgages prior to that; but they did not offer to bid an amount sufficient to pay these arrearages, or any of the large costs and expenses of the suit. *Held*, that the trial court rightfully refused to decree as thus requested, and properly adhered to its determination to decree a sale free of all liens, reserving a right to any party to redeem on paying the several amounts found due, with costs.

4. SAME—ORDER OF SALE—RECEIVER'S OBLIGATIONS.

The decree for sale on foreclosure sale of a railroad which is in the hands of a receiver may properly direct that the sale be made subject to outstanding obligations of the receiver, at the same time requiring the receiver to file a statement thereof in detail, so that the amount may be known with sufficient certainty to enable intending purchasers to bid with confidence.

5. SAME—PRIORITIES—PREFERENCES FOR SUPPLIES.

A railroad company purchased rails on a credit of eight months, promising to pay therefor out of earnings. At the end of that time only a part was paid, the notes for the balance being extended. Before the expiration of the credit, however, the company had paid interest on mortgage bonds, borrowing the money on its notes, which were afterwards paid out of earnings. Eighteen months after the purchase a receiver was appointed. *Held*, that the giving of the credit indicated an expectation that interest on the bonds would be paid, and hence the payment thereof was not a diversion of earnings within the rule giving a preference, on foreclosure, to current expenses incurred on the faith of earnings shortly before the appointment of a receiver.

Appeals from the Circuit Court of the United States for the District of South Carolina.

In Equity. Bill by Frederick W. Bound, a holder of second consolidated mortgage bonds of the South Carolina Railway Company, against the company and others, for the appointment of a receiver, ascertainment of lien claims, and for foreclosure. A receiver was appointed, the holders of the senior and junior mortgage bonds and other lien claimants came in, and the priorities were adjudicated. See 43 Fed. Rep. 404; 46 Fed. Rep. 315; 47 Fed. Rep. 30; 50 Fed. Rep. 312, 853; 51 Fed. Rep. 58; 55 Fed. Rep. 186. The final decree ordered a sale free of all liens, and the case comes to this court on appeals by Frederick W. Bound, the complainant, and Smith and Kissel, cross complainants. Decree of sale affirmed, but reversed in so far as it gives priority to the claim of the Lackawanna Coal & Iron Company for certain steel rails furnished.

Statement by MORRIS, District Judge:

There are five separate and distinct mortgages now existing on the property of the South Carolina Railway Company:

First. The statutory mortgage of 1837, which is past due, and which, with interest, amounts to about \$50,000. Proceedings to foreclose this mortgage had been instituted before this suit was commenced, resulting in a decree for sale, which, upon appeal to the supreme court of the United States, has been affirmed.

Second. The mortgage of 1868, which, except about \$8,000, is past due, and which amounts to about \$250,000.

Third. The consolidated first mortgage of 1881, the principal of which is \$4,883,000. On this mortgage, at the date of the filing of the original bill in

this suit, 7th October, 1889, there were two past-due interest coupons, amounting to \$146,490 each.

Fourth. The second consolidated mortgage of 1881, amounting to \$1,330,000, the principal of which is due, and on which, at the date of the filing of the bill, there were two past-due interest coupons.

Fifth. The income mortgage of 1881, amounting to \$3,000,000.

All of these mortgages are admittedly due, except the first consolidated mortgage, which the trustees have, under the authority given them by the mortgage, declared to be due for default in the payment of interest; but their action has been repudiated by certain holders of the bonds claiming to be a majority, and has been upheld by others. The original bill was filed 7th October, 1889, by Bound, the holder of bonds of the second consolidated mortgage. The bill alleged the insolvency of the railroad corporation, default in all of its mortgages, mismanagement and deterioration of the property, danger from suits and judgments, and prayed for a receiver, and for a sale to foreclose the second consolidated mortgage, subject to all prior liens. It made the railroad company and all prior and subsequent lienholders parties defendant, and prayed that all creditors claiming any interest in or lien on the mortgaged property might be restrained from suing or enforcing their claims, save in that court and in that cause.

All the lienors came in by cross bills, setting up their respective mortgages and claims, and asking for a sale of the entire property that their claims might be paid.

The cross bill filed by Barnes and Sloan, the trustees under the first consolidated mortgage, alleged nonpayment of two interest coupons; that under the power contained in their mortgage they had declared the principal due and payable for default in the payment of interest; that the net earnings of the company had been insufficient to pay the interest on its mortgage bonds; that its floating debt had steadily increased, and that the two prior mortgages were past due and payable. Their cross bill charged that the facts alleged in it and in the original bill filed by Bound showed that a sale discharged from all liens would be for the interest of the first consolidated mortgage bondholders and all other creditors of the company, and prayed for such a sale.

The final hearing of the cause was not had until after the court, through its receiver, had operated the railroad for nearly three years. During that time it had been demonstrated that under careful management by a receiver it required all the earnings of the road to maintain it in good running order, and pay the expenses of operating it, and that there was no net revenue applicable to the payment of interest on its first consolidated mortgage bonds. There was also testimony adduced tending to show that the money for the payment of interest prior to the defaults which led to this foreclosure suit had been raised only by the sacrifice of securities and property which it was highly important the railroad should retain, and that money paid for interest had not been derived from net earnings.

By the master's report it appeared that the Coghlan statutory mortgage of 1837, amounting to about \$50,000, was due, principal and interest, and had passed into a decree for sale; that the mortgage of 1868, on which there was due about \$235,000, was in default, and payable, and that the holders were urging a foreclosure, and were entitled to be paid. As to the first consolidated mortgage, amounting to \$4,883,000, at the time when the court proceeded to pass a decree there were three semiannual interest payments in arrear, each amounting to \$146,490. The second consolidated mortgage, amounting to \$1,330,000, had been declared due and payable, and there were seven half-yearly payments of interest in default, amounting to \$39,000 each, and the income mortgage bonds, amounting to \$3,000,000, were also due.

During the pendency of the litigation it was brought to the attention of the court that there was a dispute between the trustees of the first consolidated mortgage and certain petitioners, Smith, Kissel, and Martin, who claimed to own or to represent the owners of a majority of the first consolidated mortgage bonds. Messrs. Smith, Kissel, and Martin, claiming to be the holders of a large amount of the first consolidated mortgage bonds, on their own petition were made defendants on 6th June, 1890, and answered the cross bill of

their trustees, Sloan and Barnes, alleging that the trustees had wrongfully declared the principal of their bonds due in the interest of junior securities, to whose interest it would be that the first consolidated mortgage bondholders should be compelled to accept a less rate of interest, and charging that the earnings of the railroad, if properly applied, were sufficient to pay interest on their bonds, and that, if a sale was decreed, it should be subject to the first consolidated mortgage. The provision with regard to default in the payment of interest rendering the principal due and payable, as contained in the bonds, was as follows: "Upon default in the payment of interest on this bond for six months after it becomes payable and has been duly demanded, the trustees, subject to the provision of the said mortgage, may declare the principal of all the bonds immediately payable, and must do so if required by the holders of one-fourth of all such bonds." The provision in the mortgage was that, if default in payment of interest should continue for six months after demand made, "then and thereupon the principal of all bonds hereby secured shall be and become immediately due and payable, provided the trustees under this mortgage give written notice to the party of the first part, while such default continues, of their option to that effect, which notice they shall be bound to give, if required in writing so to do by the holders of one-fourth in amount of all such bonds then outstanding. That, in case the premises hereby conveyed, or any portion thereof are sold under or by virtue of the lien of any prior mortgage, or of any other lien having priority over this indenture, the principal of all bonds hereby secured shall be and become immediately due and payable, simultaneously with such sale."

At the final hearing of the case the court expressed itself as of the opinion that the action of the trustees of the first consolidated mortgage in declaring the principal of the bonds due had been improvident, and held that there was evidence that the trustees had acted hastily, and not solely with reference to the interest of the first consolidated bondholders; but the court did not set aside or annul the action of the trustees, and was of opinion that the three years' operation of the railroad by its receiver had demonstrated that at that time there was practically no course open except to sell the railroad, clear of all liens. It appeared to the court, as stated in its opinion, that the holders of the two mortgage debts prior to the first consolidated mortgage were pressing for a sale, and were entitled to their money without further delay, and that the rights of all claimants would be most fairly and equitably protected by a sale of the entire property, clear of all incumbrances; and it so decreed.

After the filing of the opinion of the court, and before the signing of the decree for sale, Smith and Kissel filed a petition, asking the court to allow them, or any holder of first consolidated mortgage bonds, or the trustees of the first consolidated mortgage, to redeem the Coghlan mortgage of 1837 and the mortgage of 1868, and to pass an order directing the holders of bonds secured by those mortgages to deposit them in court, and that, upon paying the amounts due on said bonds into court, the persons so paying should be substituted as the owners of said bonds, and praying the court to declare that the interest only of the first consolidated mortgage was due, and to decree a sale to be made subject to that mortgage and the liens prior to it, and to decree that out of the proceeds of sale the past-due interest on the prior liens and on the first consolidated mortgage should be paid.

All the other parties to the cause objected to the granting of this petition, and the court refused it, and passed the decree of 23d November, 1892, directing that, unless the claims, as ascertained and adjudicated by the decree, were paid in 30 days, the entire property should be sold, free from all liens, and requiring the purchaser to pay all the obligations of the receiver.

From this decree Smith and Kissel have appealed, and urge as error in the decree that it did not adjudge that they had the right to redeem the property from the liens which were prior to the first consolidated mortgage, and in not dismissing the cross bill of Barnes and Sloan, trustees, asking for a sale discharged from the first consolidated mortgage, and in not decreeing a sale under the second consolidated mortgage only.

Bound, the original complainant, also appealed, and assigned for error that the court had not decreed a sale under the second consolidated mortgage

subject to prior liens, and that the decree required the purchaser to pay the compensation of the receiver and such of his obligations as had not been paid out of the income received by him prior to his delivery of possession; and also assigned as error the allowance by the decree as a lien prior to the second consolidated mortgage bonds of the claim of the Lackawanna Iron & Coal Company to the extent of \$33,960, for steel rails purchased by the railway company in April, 1888.

Mitchell & Smith, for F. W. Bound.

W. H. Peckham, for Smith and Kissel.

Smythe & Lee, for Barnes and Higginson, trustees of second consolidated mortgage.

T. W. Bacot, for holders of mortgage of 1868.

Lord & Cohen, for Sloan and Barnes, trustees of first consolidated mortgage.

E. Ellery Anderson and George W. Dillaway, for certain holders of second mortgage bonds, income bonds, and stock.

A. M. Lee, for holders of bonds and stock of the New York & Charleston Warehouse & Steam Navigation Co.

Rutledge & Rutledge, for Lackawanna Iron & Coal Co.

Before FULLER, Circuit Justice, and HUGHES and MORRIS, District Judges.

MORRIS, District Judge, after stating the case as above, delivered the opinion of the court.

The principal point of contention on this appeal is whether or not the court was right in directing a sale clear of all liens, or should have decreed a sale subject to the first consolidated mortgage and all prior incumbrances. The objection urged that the decree was not in conformity to the prayer of the original bill, which was only for a foreclosure of the second consolidated mortgage, we think is not tenable. The receiver was appointed upon the prayer of the original complainant, and upon his prayer all persons having liens, mortgages, or claims of any kind were required to come into that case, and were enjoined from proceeding in any other case to enforce their rights. After all the lien claimants had come in, asking affirmative relief, with no objection to the form of their proceeding from any one, and after the court for nearly three years had dealt with the suit as a consolidated case, embracing all the parties as actors, in our opinion it was too late, upon the passing of the final decree, for the complainant to contend that, because the lienors had filed cross bills, and had not obtained leave to file original bills, the pleadings were irregular. The result of the filing of cross bills by all the lienors, all asking affirmative relief and a sale of the mortgaged property, to which mode of pleading no one raised any objection, was that the proceeding became and was treated by all parties as a consolidated case for the assertion of their respective rights as creditors, and for the preservation of the railroad and its franchises until their respective priorities could be adjudicated, and a decree for sale could be obtained, and the property handed over to a purchaser. All the proceedings from the filing of the original bill and the appointment of the receiver, in October, 1889,

to the filing of the opinion of the court, in June, 1892, were so treated by the parties and by the court. The proceeding was in fact a consolidated case, in which all the creditors and claimants were actors, seeking payment of their respective claims, and in which they all agreed that a receiver was necessary, and in which, by order of the court, and upon the prayer of the original complainant, they were all enjoined from proceeding in any other court or in any other case. If the prior lienors had proceeded by leave of the court by original bill to enforce their liens by foreclosure, the court would have ordered their cases consolidated with the case in which the receiver had been appointed, and in which the property and all its revenues was in the custody of the court, and in which the amount and priorities of the different liens was being ascertained.

On this branch of the appeal, the only substantial question is whether, assuming that the question was properly before it, the court was right in ordering the sale free from all liens. Certainly, so far as the Coghlan mortgage of 1837 and the mortgage of 1868 were concerned, those lienors were pressing for a sale, and were entitled to it, unless paid. No one, so far as the record discloses, up to the time when the opinion of the court on the final hearing was filed had offered to pay them. Did the petition afterwards filed by Smith and Kissell contain such an offer? We think it did not. Their petition asked the court to direct the holders of these prior securities to deposit them in court, and that the petitioners, or those acting with them, might have the privilege of redeeming; but it made no offer to redeem. Indeed, it rather appears from the language of the petition that they guardedly abstained from making such an offer. It also asked the court to direct a sale, subject to all incumbrances prior to the second consolidated mortgage, and to direct that out of the proceeds of sale under foreclosure of the second consolidated mortgage there should first be paid all interest in arrear on the mortgage of 1837, the mortgage of 1868, and the first consolidated mortgage, but it made no offer to bid an amount to pay those arrearages, or any of the large costs and expenses of the suit and of the sale. There was, therefore, reason to anticipate, in view of what had come to the knowledge of the court through the receivership of the insolvency of the railroad company, that the scheme of sale proposed by Smith and Kissell would prove nugatory. It is also far from clear, unless upon a distinct agreement of the parties concerned, how the court could direct that the proceeds of a sale under the second consolidated mortgage to realize money to be applied to the payment of its bondholders should be applied to the payment of the interest on prior incumbrances. It is a proper requirement of a petition to be allowed to redeem that it should contain a formal offer to pay whatever sums the petitioner admits to be due. Story, Eq. Pl. (8th Ed.) § 187 et seq. Considering the delay in filing this petition until after the announcement of the decision of the court, and in view of the fact that the claims to be redeemed had been ascertained and adjudicated, there was every reason why such an offer should be distinctly made

before the court could be asked to direct that the petitioners might redeem in the special manner prayed by them. The general right to redeem according to the ordinary course of equity was sufficiently allowed by the clause of the decree which, after ascertaining and adjudicating the several claims and their priorities, provided that "said railroad company, or any one for it, or any one claiming under it, or any of the parties to this suit, may redeem such premises, property, and franchises at any time before such sale shall have been made upon payment of the several amounts so found to be due, together with all costs of advertisement of the sale which may be incurred."

Smith and Kissel did not represent all of the first consolidated mortgage bondholders, and the scheme proposed by them made no provision for payment of the arrears of interest which the minority of the bondholders were at least entitled to have paid them, unless the suggestion that it should be taken out of the money to be derived from a sale to satisfy the second mortgage bondholders can be so considered.

With regard to the alleged error in making the purchaser at the sale take the property subject to the outstanding expenses and obligations incurred by the receiver not already paid out of revenue, the decree required the receiver to file a statement of such outstanding obligations and unpaid expenses prior to the sale, showing in detail all unpaid claims and obligations, so that the amount could be known at the sale with sufficient certainty to enable an intending purchaser to bid with confidence. It is a proper, if not the only, way of selling such a property, which must be kept going by the receiver until delivered to the purchaser.

Steel rails to the amount of \$50,255.93, necessary for the maintenance of the road, were purchased in April, 1888, by the railway company, upon a credit of 8 months, from the Lackawanna Iron & Coal Company. This purchase was 18 months prior to the appointment of the receiver. The expectation and promise of the president of the railway company was that the purchase would be paid for out of the earnings of the railroad, and the time of payment was arranged with reference to the expected receipt of earnings. These expectations were not fulfilled, and only a portion of the debt was paid, the notes for the balance being extended from time to time until the receiver was appointed. During this interval, in July, 1888, three months after the purchase, and before the first notes matured, the sum of \$33,960 was paid on account of interest to the second consolidated mortgage bondholders. This money was borrowed on notes of the company, which were subsequently paid out of the earnings of 1889. The court held that this payment of interest was a diversion of earnings, which had been dedicated to the payment of this purchase of materials necessary for the maintenance of the road, and, as the second mortgage bondholders had filed the bill asking for a receiver, that the Lackawanna Company had an equity as against them to displace their mortgage lien to the extent of the earnings which had been paid to them.

We think the court was in error in so holding. The rule giving preference to current expenses incurred on the faith of the earnings of a railroad shortly before the appointment of a receiver has never been carried so far. The debt of the Lackawanna Company was an ordinary merchandise debt, evidenced by notes, which were renewed from time to time. It had no stronger equity or claim upon the earnings than had those who advanced money to pay the July interest on the second consolidated bonds. The railway company was struggling with financial difficulties, and no doubt the effort to raise money to pay interest and prevent foreclosure was intended for the benefit of all the floating debt creditors. The railroad property being heavily mortgaged, all that any unsecured creditors had to look to for payment was the earnings. The immediate earnings, it is clear, the Lackawanna Company did not look to, as the sale was upon a credit of eight months. It must be inferred, therefore, that it was expected that interest on the mortgage debts was meanwhile to be paid during the running of the credit, otherwise a foreclosure would have been imminent within three months after the sale of the steel rails was made. The claim is quite different from those ordinary and necessary current expenses of operating a railroad contracted but a short time before a receivership, and which, by the sudden action of the court in appointing a receiver, are left unpaid.

The supreme court has recently, in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. Rep. 824, indicated the narrow limits to which an equity court should confine itself in allowing any unsecured claim to displace vested contract liens. Wages due employes, current operating expenses, current balances of ticket and freight money arising from indispensable business relations, and similar current debts accruing within 90 days, are recognized as among the limited class of claims which, in its discretion, the court may allow to have priority. In the case cited the supreme court held it error to allow a claim for the rental of cars necessary to operate the road for the six months prior to the receivership. The court said:

"The case of a corporation for the manufacture and sale of cars dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employes, or those who furnish from day to day supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950, the supreme court said:

"No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of displacement of vested liens."

In the present case it is true that the promise was to pay out of the earnings, and it is also true that out of those earnings, to the extent of the amount decreed to have priority, interest was paid to the second mortgage bondholders, but it is also true that, by granting an original credit of 8 months, and by extending that credit over a period amounting in all to 18 months, the Lackawanna Company must have contemplated that during that period the interest falling due on the mortgage bonds was to be kept paid out of the earnings, so that the road could remain in the hands of the railway corporation. In our opinion, the decretal order of June 25, 1892, allowing priority to the claim of the Lackawanna Coal & Iron Company must be reversed, and the decree of November 23, 1892, so modified as to disallow the priority of that claim over any of the mortgage bonds.

The other assignments of error do not, in our judgment, require special discussion. The conclusion we have reached is that the decree should stand, with the modification above mentioned, and that the sale should be made in accordance with the decree, after such reasonable opportunity for payment, and after such proper and reasonable notice of the time of sale, as the court may direct.

Decree of June 25, 1892, allowing priority to the claim of the Lackawanna Coal & Iron Company reversed, and decree of November 23, 1892, modified accordingly, and affirmed as so modified; the costs of these appeals to be paid out of the fund.

PENNEFEATHER et al. v. BALTIMORE STEAM-PACKET CO.

(Circuit Court, D. Maryland. October 18, 1893.)

1. EQUITY JURISDICTION—MULTIPLICITY OF SUITS—COMPLICATED APPORTIONMENT.

Where a carrier secures insurance on goods belonging to numerous owners, for their benefit as well as its own, and, the goods being destroyed, collects the entire amount of the insurance, equity has jurisdiction, on the ground of avoiding a multiplicity of suits and the difficulty of making a proper apportionment, of a suit brought by some of the owners, for the benefit of all who might join with them, to recover their alleged proportional interests therein.

2. INSURANCE—COMMON CARRIERS AND SHIPPERS—PLEADING.

Where a carrier voluntarily, and primarily for its own benefit, insures goods received for transportation, but under policies purporting to insure "each and all owners of such goods," such owners may maintain a bill against it to recover insurance money, averring that they were insured, that the goods were destroyed, and that the carrier collected the entire amount of insurance.

3. SAME.

Where, however, the policies provide that no owner of goods, who has insured for himself, shall be entitled thereunder, except to the excess of his loss, a bill is demurrable which fails to state whether there was such other insurance, and its amount, if any; for if the carrier collected insurance on complainant's goods in excess of its own loss, and to which neither it nor complainant was entitled under the policy, this could give rise to no equities in favor of complainant.

In Equity. On demurrer to the bill. Demurrer sustained in part, and overruled in part.

McFarland & Parkin, Richard M. Venable, and Edwin G. Baetjer, for plaintiffs.

Lemmon & Clotworthy, for defendant.

MORRIS, District Judge. This is a bill of complaint filed by three commercial firms (the partners of which are either citizens of Great Britain or Germany, or of the state of New York) claiming to be the owners of consignments of cotton shipped from places in the southern states, which the defendant corporation, the steam-packet company, had as a common carrier brought to the port of Baltimore, and alleging that while at the defendant's wharf, awaiting transshipment to other points, the complainants' cotton, together with a large quantity of other merchandise, was destroyed by fire.

The bill alleges that by the fire merchandise to the value of \$75,000 was destroyed, belonging to numerous shippers unknown to the complainants, and this bill is filed on behalf of the complainants, and on behalf of all others similarly situated. It is alleged that all the merchandise destroyed, except to the extent of about \$1,000, was shipped under bills of lading stipulating that the carrier should not be liable for loss by fire, occurring from any cause whatsoever. That the defendant, prior to the fire, had effected policies of insurance to the aggregate amount of \$25,000 against loss by fire on all merchandise in which the said defendant or certain railroad carriers, jointly and severally, were interested as owner, agent, warehouseman, or carrier, or for or in respect to which they might be under any liability as agent, warehouseman, or carrier, loaded in cars or unloaded, or while lying at any wharves or piers. That the policy contained this clause:

"It is understood that this entire policy is subject to the following special construction, to wit: It is intended to insure the Seaboard & Roanoke Railroad Company et al., as heretofore mentioned in this policy, jointly or severally, against any and all loss or damage by fire, including loss of freight, dues, back charges, charges, advances, liens, and claims upon such goods, wares, merchandise, baggage, and property, and also to insure each and all owners of such goods, wares, merchandise, baggage, and property at time of loss. The assured shall, after loss or damage, give notice to the insurers of the names of each and all owners, and such notice shall be conclusive upon the insurers as to who were such owners: provided, however, that, if any owner or owners shall have insured for themselves, the loss or damage, if any, shall be paid hereunder only to the extent of the excess of loss or damage over the amount of insurance so collected by the said owner or owners, and also to the extent of any and all claims which the said owner or owners in their own rights, or the company or companies effecting such other insurance for the benefit of such owner or owners, by virtue of subrogation, assignment, or otherwise, shall make, have, own, or hold against any and all of the companies comprising the Seaboard and Roanoke Railroad Company et al., as heretofore mentioned in this policy, jointly and severally, as to any such goods, wares, merchandise, baggage, and property of every description, for or on account of any loss or damage insured against. It being understood and agreed that this company shall make good to the insured any loss that may be sustained, notwithstanding any clause or provisions in any bills of lading issued by the Seaboard & Roanoke Railroad Co. et al., as heretofore mentioned in this policy, jointly or severally, exempting or as designed to exempt them or their connecting lines from liability, and without regard to the legal liability of the Seaboard and Roanoke Railroad Co. et al., as hereinbefore mentioned in this policy, jointly or severally, to the owner or

owners of the property destroyed. And the insurers shall not, by subrogation, assignment, or otherwise, take, have, or hold any claim or demand against the Seaboard & Roanoke Co. et al., as hereinbefore mentioned in this policy, nor any of their officers, agents, or employes, as to any such property, for or on account of any loss or damage hereby insured against, or in payment thereof."

The bill of complaint then alleges that after the fire the defendant collected the \$25,000 of insurance money, and claims that the said insurance was not only made to protect the defendant against any loss as carrier or warehouseman, but was also for the benefit of owners of merchandise whose goods might be in possession of said defendant, and that the interest of the owners was, in terms, the subject of the insurance, and insists that the complainants, as owners of their respective shipments of cotton, were insured under the policies, and were entitled to share in the insurance money collected by the defendant. The prayer is that it may be ascertained who are entitled to share in said insurance money, and in what proportions, and that all persons claiming any interest therein may be cited to appear and prove their claims, and that the defendant may account for and pay over to the complainants, and the others entitled to share therein, their proportionate shares of said insurance money, and for other relief.

The defendant has demurred to the bill of complaint for the following causes: (1) That there is no privity of contract between the complainants and defendant. (2) That the bill does not show that the plaintiffs have any right to the insurance money, or to maintain an action to recover any part of it. (3) That the bill does not aver facts sufficient to establish any equity, as against defendant. (4) That, by the terms of the policies set out in the bill of complaint, it was provided that if any owner of merchandise had insured for themselves, the loss payable under said policies should only be for the excess of loss over said insurance collected by the owner, and to the extent of any liability of the defendant to the owner, and that the bill of complaint contains no averment that the complainants, or any of them, were without full insurance on their own behalf. (5) That the bill of complaint does not aver that there was any surplus insurance money remaining in defendant's hands after satisfying the defendant's own losses, or losses for which it was liable. (6) That the bill of complaint does not aver that defendant had collected any insurance money by reason of, or on account of, the goods of the complainants, or any of them. (7) That if the defendant had collected any money belonging to complainants, or any of them, under said policies, the complainants, and each of them, had an adequate and complete remedy at law.

As to the objection urged that this is not a case of equity cognizance, it is true that each complainant, if he has a good cause of action, might maintain an action at law to recover the proportion of the fund collected by the defendant in respect to each complainant's goods; but it seems quite clear that the remedy at law is not adequate and complete, and would require a multiplicity of suits with regard to one subject-matter. If the complainants can recover, there will be serious difficulties, in a trial

at law, to determine what amount is to be distributed, and what proportion each is entitled to. It would depend on what the loss of each of the numerous shippers might prove, and the proportion of their losses to the whole fund proved to be remaining in defendant's hands for distribution. If their questions were settled by different juries in separate trials for each claimant, there would possibly be different results, with injuries to either plaintiff or defendant, and great expense. *Oelricks v. Spain*, 15 Wall. 211. In *Snowden v. General Dispensary*, 60 Md. 85, a bill in equity was filed by one dispensary on behalf of all entitled to share in certain fines collected by the sheriff, and was sustained. The court said:

"Then, again, at law, each dispensary would be obliged to sue separately; and in the one case the proof may show the defendant has or ought to have collected, in the aggregate, a certain sum, and, in another, that he has collected a greater or less amount. Besides, in one case it may appear that a certain number of dispensaries are entitled to the benefit of the act, and in another a greater or less number are entitled. The result would be a multiplicity of actions, and expensive and vexatious litigations, with different judgments, each varying in amounts; and this, too, in the face of the act of 1833, which provided that the fund shall be distributed equally among the several dispensaries entitled. By a bill in equity, with a prayer for discovery, all this may be avoided, and the rights of all concerned may be finally settled, in one litigation."

The present case belongs to the class mentioned in 1 Pom. Eq. Jur. § 245, of which it is said equity will take cognizance to prevent a multiplicity of suits—

"(3) Where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone."

Osborne v. Railroad Co., 43 Fed. Rep. 824; *Emigration Co. v. Guinault*, 37 Fed. Rep. 523.

As to the other grounds of demurrer, while it is to be inferred from the bill, and is conceded in argument, that the insurance effected by defendant was purely voluntary, and without charge to the complainants, and primarily for defendant's own protection, it does appear that the policies insured "each and all owners of such goods, wares, merchandise, baggage, and property;" and it is alleged that defendant collected the whole amount insured, and that it was collected, not only for defendant's own benefit, but also as agent of the owner of the goods destroyed. This averment that the owners of the goods were insured and their goods were destroyed, and that the defendant had collected the whole insurance, is sufficient to give the complainants a right of action. If it be a fact that the defendant did not claim or recover from the insurance companies anything in respect of the loss of complainants' goods, that, it appears to me, is matter of defense by answer or plea. So far as appears, the complainants do not know what were the losses for which the defendant claimed indemnity from the insurers. They find that defendant held policies which,

in direct terms, covered their goods, and they find that the insurance money has been paid. They are advised that it is the law that a carrier may insure the goods in its possession, and, in case of loss, recover the whole insurance, and, after paying its own claims, hold the residue for the owners. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 543; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 423, 10 Sup. Ct. Rep. 365; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. Rep. 905. If facts exist with regard to its settlement with the insurance companies which may release the defendant from accounting to complainants, those are matters within the defendant's knowledge, and must be pleaded by it.

There is, however, one ground of demurrer which I think is good, namely, that the bill of complaint contains no averment that the complainants have suffered loss in excess of insurance effected on their own behalf, and collected by them. It is an express stipulation of the policy that its meaning and intention is that no owner of goods who has insured for himself shall be entitled under this policy, except to the excess of his loss. There is no reason, that I am aware of, which should prevent effect being given to this express stipulation. Whether there was such insurance effected on their own behalf by the complainants is a matter within their own knowledge, and must be set out by them in their bill. It is urged on their behalf that whether the complainants have insured themselves or not, if the carrier has collected insurance money for their goods beyond its own losses, it is inequitable that it should not pay it over to the owner of the goods. If the defendant has collected from the insurers money which was not due under the contract of insurance, and which it is not entitled to retain, that may give rise to equities between the defendant and the insurers; but it furnishes no reason why the complainants should be twice indemnified for the same loss, contrary to the terms of the policy. The stipulation distinguishes the policy from those held to be contributory in *Hough v. Insurance Co.*, 36 Md. 398.

My conclusion is that the demurrer must be sustained, because the complainants, respectively, have failed to allege what insurance, if any, they had effected on their own behalf, and what loss, if any, they have suffered in excess of such insurance collected by them, but the other causes of demurrer assigned by the defendant are held not to be well taken.

THOMAS et al. v. NANTAHALA MARBLE & TALC CO.

(Circuit Court of Appeals, Fourth Circuit. October 4, 1893.

No. 45.

1. INJUNCTION—PLEADING—DISCRETION OF TRIAL COURT.

In a suit to enjoin a trespass on lands, and the taking of ores therefrom, the object being merely to preserve the rights of the parties until an action at law can be brought to determine the title, the failure of the

bill to set out complainant's chain of title is not fatal; and where answer is filed without interposing a demurrer, the sufficiency of the bill in this respect is a question for the trial court to deal with in its discretion.

2. SAME—DERAIGNMENT OF TITLE—SUFFICIENCY OF BILL.

In such case, a bill which describes by metes and bounds the land claimed by complainant, avers that he had possession thereof at the time of the alleged trespass, and that he owns the same in fee under the laws of the state, may be regarded, after answer filed, as sufficient, without a particular statement as to how he acquired title.

3. FEDERAL COURTS—EQUITY JURISDICTION—STATE PRACTICE—LAND TITLES.

The equity jurisdiction of the federal courts cannot be controlled or affected by modifications of the general practice which have grown up in the various states, even in respect to land titles; but such jurisdiction remains as established by the general principles of equity jurisprudence.

4. INJUNCTION—TRESPASS—RECEIVER—MINING LANDS.

On a bill to enjoin a trespass and the taking out of ores, where the ground in dispute is a narrow strip, adjoining which both parties have undisputed possession of other lands, which they can continue to work, the case is not one for a receiver, but for an injunction to maintain the status quo until the title can be determined by an action at law.

5. SAME—INJUNCTION PENDING ACTION AT LAW.

In such a case, where the affidavits strongly tend to show that complainant had undisputed possession of the ground until driven off by violence and threats of bloodshed,—constituting the trespass complained of and which is enjoined,—the defendant in the injunction suit may be properly required by the decree to become plaintiff in a suit at law to determine the title.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

In Equity. Suit by the Nantahala Marble & Talc Company against W. S. Thomas and others to enjoin a trespass upon mining lands, and for an account and other relief. The court below granted an injunction, pending which it required defendants to bring an action at law to determine the title to the disputed lands. Defendant Thomas and another appeal. **Affirmed.**

Statement by MORRIS, District Judge:

The appellee, the Nantahala Marble & Talc Company, a corporation of West Virginia, filed its bill of complaint in the circuit court of the United States for the western district of North Carolina, October 13, 1892, against Thomas, Bruce, Richard, and Hewitt, all citizens of North Carolina, except Bruce, who was a citizen of Virginia, alleging that the complainant corporation owned in fee, and, at the time of the trespasses complained of, was in possession of, certain lands described by metes and bounds in the bill, situated on the Nantahala river in North Carolina, which were of value exceeding \$2,000, and were valuable only on account of the talc and marble; that the defendants had wrongfully entered upon complainant's land, and were taking from it large quantities of talc, and grinding and manufacturing it and shipping it away, and doing irreparable damage and injury to the complainant, and that the defendants were insolvent. The bill prayed for a preliminary injunction restraining the defendants from further trespassing, and for an account, and for other relief.

The court fixed a day for the hearing of the application for injunction, and granted a restraining order as prayed. The defendants Thomas and Bruce answered, denying that they, or any one under them, were trespassing upon the lands described in the bill, and denying that they were insolvent. They alleged that they were the owners of 150 acres of land on the Nantahala river, and that their codefendants, Richard and Hewitt, were their lessees.

and as lessees had been mining and manufacturing talc from their land since 1887, but not outside of their tracts, utilizing the land to the best advantage as prudent miners with machinery and works which would be greatly damaged by any interference, and that they were able to respond in damages for any supposed injury to the complainant, and that the complainant had a complete and adequate remedy at law to try its title by ejectment, and to recover any damages. It appeared from the affidavits on behalf of both parties read at the hearing of the application for the injunction that the land in controversy was a small triangular strip containing about $5\frac{1}{4}$ acres, lying between the undisputed lands of both parties, and that the controversy arose from a dispute as to the proper location of the dividing line. The affidavits submitted at the hearing tended to show that the lands of both parties had belonged to the estate of one Jarrett; that the whole tract of Jarrett's land had been surveyed and divided into parcels, and sold to different purchasers in 1876, and affidavits filed by the complainant sworn to by heirs of Jarrett and by surveyors, who had platted the land for division, and by persons familiar with the property, some of whom had been employes of defendants, tended to show that the dividing line claimed by the complainant had been marked by stakes driven in the ground and trees blazed along the line, and had been acquiesced in and consented to until the complainant, in September, 1892, began erecting a fence along the line, when the defendants, with a force of men, and against the protest of complainant, tore down the fence, and put up a brush fence about 300 feet back on complainant's land, and with a strong force drove away complainant's workmen, and proceeded to uncover the talc on the disputed land, and mine it out, working with great expedition for 10 or 12 days, until stopped by the restraining order.

On November 15, 1892, the court having heard argument, and having considered the bill, answer, and affidavits, granted the injunction, and directed that the defendants might bring an action in that court to try title to the land, which action should stand for trial at the next term, and in which the complainant, as defendant, should admit service of process and possession of the land. The defendants Thomas and Bruce have appealed, and assign for error (1) that the case made by the bill was not one of equity jurisdiction, as there was an adequate remedy at law; (2) that there was no pending ejectment suit, nor any reason asserted for not bringing one; (3) that there was no irreparable injury, as the defendants were solvent; (4) that the bill did not properly set out the complainant's title; (5) that the court erred in directing that defendants should be plaintiffs in the ejectment to be instituted, when it was the defendants who were in possession.

F. C. Fisher, for appellants.

Charles Price, for appellee.

Before FULLER, Circuit Justice, and HUGHES and MORRIS, District Judges.

MORRIS, District Judge, after stating the case as above, delivered the opinion of the court.

The appellants contend that the bill is defectively framed, in that the complainant does not deraign its title; that is to say, does not set out and state in detail the chain of conveyances or the immediate deed upon which it relies for its title. This is an omission, and might have been demurrable. The rule, however, which in such cases requires the complainant to set out his title, is one of practice and convenience, and not a matter of jurisdiction, and, after answer, may be dealt with by the court in its sound discretion. In this case, at the hearing, from the answer and affidavits, it became evident that the parties were claimants of adjoining lands by titles derived from the same source, and that the dispute was as to the location upon the ground of a division line. The affidavits—some

from defendants' own employes—tended to show that the line had been several years before marked with stakes driven in the ground and by blazes upon trees, and had been consented to and acquiesced in until a few days before the filing of the bill, when the defendants, with overpowering force and threats of bloodshed, had driven away the complainant's employes, and was proceeding to excavate and carry away the talc. The suit was not one in which the equity court was to pass finally upon the merits of the respective claims of title and pronounce upon their validity, but was intended merely to preserve the rights of the parties until in a suit at law they could be determined. It was, therefore, not like a bill to quiet title, or similar proceeding, in which the complainant should of necessity be required to set out in detail the title the court is to pass upon. *Stark v. Starrs*, 6 Wall. 410; *Goldsmith v. Gilliland*, 22 Fed. Rep. 865. If sufficient jurisdictional facts were alleged in the bill, it was for the court upon the hearing for injunction to say whether, as to the details of its case, the complainant had made a full, fair, and candid disclosure of the facts which the court was called upon to consider. In its bill the complainant described by metes and bounds the land which it asserted it had in possession at the time of the alleged trespass, and which it asserted that it owned in fee under the laws of North Carolina; and, under the circumstances of this case, the court was right, after answer, in not regarding as fatal the omission to set out with more certainty how the complainant had acquired its title.

It must be conceded that the equity jurisdiction of the circuit courts of the United States, in a proper case, to enjoin the destruction of the substance of an estate by mining, cutting down trees, or removing coal, pending litigation over the title, even when the alleged trespasser is solvent, is in common use, (2 Daniell, Ch. Pr. § 1631,) and has been sanctioned by the supreme court of the United States in *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. Rep. 565. Whether any particular case calls for the issue of this preventive writ depends upon its circumstances. It is urged upon behalf of the appellee that in North Carolina it is the settled policy of the state, as declared by its supreme court, not to interrupt mining enterprises by injunction in cases of disputed titles, but to appoint a receiver, if necessary, and hold the fruits of the enterprise until the title is adjudicated. It has been so held by the supreme court of North Carolina in several gold mining cases, among others in *Mining Co. v. Fox*, 4 Ired. Eq. 61; *Falls v. McAfee*, 2 Ired. 236; *Parker v. Parker*, 82 N. C. 165. It was conceded in these cases that it was the common practice of equity courts to restrain by injunction the carrying away of the substance of an estate, but it was held that, as the only use which could be made of the mineral lands of North Carolina was to mine the ores, and, if this was done in a proper manner, the ore could be compensated for, and as it was the policy of the state of North Carolina to develop its mining resources, and as in gold mining the enterprise required a large outlay of capital and the maintenance of an expensive equipment of machinery and workmen, that it was more consonant with equity,

in such cases that a receiver should be appointed, rather than that the whole enterprise should be stopped by injunction. In *Purnell v. Daniel*, 8 Ired. Eq. 9, however, in which there was a dispute as to the boundaries of adjoining landowners, and an allegation of danger of irreparable damage by overflow from a dam about to be erected, and in which there was none of the hardship of stopping a large established business, the same court did not hesitate to approve the issuing of an injunction to prevent the erection of the dam until the question of boundaries could be settled by ejectment.

It has been urged in behalf of the appellants that the federal courts, when administering the general principles of equity, should be controlled by the modifications of the general practice which have grown up in respect to land titles, and have been sanctioned by the state courts, because of the peculiar conditions of the country. But it is settled that neither the state practice nor its legislation can limit or expand the equity jurisdiction of the federal courts. Their equity jurisdiction remains as established by the general principles of equity jurisprudence. *Fenn v. Holme*, 21 How. 481; *Thompson v. Railroad Co.*, 6 Wall. 134; *Payne v. Hook*, 7 Wall. 425; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. Rep. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. Rep. 883, 977. But one of the fundamental rules governing all equity courts is that an injunction, when allowable, is granted or refused according to the essential requirements of the particular case. Its object is to preserve rights and prevent irreparable damage, and one frequent use of an injunction is to prevent a going business from the disorganization and loss which may result from a harsh exercise of a legal right. The practice of the North Carolina courts in not stopping the operations of an established and working gold mine pending litigation as to the title of the land, when the rights of the parties could be better preserved by a receiver, is conformable to the principles of equity as everywhere administered.

It does not appear to us, however, that this case presented similar considerations. Here were two owners, one engaged in digging talc and the other about to engage in it on large tracts of adjoining land, with a small strip between them, claimed by both. The affidavits tended to show that the complainant had been in peaceable possession of the strip, and that the defendants, with force and threats, had driven off complainant's men, and were rapidly digging out the talc. Nothing appeared tending to show that the mining operations of either would be materially disturbed by being enjoined from using the disputed strip pending an ejectment suit, as both were the owners of other adjoining lands containing the same minerals. It did appear, however, that the controversy was likely to lead to breaches of the peace, and that, if defendants were not enjoined, they would speedily dig out and carry away all that made the land valuable to the complainant. The case, as presented, was not one in which there were any considerations to induce the court to appoint a receiver as a substitute for a preventive injunction, and was one in which an injunction was appropriate and proper.

It is further contended by the appellants that the circuit court erred in directing that the appellants should be the plaintiffs in the ejectment suit. The affidavits tended very strongly to establish that the complainant was in possession, and that the forcible entry made by the appellants against its protest was in the nature of a trespass, and we think the fair conclusion to be deduced from the proof which the court had before it was that the complainant ought to be defendant in the ejectment suit.

Finding no error in the order appealed from, it is affirmed, with costs.

RIDDLE v. HUDGINS et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 263.

1. UNITED STATES COURT IN INDIAN TERRITORY—ENFORCEMENT OF EQUITABLE LIEN.

Equitable liens on personalty by contract of the parties being enforceable only in equity, jurisdiction of a case arising in the Choctaw Nation, upon suit by nonresidents to enforce such a lien against an administrator, is in the United States court for the Indian Territory, and not in the probate court of the Choctaw Nation.

2. EQUITABLE LIENS—FORECLOSURE—SEIZURE AT COMMENCEMENT OF SUIT.

Foreclosure of an equitable mortgage upon personalty can be effected only by seizure and sale, and such seizure may be made at the commencement of the suit if the debtor is insolvent, or if for any reason the equity of the creditor can be preserved only by bringing the property under control of the court.

3. APPEAL—EFFECT OF ERRONEOUS ALLOWANCE.

A trial court does not lose jurisdiction of a cause by erroneously allowing an appeal therein from an interlocutory order which is not appealable.

4. APPEAL — APPEALABLE ORDERS — DISCHARGE OF ORDER FOR SEIZURE OF PROPERTY.

In a suit in a federal court to enforce an equitable mortgage upon personalty, an order discharging a previous order to the marshal to seize and hold the property is not a final decree, and is not appealable.

5. PAROL EVIDENCE — RECITAL IN BILL OF SALE OF RECEIPT OF PURCHASE MONEY.

In a suit to enforce an equitable mortgage of personalty parol evidence is admissible to vary or contradict the bill of sale of the property in so far as it is a receipt for the purchase money, just as if the receipt were separate from the bill of sale.

6. EQUITABLE LIENS—ENFORCEABLE IN FOREIGN JURISDICTIONS.

An equitable lien upon personalty created by a contract for sale thereof in Arkansas is enforceable in the Indian Territory after the purchaser has removed thither with the property.

Appeal from the United States Court in the Indian Territory.

In Equity. Bill by Joseph G. Hudgins and Holder Hudgins, trading under the firm name of Hudgins & Bro., to enforce against Dauf Riddle, administrator of the estate of Blackstone Nichols, deceased, an equitable mortgage upon certain personal property. Decree was rendered for complainants. Defendant appeals. Affirmed.

Statement by CALDWELL, Circuit Judge:

This suit grows out of the following state of facts: Joseph G. Hudgins and Holder Hudgins, white men, and partners in trade under the firm name of Hudgins & Bro., residing and doing business at Dallas, in Polk county, Ark., there sold and delivered to Blackstone Nichols, a Choctaw Indian, between the years 1882 and 1886, 950 head of cattle, and some other property which need not be specifically mentioned. The cattle were sold and delivered in lots at different times, and as each lot was sold and delivered Hudgins & Bro. executed to the purchaser a written bill of sale for the same, in which the receipt of the purchase money was acknowledged. The cattle, however, were not in fact paid for, but were purchased on a credit upon an express verbal agreement between Hudgins & Bro. and Nichols that they should have a lien on the cattle and their increase to secure the payment of the purchase money as well as some other indebtedness due to them from Nichols. The purchaser, Nichols, removed the cattle from Arkansas to the Choctaw Nation in the Indian Territory, where he died on the 20th of January, 1889, owing Hudgins & Bro. \$9,017.51, all of which indebtedness, under the contract and agreement between the parties, was a lien on the cattle, and their increase, so sold to Nichols. At the time of Nichols' death he still owned and had in his possession more than 500 head of the cattle purchased from Hudgins & Bro. After Nichols' death, Dauf Riddle was appointed administrator of his estate by the probate court of the Choctaw Nation, and qualified as such, and thereupon, as such administrator, took possession of all the intestate's property, and refused to pay the debt due to Hudgins & Bro., or to deliver to them the property upon which they had a lien, and refused to recognize the validity of the lien. Hudgins & Bro. thereupon filed this bill in the United States court in the Indian Territory against Riddle, as administrator of Nichols' estate, setting out in substance the foregoing facts, and others wholly irrelevant to the merits of the case, and therefore not material to be stated, and praying that an attachment issue to seize and hold the cattle and other property, and that the court would decree that they have a lien thereon for \$9,017.51, the sum due them from Nichols, and that the property be sold to satisfy the same. The answer denied any knowledge of the indebtedness of the intestate to the plaintiff, or of the agreement for a lien on the cattle and other property to secure such indebtedness; alleged that the defendant had been duly appointed administrator of the estate of Nichols by the proper probate court of the Choctaw Nation, and had duly qualified as such, and had as such administrator taken the property mentioned in the bill into his possession, and claimed the right to administer the same according to the laws of the Choctaw Nation, and denied that he had done or contemplated doing any act that would authorize an attachment of the property. Subsequently the defendant filed a motion to quash the attachment upon various grounds, which motion was sustained, from which ruling the plaintiffs prayed an appeal to the supreme court of the United States, which was allowed. A portion of the property had been sold by order of the court, made in pursuance to a stipulation of the parties, and the proceeds of the sale, amounting to \$1,171.77, was by order of the court paid to one of the defendant's attorneys. The remainder of the property was turned over to the defendant, who was enjoined from disposing of the same until the further order of the court in the premises. The case was referred to a master, who, after taking testimony, made a report. The master found there was due from the estate of Nichols to the plaintiffs the sum of \$9,017.51, and that to secure the payment of this sum a lien was created by express agreement between the plaintiffs and Nichols upon the property mentioned in the bill, which the plaintiffs were entitled to have foreclosed in this suit. The master reported on several other matters injected into the case by averments in the bill and answer; but, as those matters have no relation whatever to the merits of the case, they need not be noticed. Exceptions were taken by the defendant to the master's report, which were overruled, and the report confirmed, and a final decree rendered in favor of the plaintiffs for the amount of their debt, to secure the payment of which it was

found, and decreed that the plaintiffs had a lien on the property, which was ordered to be sold to satisfy the debt. From this decree the defendant appealed to this court.

W. H. H. Clayton, James Brizzolara, and James B. Forrester, for appellant.

William M. Cravens, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Upon the evidence in the case it is indisputable that the intestate, Nichols, at the time of his death owed the plaintiffs the amount stated in the master's report, and that by an express agreement between the plaintiffs and Nichols they had a lien on the cattle and other property mentioned in the bill to secure the payment of that indebtedness. The lien, which was created by agreement of the parties in this case, is called an "equitable lien" or an "equitable mortgage." It is said equitable liens by contract of the parties are as various as are the contracts which parties may make. 1 Jones, Liens, § 27. Such liens do not depend upon the possession of the property by the creditor, as do liens at law. Nor do they depend upon any statute for their force and efficacy, and they are not affected by the registration laws. They are founded upon the contract of the parties, which may be either verbal or in writing, and they will be enforced in equity against the party himself and his personal representatives, heirs, voluntary assignees, and purchasers with notice. *Id.* §§ 28, 30, 93; *Fletcher v. Morey*, 2 Story, 555, 565; 3 Pom. Eq. Jur. § 1235; *Gregory v. Morris*, 96 U. S. 619; *Hauselt v. Harrison*, 105 U. S. 401; *Pinch v. Anthony*, 8 Allen, 536; *Tied. Eq. Jur.* §§ 384, 385. The law gives no remedy by which such liens can be established and enforced. Being an equitable lien, the enforcement of it is exclusively within the province of a court of equity. "Equity," says the supreme judicial court of Massachusetts, "furnishes the only means by which the property on which the charge is fastened can be reached and applied to the stipulated purpose." *Pinch v. Anthony*, *supra*; *Hovey v. Elliott*, 118 N. Y. 124, 136, 137, 23 N. E. Rep. 475. The lien asserted by the plaintiff was a matter of purely equitable cognizance, and was not, therefore, within the jurisdiction of the probate court of the Choctaw Nation, which is not invested with the jurisdiction or powers of a court of equity. The plaintiffs brought their suit in the proper forum; indeed, in the only forum which could rightfully assert jurisdiction over the parties and the subject-matter. The lien which the plaintiffs were seeking to enforce being an equitable one, it could only be enforced in a court of equity; and in giving effect to and in enforcing such a lien a court of equity proceeds independently of the attachment laws of the state or territory applicable to common-law actions for the recovery of a debt. When appealed to for that purpose, a court

of equity will protect and enforce the rights of such a lien holder by recognized chancery methods. Most commonly these consist of the writ of injunction and the appointment of a receiver, though other methods may be pursued where the exigencies of the case demand them. The foreclosure of such a lien on personal property can only be effected by its seizure and sale; and the seizure may be made at the commencement of the suit whenever it appears the debtor is insolvent, or that for any reason the equity of the creditor to have the property applied to the payment of his debt can only be preserved by bringing the property under the control of the court. The death of the debtor does not vary the rights of the creditor in this respect. If the debtor's estate is insolvent, or if for any reason it is made to appear that the equitable lien of the creditor is in danger of being lost, and that there is no other means of making his debt but by the enforcement of such a lien, a court of equity will make some appropriate order for impounding the property until the hearing.

In the case at bar, upon the allegations of the plaintiffs' bill, it would have been proper for the court to place the property in the possession of a receiver, and enjoin the defendant from interfering therewith until the hearing. In substance this is what was done. The marshal was directed to seize and hold the property. For some reason, not very apparent, this order, called in the record an attachment, was set aside, and the property restored to the custody of the defendant. From this last order the plaintiffs prayed an appeal to the supreme court of the United States, which was allowed, and one of the contentions of the appellant is that the lower court thereby lost jurisdiction of the case. The order discharging the so-called "attachment" was not a final judgment, and was not appealable, (*Robinson v. Belt*, 56 Fed. Rep. 328,) and the jurisdiction of the court over the cause was not affected by anything done in relation thereto.

A further contention of the appellant is that, as the plaintiff executed to Nichols written bills of sale for the cattle, in which they acknowledge the receipt of the purchase money, they cannot show by parol testimony that the price was not paid, and that there was an agreement that they should have a lien upon the cattle until it was paid. The objection is not tenable. Parol testimony is not admissible to contradict or vary the bill of sale so far as it contains a contract; but so far as it is a receipt for the purchase money of the property it may be explained, varied, or contradicted to the same extent that it could be if it was simply a receipt for the purchase money separate from the contract of sale. It is common learning that, so far as a receipt goes only to the acknowledgment of payment, it is merely *prima facie* evidence of the fact of payment, and may be explained, varied, or contradicted by parol testimony. 7 Waite, Act. & Def. 448, where the authorities are collected. An agreement for a lien on the property sold to secure the payment of the purchase price is a contract about a matter not dealt with by the bill of sale, and not inconsistent with anything therein con-

tained. It is an independent contract, which it was perfectly competent for the parties to enter into upon sufficient consideration, before, at, or after the execution of the bill of sale. *Browne, Par. Ev.* pp. 138, 346-349. *Steph. Ev.* 107, 108; *Allen v. Pink*, 4 Mees. & W. 140. The evidence shows that the agreement for the lien constituted a part of the consideration for the sale.

It is objected that, the sale of the cattle having taken place and the contract for the lien having been made in Arkansas, the lien cannot be enforced in the Indian Territory. This contention is founded on the erroneous assumption that the lien sought to be enforced is the creation of an Arkansas statute. The Arkansas statute had nothing to do with the creation of the lien. It was an equitable lien, created by contract, and binding upon the parties in equity, and can be enforced in all jurisdictions where the equity jurisprudence of this country prevails. The sellers did not lose their equitable lien on the cattle by their removal into the Indian Territory, any more than the purchaser lost his title by that act. The legal rights and equities of the parties remained the same in the Indian Territory that they were in Arkansas.

We have looked through the record carefully, and find no error of which the appellant can complain. We think it proper to say that the only errors disclosed by the record are those of which the plaintiffs alone could complain. We feel constrained to say that the order allowing the defendant \$800 for attorneys' fees to be paid out of the proceeds of the sale of the mortgaged property does not meet with our approval. The fact that the defendant was an administrator, and that the estate of which he was administrator was insolvent, or without means, did not entitle him to a large percentage of the proceeds of the sale of the mortgaged property to pay his attorneys for resisting the foreclosure. The administrator represented his intestate, and was no more entitled to demand that a part of the proceeds of the mortgaged property, already insufficient to pay the mortgage debt, be diverted to pay his attorneys for defending the foreclosure suit, than the intestate, if living, would have been. We know of no case where a court can take the money of a plaintiff which happens to come into its possession, and use it to pay his adversary's attorneys. The cases are very rare where the court is justified in directing the payment of attorneys' fees out of a fund in court, and, without stopping to enumerate them, it is sufficient to say this was not one of them. *Trustees v. Greenough*, 105 U. S. 527; *Hauenstein v. Lynham*, 100 U. S. 483, 491. In the case last cited the supreme court say: "It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute." But the appellant is not complaining of this order, or the order quashing the attachment, and, as the plaintiffs did not appeal, this court is powerless to deal with them.

The decree of the court below is affirmed.

CURTIS v. NEWTON et al.

(Circuit Court, D. Colorado. July 13, 1892.)

No. 172.

PRINCIPAL AND AGENT — MUTUAL RIGHTS AND LIABILITIES — SETTLEMENT — LACHES.

Where a principal, being unable to reimburse his agent for expenditures made in acquiring title to real estate for the purpose of protecting the principal's interest therein, receives a payment from the agent, and gives him a receipt in full of all demands, for the purpose of settling the whole transaction, he cannot, after remaining silent for 12 years without offering to return the money, assert any claim to the property on the theory that the agent continued to hold it in trust for him,

In Equity. Suit by Orlando Curtis against George A. Newton and others to charge said Newton as a trustee holding the legal title to real estate for complainant, and for an accounting, etc. Bill dismissed.

D. W. Jackson, for complainant.

W. L. Hartman, E. C. Glenn, and Chas. E. Gast, for respondents.

HALLETT, District Judge. January 3, 1878, complainant held a note for \$1,000, made by Reuben Sherman and William B. Harmon to D. S. Foote, dated December 15, 1887, and payable one year after date. The note was secured by trust deed on the north half of fractional block 46 in the town of Pueblo. Complainant also held fifteen other notes of \$200 each, and one note of \$100, made by the same parties to the same payee, which were not secured. There were also two orders,—one for \$150, and one for \$100,—made by parties in Pueblo. These securities were obtained from Sherman & Harmon, a firm then, or a short time before, doing business in Pueblo, which then, or soon afterwards, became insolvent. Complainant was a citizen and resident of Chicago, and desirous of returning to his home, and therefore unable to attend personally to the collection of the claims. He was also in need of money for current expenses, and applied to respondent George A. Newton to borrow \$100, and to attend to the collection of the notes, and the several demands above mentioned. Respondent acceded to his request, loaned \$100 to him, took possession of the securities, and thereupon executed a receipt, the last clause of which reads as follows:

"The above notes and orders to be held by me as collateral security for the payment to me of \$100.00, (one hundred dollars,) and, after payment of said amount, the balance, after payment of costs attending the collection of same, to be applied on payment of note of \$3,000.00 given by D. S. Foote to D. C. Foote, and held by me for collection."

There was added to the receipt, without signature, the following:

"There being a note of \$400.00, secured by deed of trust, prior to the note of \$1,000.00 given by D. S. Foote, moneys received will first be applied to liquidating that claim unless paid by Sherman."

The first deed of trust here mentioned was also mentioned in the trust deed given by Sherman to secure the \$1,000 note above

mentioned. Following this transaction, there was considerable correspondence between complainant and respondent, the former in Chicago and the latter in Pueblo, touching the collection of the notes and orders, but no part of any of them was secured.

About March 5, 1878, respondent purchased of the Bank of South Pueblo the note held by that bank secured by the first trust deed on the north half of fractional block 46, which, by the memorandum added to the receipt from respondent to complainant, was to be paid out of moneys collected for complainant's account. He paid the amount due upon the note at that time, which was \$419. Complainant was advised of this purchase, and was asked to send money to make it his own; but he did not do so, probably because he was unable to raise the amount. He did refund the \$100 which he borrowed from respondent. About March 28, 1878, respondent caused the property to be advertised for sale under the first trust deed, and on April 27, 1878, he purchased the property at the trustee's sale then made.

In thus purchasing the first incumbrance on the north half of fractional block 46 from the Bank of South Pueblo, and afterwards purchasing the property itself at the trustee's sale, while he held for collection the note of Sherman and Harmon, secured on the same property, for complainant's account, it is contended that respondent became trustee for complainant in respect of the title to that property, and that he has been in that relation to complainant from the time of his purchase, in 1878, to the present day; that the rents received by respondent from the property should be charged against the amount paid by him to the Bank of South Pueblo, so far as it may be necessary to extinguish that amount; and that he should account to the complainant for the excess. This position would be entirely correct if complainant had paid to respondent the money paid to the Bank of South Pueblo before such payment was made by respondent, or within some reasonable time afterwards. By the first arrangement of the parties, respondent was to apply the money received from collections to the purchase of the first incumbrance, then in the hands of the Bank of South Pueblo. As nothing came from that source, it became necessary for complainant to take up that incumbrance in order to protect his own interest in the property. He had no reason to expect that respondent would advance money for that purpose, and look to the rents and profits of the property for repayment. In the correspondence of the parties there is abundant evidence to show that at the time of purchasing the note from the Bank of South Pueblo, and at the time of purchasing the property at the trustee's sale, and afterwards, respondent understood and believed that complainant would refund the amount paid for the note to the Bank of South Pueblo, and take the property. The letter of November 21, 1878, written by complainant to respondent, fully supports this view. He says:

"The arrangement is now complete for Mr. Henry Corwith to buy and take the title and purchase the Sherman lumber yard and property. * * * The rents will come to me as agent, which are to be earned in the future monthly,

by P. O. order or some cheap way of remitting the money. Please credit up the income, and make the draft down as small as you can. In other words, do as well as you possibly can in closing up this business for me, & I shall feel forever grateful. Mr. Corwith may possibly help me some if he ever sells it to any good advantage in the future."

This shows the complainant's misfortune from the beginning,—that he was unable to pay the \$419 which respondent paid to the bank for the first incumbrance. He was willing to pay this sum, and respondent was willing to receive it; but the amount could not be got. The arrangement with Mr. Corwith was the nearest approach at any time to a settlement of the matter. Respondent explains why it was not carried out,—that complainant, or rather Mr. Corwith, demanded full title, which could not be given. Finally, in June, 1880, when it was no longer probable that complainant would take up the first incumbrance, respondent sent complainant \$175, in settlement of the whole matter. Complainant received this amount, and gave a receipt in full of all demands. There is not the slightest reason to believe that any mistake or misunderstanding was made in this transaction. Complainant says that he read the receipt before signing it; and, if so, he must have understood its meaning.

In face of the facts which clearly appear in the whole record, that respondent received nothing from complainant towards getting the property in dispute, that complainant was fully advised of the manner in which respondent acquired title to the property, and stood by for upwards of 12 years without asserting his claim to the property, and without offering to refund the money which respondent had paid for the property, it is impossible to say that he has any right to the relief demanded.

At the next term the bill of complaint will be dismissed.

EVANS v. UNION PAC. RY. CO. et al.
(Circuit Court, D. Colorado. December 1, 1893.)

No. 3,001.

1. EQUITY JURISDICTION—ENFORCEMENT OF CONTRACTS—MATTERS OF POLICY—RAILROAD COMPANIES.

In a contract of alliance between two railroad companies, a provision that one of the roads "shall at all times be operated in its own interest" is a matter of policy and administration, which equity has no jurisdiction to enforce.

2. SAME.

Provisions, however, that the companies shall erect shops in a given city, and that one company shall maintain an independent organization, with its headquarters in a city named, are matters of judicial cognizance.

3. SAME—EQUITY RULE 94—REMOVED CASES.

Equity rule 94, requiring certain allegations in a suit by a shareholder to enforce rights which the corporation itself might properly assert, has no technical force in cases removed from the state courts; and the question is whether the state court had jurisdiction, and whether the federal court has the same jurisdiction in succession thereto. And the shareholder may prosecute the suit if it appears anywhere in the entire record that the corporation will not enforce its rights.

4. RAILROAD COMPANIES—RECEIVERS—ALLIED LINES.

Upon the insolvency of a controlling railroad company, the allied companies must look to themselves, and if they have been carried into the hands of receivers, along with the parent company, they should have receivers of their own appointed.

In Equity. Bill by John Evans, a stockholder in the Union Pacific, Denver & Gulf Railroad Company, against said company, the Union Pacific Railway Company, and others, for the appointment of a receiver, and other relief.

E. T. Wells, M. F. Taylor, C. J. Hughes, Jr., and R. W. Bonyng, for complainant.

Teller, Orahood & Morgan and J. M. Thurston, for respondents.

HALLETT, District Judge. In the early part of the year 1890, 13 railroad corporations were combined in one, which was called the Union Pacific, Denver & Gulf Railway Company. Seven of these corporations owned lines of road lying north and west of Denver, of the aggregate length of 505 miles. These corporations, and the roads owned by them, were then, and for a considerable time before, in the control of the Union Pacific Railway Company. Six of the corporations so combined owned lines of road lying south of Denver, which formed a continuous line between that place and Ft. Worth, in the state of Texas, with several short branch roads to points near the main line. These corporations were under one management, and bore the common name of the Denver, Texas & Ft. Worth Railroad Company. In connection with other roads extending from Ft. Worth to Galveston, and with a steamship line between Galveston and New York, this line of road was in competition with the Union Pacific Railway Company in the transportation of freight and passengers between the Atlantic seaboard and Colorado points. Complainant in this bill was a stockholder in one or more or all of the companies from which the Ft. Worth Company was made up, and in virtue of that ownership he became a stockholder in the Gulf Company, which, as before stated, was made up of the 13 companies. The purpose of combining all the companies in one is very fully stated in an agreement between the Union Pacific Railway Company and the Gulf Company, which was drawn about the time of the articles of amalgamation. Indeed, it seems that the agreement was the chief consideration between the parties, and that the amalgamation of the companies was regarded as a means only to the end stated therein. The agreement recites the views of the parties in the following language:

"Whereas, the operation of the said Union Pacific, Denver & Gulf Railway Company in harmony with the roads of the Union Pacific Railway Company will be beneficial to each; and whereas, the parties hereto, for their mutual advantage, have agreed to an arrangement for the interchange of business and traffic, and for the carrying of the same over their respective railroads, and have agreed upon a division of the earnings from said traffic, as herein-after set forth, and provided * * *."

Following these recitals, there are elaborate provisions to the general effect that the roads of both companies shall be operated

as continuous lines, and "in close harmony," and "never in hostility or antagonism" the one to the other, and that they shall not be operated "in the interest of any other line or road to the injury of the roads" of either party.

Much of the bill of complaint is designed to expose a violation of the contract, in respect to a withdrawal of the Ft. Worth Line from the competitive business in which it was engaged at the time the contract was made. It is said that the parties really intended to keep the Ft. Worth road in competition with the Union Pacific for business going to and coming from the Atlantic seaboard, and this is sufficiently expressed in another clause at the end of the contract, to the effect that the road "shall at all times be operated in its own interest." This is a wide field of discussion, which we are not required to enter, since the fulfillment of contracts of this character, involving the general policy of the company and the management of its business, is not within the control of the courts. *Oglesby v. Attrill*, 105 U. S. 605. Such matters are within the administrative function of the officers of the company, in respect to which the courts cannot interfere.

The agreement to do specific things, as the erection of shops, and to maintain an independent organization and headquarters in the city of Denver, may be referred to another principle of equity jurisprudence. Two paragraphs at the end of the agreement are in the following words:

"And it is also furthermore agreed between the parties hereto that the party of the second part will, in connection with the party of the first part, and the Denver, Leadville and Gunnison Railway Company, erect shops for the joint use of said companies in the city of Denver, the same to cost not less than five hundred thousand (\$500,000) dollars. And the parties hereto also further agree that the said Union Pacific, Denver & Gulf Railway Company shall at all times be operated in its own interest, and that it shall maintain an independent organization, with its headquarters in the city of Denver."

As pointed out above, the court has not power or ability to mark the course of wise administration, or to keep the officers of the company within it after it shall have been defined, and therefore the road cannot be "operated in its own interest" through a court of equity. But the other matters mentioned in these paragraphs are proper subjects of judicial inquiry. It is not necessary at present to speak of the shops, as to which there is great controversy, nor to define what is meant by an independent organization of the Gulf Company. It is enough to say that the headquarters of the company have been removed from Denver and from the state of Colorado, and nothing thereof remains within the state. The suggestion that a superintendent in charge of the road as a division of the Union Pacific system may be regarded as holding in his person the headquarters of the company is too absurd for serious discussion; so that it appears clearly enough that some of the subjects mentioned in the agreement and in the bill of complaint are of equitable cognizance, and no doubt arises as to the power and authority of the court in the premises.

Rule 94 of the supreme court¹ has no technical force in a case removed from a state court. In such case the question is whether the state court had jurisdiction, and whether this court has the same jurisdiction in succession to the state court; and, if it is shown anywhere in the entire record that the corporation will not proceed to vindicate its right, a shareholder may be allowed to prosecute the suit. It appears clearly enough in this record that the Gulf Company has passed into the control of the Union Pacific Company, and therefore it is not reasonable to look for any assertion of its right under the contract.

Under ordinary circumstances, the Gulf Company being in possession of its road and managing its affairs, the court would act in the first instance, and probably throughout the proceeding, by injunction, rather than through a receiver. But the Union Pacific Company, having fallen into bankruptcy, has carried this satellite with it into the hands of receivers appointed in other districts, and in this district also, at the instance of its creditors. Upon a condition of insolvency in the parent company, it would seem that allied companies must look out for themselves. The trunk of the tree being dead, the branches must fall. And since it is a question of receivers, in any case, it would seem that the Gulf Company should have its own. Such an appointment will be made at some convenient time after the parties have been heard as to a fit person for the place.

CENTRAL TRUST CO. OF NEW YORK v. CINCINNATI, J. & M. RY. CO.

(Circuit Court, N. D. Ohio, E. D. November 1, 1892.)

No. 975.

1. RAILROAD FORECLOSURE—SALE—ENFORCEMENT OF TERMS AGAINST BIDDERS.

A reorganization committee, to whom a cash sale of the road is made and confirmed, and who fail to make good their bid, not for want of funds, but because they think the price too high, cannot be excused, on a resale of the property for a less price, from making good the difference, if the unsecured creditors will be benefited thereby. *Camden v. Mayhew*, 9 Sup. Ct. 243, 129 U. S. 73, followed.

2. SAME—REORGANIZATION AGREEMENT—RIGHTS OF BONDHOLDERS.

When a reorganization agreement to which all the bondholders and stockholders of the mortgagor company are parties plainly shows an intention that the new securities to be issued after the purchase of the road at judicial sale shall extinguish the old bonds for which they are to be exchanged, the consummation of the plan operates as a payment of the old

¹Equity Rule 94: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

bonds, and the former holders thereof have no claim upon the proceeds of the sale, on the theory that they are to be regarded as unsecured creditors to the amount by which the sum realized falls below the amount of such bonds.

3. SAME.

Judgment creditors who had advanced money to the railroad company, and who were included in the reorganization agreement on the same basis as the bondholders, were in a like position after the completion of the scheme by the delivery of the road to the new company, and their claims also must be considered as paid.

4. SAME—DISTRIBUTION OF PROCEEDS—PAYMENTS BY NEW COMPANY.

Where a reorganized railroad company purchases and receives possession of the road, and thereafter pays certain taxes, and also indebtedness incurred by the receiver, without especial authority from the court, these payments cannot be regarded as loans to the receiver, to be reimbursed from the proceeds of the sale.

5. SAME—RIGHTS OF UNSECURED CREDITORS—WAIVER.

When, by the conditions of a railroad foreclosure sale, the court has required the payment in cash of an amount which is sufficient to meet all allowed claims and the expenses of the suit, (the rest being paid in bonds,) the subsequent application, by consent of all parties, of part of this money to liabilities not properly chargeable against it, is a waiver by the owners of allowed claims of their rights to the extent that such appropriation reduces the ability of the fund to discharge their entire claims with interest, and they cannot afterwards require the purchasers to substitute sufficient cash in lieu of bonds to pay their claims in full.

6. RECEIVERS—COMPENSATION.

A railroad receiver, who resides at a distance from the property, and commits its active management to others, is not entitled to the full compensation usually paid to railroad presidents and receivers who are the active executive heads of going railroads.

In Equity. Bill to foreclose a railroad mortgage. Heard on questions as to distribution of the proceeds of sale.

Butler, Stillman & Hubbard, for complainant.

Swayne, Swayne & Hayes and R. G. Ingersoll, for receiver.

Robert G. Ingersoll, for Wm. Stewart Tod.

A. L. Smith, E. D. Potter, Jr., and J. L. Price, for intervening creditors.

Before TAFT, Circuit Judge, and RICKS, District Judge.

TAFT, Circuit Judge. Complainant exhibited its bill praying for foreclosure of two mortgages upon the property of the Cincinnati, Jackson & Mackinaw Ry. Company, and a sale of the road. Decrees of foreclosure and sale have been passed, the entire corpus of the defendant company has been sold, and the sale confirmed. The questions now to be decided arise upon distribution, and are presented on two motions to that end, made by certain intervening judgment creditors, whom we may shortly call Schaffer et al. The defendant company was a consolidation of the Jackson & Ohio Railroad Company, owning and operating a road running from Michigan into Ohio, and the Cincinnati, Van Wert & Michigan Railroad Company, whose road lay wholly within Ohio. These constituent parts we shall call hereafter, the one the Jackson Division, and the other the Van Wert Division. Before the union, the Van Wert road had placed two mortgages on its property; the first

to secure an issue of bonds amounting in round numbers to \$1,150,000, and the second to secure an issue of income bonds of which there were outstanding at the foreclosure \$363,000. After the union, the new company issued a mortgage to secure bonds amounting to more than \$2,000,000. This mortgage covered its whole road, including the Van Wert Division, but its lien on that division was, of course, subsequent to that of the two mortgages above stated. The two divisions of the road were, by order of court, sold separately. At the first sale of the Jackson Division it was struck off to the reorganization committee of bondholders and stockholders of the defendant company at their bid of \$2,525,000, to secure the completion of which they deposited \$25,000. The Van Wert Division was struck off to A. V. Rice and associates at \$1,640,000, and \$15,000 was deposited as security. After obtaining one or more extensions, both purchasers declined to complete their bids. A resale was ordered, and the reorganization committee bid in both divisions; the Jackson Division at \$2,250,000, and the Van Wert Division at \$150,000. On motion Rice's deposit of \$15,000, less the expenses of the first sale, was returned to him by order of the court.

The first motion of Schaffer et al. is for an order requiring the committee of reorganization to pay into court \$250,000, which, with their deposit of \$25,000, already in the registry of the court, would make up the difference of \$275,000 between their first and second bids for the Jackson Division. The committee still hold \$150,000 of first mortgage bonds applicable to the purchase price under the decree for sale, and the effect of the order asked, therefore, would be to require a further payment of \$100,000 in cash.

The second motion is for distribution of this fund to pay the judgments of Schaffer et al., aggregating \$18,000.

If there are no other creditors of the road entitled to share in this distribution, it is apparent that the fund of \$25,000 already in court will suffice to pay Schaffer et al. in full, and the order upon the committee, moved for, need not be made.

As to the first motion, the committee contend that, not only should they not be required to make up the deficiency on the resale of the Jackson Division, but that the deposit of \$25,000 already made should be returned to them. They urge that, as Rice was relieved from the loss of his deposit on his default, the same measure of mercy ought to be extended to them. We are of the opinion that the circumstances of the Rice bid and the bid of the committee are very different. None of the parties resisted Rice's motion. He made his bid to secure himself and associates from severe losses arising from their investment in the original construction of the road. He made it with the reasonable hope that he might be able to complete it, but he failed only from lack of funds. The committee failed to complete their first bid, not from want of funds, but because they concluded that the price they had contracted to pay was too high. They had not made as good a bargain as they could make if they were given a second chance.

We do not see anything in the situation that appeals strongly to the mercy of the court, and we do not see why, if unsecured creditors will derive advantage from the contract of purchase which the authorized representative of the committee deliberately made, the court ought not to fully enforce it for their benefit. Nor is there any doubt in regard to the power of the court to do so. The supreme court of the United States, in the case of *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, decided that:

"When a decree of a court of equity for the sale of a tract of land requires the sale to be made upon the terms 'cash in hand upon day of sale,' and the person bidding for it at the sale is the highest bidder, and as such is duly declared to be the purchaser, no confirmation of the sale by the court is necessary to fix liability upon him for the deficiency arising upon a resale in case he refuses without cause to fulfill his contract, and, if the purchaser refuses to pay the amount bid, the court, without confirming the sale, may order the tract to be resold, and the purchaser shall pay the expenses arising from the noncompletion of the purchase, the application, and the resale, and also any deficiency in the price in the resale."

We have at bar a stronger case than the one cited, for here the sale was confirmed. The sale was what is known as a cash sale, though the cash was not to be paid on the day of sale; but this difference does not affect the application of the principle laid down by the supreme court. If there are any creditors whose claims have not been paid, they are entitled, therefore, to an order upon the reorganization committee, or their successor, the company now in possession of the road, requiring the payment into court of the deficiency in the resale.

As to the motion by Schaffer et al. for distribution, the point at issue between them and the reorganization committee is whether the latter, as holders of all the first mortgage bonds on the Van Wert Division, may share in the distribution as unsecured creditors to the extent of \$1,000,000, the difference between \$1,150,000, the face of their bonds, and \$150,000, the proceeds of sale of their mortgage security. The consolidated company, by the union, of course assumed the payment of the Van Wert bonds; and, unless these bonds have been paid or extinguished, the claim of the committee would seem to be well grounded. If so, the amount to be received by Schaffer et al. on their judgments will be inconsiderable. They maintain that the claim of the committee in this behalf cannot be sustained, because by the carrying out of the reorganization plan and agreement, to which all the Van Wert first mortgage bondholders were parties, their bonds were fully satisfied as against the old company. Here is presented the chief point of discussion on these motions: Has the execution of the reorganization plan under the agreement extinguished the bonds of those who accepted its benefits? The plan and agreement were made before the foreclosure proceedings, but the details of the plan were somewhat modified from time to time. The plan was that the road should be bought in by the committee at the foreclosure sale, a new company organized, (if necessary,) and that new securities be issued to "take up" the old securities. The details of the plan

finally adopted and carried out, as stated in a circular of the committee, were as follows:

"The holders of the present bonds shall receive, dollar for dollar, of the new bonds, for principal and interest, being calculated at four per cent. from payment of last coupon; and the old stockholders shall receive of the new stock in exchange for the old, share for share, upon the payment of one per cent. on the common stock and three-quarters of one per cent. on the preferred stock, payable by the holders on deposit of said stock or present certificates with the Central Trust Company of New York for the purpose of exchange."

"Eight hundred thousand dollars of said bonds shall remain in the treasury of the company for future additions to and improvements of the property, and for the purchase of additional rolling stock as required. The \$4,000,000 will be issued and delivered to the reorganization committee, and used by them to carry out the terms of the reorganization agreement."

It was also provided that the income bondholders were to receive the stock of the new company in exchange for their bonds, share for bond, without the payment of any assessment. The agreement, after reciting the plan, went on to define the duties of the subscribers thereunder, and the authority and powers of the committee essential to its execution.

The agreement provided that the owners of bonds and stock should deposit them with the Central Trust Company for account of the committee, and accept "in lieu thereof" negotiable certificates of deposit; that they should in all cases execute transfers, so that the legal title of the bonds and stock should be vested in the committee for the use of the committee, and subject to their control. The plan of reorganization is approved of in the agreement, and the committee are constituted the trustees and agents of the subscribers to carry it out. The committee are given power to enforce foreclosure proceedings, to act for the subscribers in all meetings of stockholders and bondholders, and institute all necessary legal proceedings; "to approve, secure, control, pay over, surrender, and otherwise dispose of" the bonds and stock deposited with them, "and all rights, privileges, property, and interest therein represented, or pertaining thereto, in furtherance of any reorganization; to receive and receipt for so much of the proceeds of any sale or sales of the whole or any part of the property covered by or included in the said mortgages as may pertain to the securities deposited hereunder, and thereon to cancel, surrender, or reduce said securities, or any part thereof, therefor." The committee is further given power to secure the sale of the road as a whole or in blocks, as may seem best, and to purchase such parts as they deem proper, or the whole of it, at public or private sale, at such prices as the committee deem proper for the protection of the subscribers; and "to hold the property purchased either in their name or in the name of persons chosen by them," and to apply the securities deposited with them in satisfaction of any such bid, according to their discretion, and to borrow money either on a pledge of the securities deposited or of the property purchased, for such an amount as they may require pending reorganization. The committee are given power to take the deed of such parts of

the road as they purchase, or, "if any part should be purchased by others, the committee and trustees may receive the distributive share due on the securities held by them out of the proceeds of such sale, and distribute the same according to the rights of the parties hereto, less their pro rata share of all expenses incurred" under the agreement.

All the first mortgage bondholders of both the Jackson and Van Wert Divisions have signed the agreement, as well as all the stockholders of the old company. The holders of \$152,000 of the Van Wert income bonds out of \$363,000 have also signed. A new company has been organized to take the road and issue the securities, and those securities have been issued.

The argument on behalf of the committee is that the defendant company, which owes the amount of the bonds, was not a party to the agreement, and therefore that the benefit accruing to the bondholders thereunder could not inure to the benefit of the company. The bondholders and stockholders, it is said, had a right to purchase, and, having purchased, had a right to make such an agreement among themselves as seemed best to them in regard to the division and incumbering of the property. The company, by the sale, had been lawfully divested of all ownership and further interest in the railroad, and must depend alone on the proceeds of sale to pay its debts. As between the company and the holders of the Van Wert bonds, it is said the former can take no benefit from the fact, if it be a fact, that the bondholders have made a fortunate investment in their purchase. The argument is plausible, but it does not meet the real point of the case made by Schaffer et al., which is that it was the intention of the bondholders and stockholders subscribing the agreement, as evidenced by the terms of the plan and agreement, that when the new bonds were delivered for the old, the old bonds should be considered paid and extinguished. It is immaterial whether the old company was a party to the reorganization agreement or not, if in fact the subscribers intended to extinguish the obligations of the company and have done so. It is well settled, both in the federal courts and in the courts of Ohio, that in certain cases two parties to a contract may stipulate for the benefit of a third person, a stranger to the contract; and that the third party may sue thereon, to recover the benefit inuring to him. See *Hendrick v. Lindsay*, 93 U. S. 143; *Emmitt v. Brophy*, 42 Ohio St. 82. By an analogous principle it has been held that, where a stranger pays to the holder of a note the amount due on it, intending thereby to pay it, the debt is extinguished, and the maker may have the benefit of it. In *Dodge v. Trust Co.*, 93 U. S. 379, it was held that where a stranger paid the amount of a note in bank for collection, the question whether his act was a payment of the note or a mere purchase of it was one of intention. The same rule has been applied to the payment of judgments. *Harbeck v. Vanderbilt*, 20 N. Y. 395. In *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131, where coupons on negotiable bonds were taken up by an officer of the company which

had issued them, with his own money, it was said that the question of whether the coupons were paid or still remained as a lien upon the property which originally secured them was a question of the intention of the officer who took them up, and from the facts and circumstances of that case the court found that the officer did intend to pay them, and that the coupons were extinguished. In *Ketchum v. Duncan*, 96 U. S. 659, the circumstances were such that the court, in applying the same principle, found that the stranger had not intended to pay the coupons, but to buy them.

In the case at bar we have the subscribing stockholders and bondholders pooling their securities for the purpose of buying the old road and reorganizing and agreeing among themselves that in exchange for their old securities they would receive securities to be issued by the new road. If now, from the agreement and circumstances of the case, we can infer that they intended thereby to wipe out and extinguish the old securities, we can properly hold, on the principle of the cases cited, that the old bonds were absolutely paid. Taking up the plan and agreement by the four corners, we have not the slightest doubt that it was the intention of the parties, if the plan was successfully carried out, the old road purchased, and transferred to the new corporation, and the new securities issued, that the old bonds should be considered extinguished. The plan in its entirety has been successfully carried out, and the result of payment follows.

Great stress is laid by counsel for the committee upon the powers of the committee over old securities deposited with them as evidence that it was not the intention of the subscribing bondholders that under the agreement their bonds should lose their character as living obligations of the old company. By the agreement the title to the bonds before the purchase was to vest in the committee as trustee, to enable them to carry out the plan of reorganization, and to that end, with a wealth and redundancy of verbiage, every power that could be suggested with reference to those old securities was conferred upon the committee. They were given the power to pledge the old securities, and to raise money on them, and to use them in the purchase of the road, or to dispose of them in any other way in furtherance of the plan. But why should this show that, after the plan was carried out, the bonds were not to be considered paid? It is, of course, true that pending its execution the bonds were not extinguished. On the contrary, they were the very instruments with which the committee were to do the work. Payment of them was to follow only after the road had been bought, and the new securities issued.

Nor does the power to receive the proceeds of sale given to the committee have any application to the present condition of affairs, now that the committee own the whole road. It was not certain that the committee would find it best to buy the whole road, and thus carry out the plan in its entirety. The committee were given the discretion to petition the court for a sale of the road in blocks,

and to buy such blocks as they deemed best. If the road had been sold in blocks, and the committee had bought some of the blocks, and other purchasers had bought other blocks, the proceeds of the latter would probably have been applied to reduce the first mortgage bonds. Or, if the road had, all of it, gone to other purchasers, there would have been nothing to do but to receive the proceeds in exchange for a surrender of the bonds, and to distribute the money among the bondholders. It is to such contingencies that we must apply the words of the agreement—so much relied on by counsel for the committee—in which power is given to the committee “to receive and receipt for so much of the proceeds of any sale or sales of the whole or any part of the property covered by or included in the said mortgages, and thereon to cancel, surrender, or reduce said securities, or any part thereof, therefor.” This becomes quite apparent when the same power is referred to in another part of the agreement, where the duty of the committee towards the various bondholders is set forth. There it is said:

“And in case the committee and trustees do not purchase the said properties, or every portion thereof, or if any portion of it should be sold to others, the committee and trustees may receive the distributive share due on the securities held by them out of the proceeds of such sale, and distribute the same according to the rights of the parties hereto, less their pro rata share of all expenses incurred hereunder.”

The power to receive the proceeds of sale thus given is, therefore, not at all inconsistent with an intention on the part of the subscribers to the agreement that in case that and after the committee purchased the entire road, the old bonds should be extinguished by the issue of the new bonds, in accordance with the plan. It was not in the contemplation of the parties that if they purchased the whole property of the defendant road there would be any proceeds of sale to be distributed among them. Counsel for the committee concede this, and that it is manifestly true can be inferred from the embarrassment that would attend the disposition, under the agreement, of any part of this \$125,000, if it is to be received back by the reorganization committee by virtue of their title to the Van Wert first mortgage bonds. How is it to be divided? If the language referred to is to have the meaning urged on behalf of the committee, then this fund goes to the Van Wert bondholders. It will therefore follow that, because their mortgage security only realized the nominal sum of \$150,000, they obtain greater benefit from the foreclosure and sale and the reorganization agreement than the Jackson Division first mortgage bondholders, whose security sold for more than their mortgage bonds. Plainly, the parties to the agreement intended no such paradoxical result.

All the stockholders were parties to the reorganization agreement. As stockholders in the old company, they would be liable to the Van Wert bondholders for this deficiency, amounting to \$1,000,000, on the Van Wert bonds. Can the Van Wert bondholders, or the committee of reorganization for them, enforce this liability? It is conceded by counsel for the committee that they cannot. If not, why not? The only reason is that the bondhold-

ers under the agreement have impliedly agreed with the stockholders that the new securities which they have received, extinguish their debt. Counsel for the committee say:

"We think it is true that the bondholders could not sue the stockholders, parties to the reorganization agreement, upon their individual liability, but not by reason of the fact that the issue of new bonds was to be a payment of the bonds of the old company, but for the reason that the rights of the holders of the bonds and the stockholders became merged in the bonds and stock deposited with the trustee in carrying out the agreement, so that they were held for the equal benefit of both; and the trustee would manifestly have no power to use them in any way which would be to the detriment of any of the *cestuis que trustent*."

We do not see that counsel avoid the difficulty by this explanation. It is as much as to say that the stockholders and bondholders, as between themselves, agreed to look to the plan of reorganization alone for the satisfaction of their claims; in other words, that as against all the stockholders of the company the delivery of the new securities for the old would be payment of the old. But, if payment as to the stockholders is to be inferred, why may we not also infer an intention to pay absolutely? The well-understood purpose of every reorganization agreement of this kind, when entered into by all the stockholders and all the bondholders, is to wipe out all the obligations, and readjust the debts and interests between the creditors and stockholders. The bondholders thereby agree, in effect, to look to the corpus of the railroad alone for the payment, and accept the new mortgage debt of that corpus in lieu, *i. e.* in payment, of the old.

The Van Wert road went to the reorganization committee for \$150,000. This was the lowest price fixed in the decree for sale. Presumably the court would not have confirmed the sale for this price, except to the representative of the holders of the first mortgage bonds, amounting to \$1,150,000. Sold to them, it was practically immaterial whether they paid \$150,000 or \$1,150,000. The price given was plainly inadequate, except under the circumstances stated; and it would be inequitable for this court, if it can avoid it by applying any legal principle, to permit the inadequacy of the price paid by the purchasers to enable them to secure a very large portion of the assets of the road still in the hands of the court for distribution, to the prejudice of creditors, who thus far have received nothing on their claims. We must hold, therefore, that the Van Wert bondholders are not entitled to be treated as unsecured creditors to the extent of a million dollars, or of any other sum, against the defendant company, or to share as such in the distribution of any further assets available for the payment of the company's debts.

The two questions which were made on the motion have thus been disposed of, but we are unable, with the showing made before us, to enter an order of distribution, because we are not advised whether the moving creditors, Schaffer et al., are the only ones entitled to share in such distribution. If they are, it will not be necessary to make the order upon the reorganization committee to pay up the deficiency in the resale. If there are others, it will

be necessary to determine the amount of their claims, and then perhaps to make the order upon the reorganization committee. There seem to be other intervening creditors than those who make this motion, and, until the validity of all the claims entitled to share in the distribution has been determined, the order cannot be entered.

Counsel may present to the court the facts material in making the proper order at Cleveland, on Monday morning, November 14th.

(October 4, 1893.)

TAFT, Circuit Judge. After the filing of the foregoing opinion, the case was referred to Irvin Belford as master, to take evidence, and report upon the validity of the claims made to the fund in accordance with the principles announced in the opinion. Notice was given to all parties interested, a hearing was had, evidence was taken, and exhibits were filed, and the master has filed his report, in which he concludes that the only creditors of the Cincinnati, Jackson & Mackinaw Railway Company who are entitled to share in the fund of \$25,000 now in the registry of the court are Francis M. Schaffer, \$6,139.34, with interest from October 27, 1888, at 6 per cent.; Byrd Hubbard, \$253.40, with interest at 6 per cent. from May 6, 1889; Annie M. Dolan, \$196.29, with interest at 6 per cent. from October 21, 1889; Charles P. Patterson, \$5,689.80, with interest from February 25, 1888, at 7 per cent.; and John W. Foll, \$2,444.81, with interest at 6 per cent. from December 1, 1891. Exceptions have been filed by defeated claimants, and upon these exceptions arise the questions now to be decided.

The largest claim against the fund was presented by William Stewart Tod. It was in the form of a judgment for \$228,397.21, with interest since November 7, 1889, against the Cincinnati, Jackson & Mackinaw Railroad Company. The facts in regard to this judgment as found by the master from the evidence are that the principal of this judgment was made up of advancements to the old company to pay interest on bonds and current liabilities by a number of the directors, or by firms in which the directors were partners. These directors were Walston H. Brown, George F. Stone, George R. Sheldon, Richard T. Wilson, J. Kennedy Tod, C. M. McGhee, John T. Martin, Samuel Thomas, and W. T. Walters. The advancements were represented by different unsecured notes of the company made to the foregoing individuals, who, in order that the claims might all be in one person, indorsed the notes in trust and without consideration to William Stewart Tod, in whose name the judgment was taken. When the reorganization committee was formed, it was stipulated and agreed that those who were the real owners of this judgment should stand exactly as if they were first mortgage bondholders, and the amount of bonds to be issued by the new company was increased beyond the amount of the old bonds sufficiently to allow the issues of bonds to take up, dollar for dollar, the claims aggregated in this judgment. These

bonds have been issued by the new company, organized by the reorganization committee to the Central Trust Company, which holds the bonds subject to the order, not of the new company, which issued them, but of the reorganization committee, who are the trustees and agents for the bondholders and these judgment creditors. The new company is completely organized. It is in possession of and is running the road. The delay of the reorganization committee in distributing the bonds is caused, perhaps by this litigation, and certainly by the injunction suit to prevent the Cincinnati, Hamilton & Dayton Railroad Company from purchasing from the reorganization committee stock of the new company, and from guarantying the bonds issued by the new company. The delivery of the bonds by the new company to the Central Trust Company to the order of the reorganization committee was a delivery to the old bondholders and these judgment creditors, for whom the reorganization committee were simply agents. On the principles announced in the opinion, this was a payment of these claims against the old company. It was a complete novation, and discharged the old company, and any fund or property remaining as its assets, from liability to pay them. The oral and documentary evidence abundantly sustains the findings of the master. Indeed, I am convinced by the evidence that there was a written agreement embodying that which the master finds to have been only a verbal agreement or understanding. The claim of William Stewart Tod as a judgment creditor to share in the distribution of the fund now in the registry of the court was rightly rejected.

A second claim made is by the reorganization committee for \$20,009.17, with interest from March 16, 1892. This claim arose from certain claims for rights of way now enjoyed by the railroad company. On a previous reference the master reported that this claim was a lien upon the corpus of the railroad prior to the first mortgage bonds. No exceptions have ever been filed to this report, which must stand confirmed. Subsequently the reorganization committee paid off this claim as a prior lien. This was obviously a mere payment, and not a purchase. It was made to clear the title for the owners by purchase of the property. Manifestly it entitles the payors to no claim against the purchase price of the property when sold subject to the lien. The master found that the claimants were not entitled to share in the distribution of the fund before the court, and this finding is sustained.

A third claim is made by the reorganization committee for \$14,000, with interest from March 10, 1892. This was based on money paid by one J. M. C. Marble for the benefit of the old company. The master, in the former reference, which, as already stated, stands unexcepted to and confirmed, reported that this money had been voluntarily paid by Marble, and could not be made the basis of a claim against the old company. If so, then, of course, it cannot share in the fund for distribution to the unpaid creditors of the old company. More than this, it now also appears that Marble

has come into the reorganization scheme, and has had his claim paid just as the old bondholders have been paid, dollar for dollar, in new bonds. The finding of the master on this claim is confirmed.

A claim was presented for and on account of the advancements made by the Cincinnati, Jackson & Mackinaw Railway Company, i. e. the newly organized company, to pay the floating indebtedness of the receiver, contracted by him for and on account of labor, material, supplies, taxes, repairs to rolling stock, and amounts due to connecting lines. The amount claimed is \$44,267.79. It appears that on June 29, 1892, by an order of court on motion of the receiver, consented to by all of the parties in interest, \$20,221.66 was paid out of the fund then in the registry of the court to the receiver, to pay taxes, etc., which were a lien on the road, and that the \$44,267.79 now claimed includes these \$20,221.66. Why credit should not be given for this payment by order of court, and the claim reduced to \$24,046.13, it is difficult to understand. The master reports that such reduction should be made, and he is clearly right.

The master further reports that this indebtedness of the receiver was incurred without especial authority of the court, and was paid by the new company rather to clear its title to property upon which the indebtedness would be a lien than as a loan to the receiver. It appears that the receiver delivered possession of the road to the new company in April, 1892, and that nothing was paid by the new company until some time after that date. I am clearly of the opinion that the new company did not pay this money as a loan to the receiver, but only for the purpose of clearing its own property from possible and probable liens. A large part—probably 40 per cent.—of this claim was for taxes which would and did constitute a lien, and the running expenses of the road during the receivership were also so regarded. It is a misnomer to call these payments by the new company loans to the receiver. They were payments for the new company's benefit, and cannot entitle it to share in the fund now to be distributed.

The claims in favor of which the master reports are founded on judgments for personal injuries and other torts arising in the operation of the road. Their validity is not attacked, and no reason is shown why they should not be paid out of the fund. No claim is presented on behalf of the holders of the income bonds referred to in the previous opinion.

There remains only to consider the claim of the receiver for his compensation. The amount claimed is \$6,000 a year for two years and five months and eleven days. The claim was rejected by the master on the ground that the order of reference limited his inquiry to the "creditors" of the old Cincinnati, Jackson & Mackinaw Railroad Company. It may be that the master was right in his conclusion, because of the language of the order of reference, but, as the court is not thus restricted, it may do equity. The compensation of the receiver should be paid out of the fund realized from the corpus of the railroad, because that was a necessary and

proper expense incurred in preserving the road for its creditors. This is not denied by the holders of the claims just allowed, but they contend that the purchasers who paid for the road in bonds should be required to substitute therefor money enough to pay the expenses of the trust. The purchasers deposited \$40,000 on the order of the court, and paid the remainder of the purchase price in bonds. Presumably it was supposed by the court that this sum would pay the compensation of the receiver and other expenses, for the sale was confirmed to the purchasers, and the question of the receiver's compensation and expenses continued for further consideration. In addition to the \$40,000 deposited at the last sale, there was in the registry of the court the \$25,000 forfeited on the first sale, which was not completed. Now, these sums would have been ample to pay all expenses and the allowed claims had not the court, with the express and written consent of the holders of the allowed claims, made an order for the payment of \$20,000 and more on account of taxes, etc., already paid by the new company. As already held, this was not chargeable to the court funds, and if, by reason thereof, the fund now in court is too small to pay those consenting to the order, they cannot complain. It would be inequitable to change the terms of the sale so long acquiesced in simply to pay interest on allowed claims whose holders have voluntarily permitted the fund to be reduced by a payment which would not have been made without their consent and against their objection. For the same reason I do not think that an order should be made on the reorganization committee to complete their first bid. In my opinion, the holders of allowed claims waived their right to interest by consenting to the payment of \$20,000 out of the fund available for their claims.

The receiver is a citizen and resident of New York, and did not come to live in Ohio, where the railroad is in operation, during the period of his receivership. The immediate executive management of the road was in other hands. He is not, therefore, entitled to compensation like that usually paid railroad presidents and receivers who are the active executive heads of the going railroad, in immediate charge, and who devote all their time to the same. I think that \$2,500 a year, or \$6,250 in all, is ample pay for the receiver. The master will be allowed \$500 as a fee, and his expenses. The remainder, after payment of such court costs as remain unpaid, will be distributed pro rata to the claims allowed by the master. This will pay the principal of these claims, and something upon the interest due.

Let a decree be entered accordingly, confirming both master's reports as modified herein.

SMITH v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 201.

1. PUBLIC LANDS—GRANTS IN AID OF RAILROADS — RIGHT OF WAY—DEFINITE LOCATION OF ROAD.

The right of way granted by Act July 2, 1864, (13 Stat. c. 217, § 2, p. 365,) to the Northern Pacific Railroad Company, "to the extent of 200 feet in width on each side of said railroad," is limited to land within 200 feet of the line of the railroad as "definitely fixed" by the map thereof filed by the company May 26, 1873, in conformity with section 3 of the act, and does not attach to land beyond said limits, but within 200 feet of the line of the railroad actually constructed, as against one holding title to such land under a patent from the United States without reservation.

2. SAME—MEANING OF "RAILROAD" AND "RAILROAD LINE."

No significance is to be attached to the use of the word "railroad" in the grant of said right of way, as distinguished from "railroad line," as used in the grant of lands in aid of the road, for the terms are used interchangeably, as synonymous.

3. SAME—DEVIATION FROM DEFINITE LOCATION.

The fact that railroads frequently deviate from their lines of definite location, as fixed on their maps, is no ground for inferring that congress intended that the right of way should follow the constructed road, and not the line fixed on the map, for the act, while providing for such deviation by giving the company the right of eminent domain, by its other provisions indicates a purpose to have the railroad actually constructed on the line fixed by the map, and to limit the right of way granted to the 200 feet on each side of that line.

4. SAME—DECISION OF COMMISSIONERS AS TO CONSTRUCTION OF RAILROAD—RES JUDICATA.

A report that the railroad had been completed in a good, substantial, and workmanlike manner, and as in all other respects required by the act, made by commissioners appointed by the president, under section 4 of the act, to examine and report whether it was ready for the service contemplated, does not operate as a judicial determination of the company's title to the right of way over the land on which the road was constructed, as against one holding such land under a patent issued by the United States without reservation.

In Error to the Circuit Court of the United States for the District of North Dakota.

At Law. Action of ejectment by Patrick R. Smith against the Northern Pacific Railroad Company. A verdict for defendant was directed by the court below, and judgment entered thereon. Plaintiff brings error. Reversed.

H. F. Stevens, for plaintiff in error.

Fred. M. Dudley, (J. H. Mitchell, Jr., on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The principal question in this case is whether, as against one holding title under a patent of the United States which contains no reservation of right of way to the company, the right of way granted to the defendant, the Northern
v.58F.no.3—33

Pacific Railroad Company, by the act of congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved July 2, 1864, (13 Stat. c. 217, p. 365,) attached to a tract of land 200 feet in width on each side of its railroad, as actually constructed, where the railroad, as constructed, crosses the land in question, but the line of its definite location shown on its map filed for that purpose with the secretary of the interior, and accepted by him, does not cross it, but passes about two miles south of it.

The property in controversy is eight lots in the city of Bismarck, in North Dakota, which were a part of an 80-acre tract of land that was entered by John A. McLean, as mayor of that city, in behalf of its inhabitants, under the town-site act, (Rev. St. § 2387,) and was patented to him thereunder July 21, 1879. The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff. The 80-acre tract on which these lots are situated was selected as the location for a portion of this town site, and surveyed, prior to June 20, 1872. In the year 1872, the attorney of the Lake Superior & Puget Sound Land Company—the company that first made this selection—commenced, and thereafter continued, to sell lots upon this town site according to a plat thereof which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the 1st of January, 1873, 30 buildings had been erected on the town site, and from that time until the patent was issued the population of the city, and the improvements in it, continued to increase. It was upon the town site thus selected, and the plat thus made, which were afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and it contained no reservation of any right of way to the Northern Pacific Railroad Company.

On February 21, 1872, the Northern Pacific Railroad Company filed in the department of the interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this 80-acre tract. On May 26, 1873, it filed with the secretary of the interior, and he accepted, its map fixing the definite location of its line. The line thus fixed passed about two miles south of this 80-acre tract. During the year 1872, grading was done by the company on this line, extending, in a continuous line, from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this 80-acre tract extended south to its intersection with the grading. During the year 1872, there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location, two miles south, was abandoned. The lots in question are within 200 feet of the main track of this railroad, as actually constructed, and more than two miles from its line of

definite location, as shown on its map filed to definitely fix this line. Upon these facts, the court below instructed the jury that the lots were subject to the right of way of the company, and directed a verdict in its favor on that ground.

Section 2 of the charter of the Northern Pacific Railroad Company provides:

"That the right of way through the public lands be, and the same hereby is, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; * * * said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations." 13 Stat. c. 217, p. 367.

Section 3 of this charter contains a grant of the company of—

"Every alternate section of the public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

Section 4 provides that, whenever the company shall have 25 consecutive miles of its railroad and telegraph line ready for use, the president shall appoint three commissioners to examine it, and, if they find and report that the 25 consecutive miles have been properly constructed—

"Patents of the land as aforesaid shall be issued to the said company, confirming to the said company the right and title to the said lands situate opposite to, and coterminous with, said completed section of said road."

This act was approved July 2, 1864.

That the grants of the right of way, and of the lands in aid of the construction of this railroad, were grants in presenti; that they vested in the company the present right to the lands and easements thus conveyed; that these grants were afloat, and attached to no specific land, until the line of the road was "definitely fixed," and that, whenever the line of the railroad was "definitely fixed," the selection of the lands and of the right of way was thereby made, and the right to lands and easements thus selected vested in the company as of the date of the approval of the charter,—are propositions now too well settled to admit of discussion. *Railroad Co. v. Baldwin*, 103 U. S. 426; *Grinnell v. Railroad Co.*, Id. 739; *Railroad Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389; *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. Rep. 362.

It is also well settled that, so far as the land grant is concerned, the line of the railroad was "definitely fixed" by the filing with, and acceptance by, the secretary of the interior of the company's map of its line of definite location. The company thereby exhausted its

right of selection, and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it, without legislative consent, so as to affect titles accruing thereunder, or in any way affected thereby. Thus, in *Van Wyck v. Knevals*, 106 U. S. 360, 366, 1 Sup. Ct. Rep. 336, Mr. Justice Field, in delivering the opinion of the court, said:

"The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

In *Railroad Co. v. Dunmeyer*, 113 U. S. 629, 634, 5 Sup. Ct. Rep. 566, Mr. Justice Miller, in delivering the opinion of the court, said:

"The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is, in law, bound to report its action by filing its map with the commissioner, or, rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party."

And in *Land Co. v. Griffey*, 143 U. S. 32, 39, 12 Sup. Ct. Rep. 362, Mr. Justice Brewer, delivering the opinion of the court, said:

"The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the land grant are concerned, is its line definitely fixed; and it cannot thereafter, without the consent of the government, change that line so as to affect titles accruing thereunder."

These decisions seem to be broad enough in terms, and positive enough in language, to settle the question here presented. But it is said that the question now before us involves the limits of a right of way, and that the decisions referred to were rendered in cases involving land grants in aid of the construction of railroads. This is true. But it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed, under the act of congress, by filing its map of definite location, and yet be subject to another and subsequent definite fixing, on a different line, by its actual construction, for this is simply to say that a line which is "definitely fixed" is indefinitely changeable. Nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant, and another and a parallel line for the purposes of its right of way.

It is said that the grant of the right of way reads, "Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain," while the grant of lands in aid of the construction reads, "to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the ter-

ritories of the United States, and ten alternate sections of land on each side of said railroad when it passes through any state," and hence that the former grant refers to the constructed railroad, and the latter to the line of definite location on the map. But this argument is hypercritical. It proves too much. It proves that the land grant itself is to be measured from the line of definite location fixed on the map in the territories, and from the constructed railroad in the states, for the grant is of 20 alternate sections "on each side of said railroad line" in the territories, and 10 alternate sections "on each side of said railroad" in the states. The fact is that the words "railroad" and "railroad line" are here used interchangeably, as synonymous terms, and no special significance attaches to the use of the one or the other.

It is said that the completed railroads frequently deviate from their lines of definite location, as fixed upon their maps, on account of unforeseen obstacles to construction; that congress must have known this fact, and must have intended that this right of way should follow the constructed road, and not the line fixed upon the map. Conceding the existence of the fact of the frequent deviation of railroads from their fixed lines, and that congress was aware of this fact, it made ample provision for this deviation in section 7 of the act, by giving to this company the power of eminent domain. The company was given the power to condemn its right of way, whenever it desired to deviate from its fixed line. On the other hand, there are many provisions in this act that indicate that it was the purpose of congress to have the railroad actually constructed on the line the company fixed by this map, and to limit the right of way granted to the 200 feet on each side of that line. It was in the contemplation of congress, when this act was passed, that this company would first file a map showing its general route; that upon the filing of this map the lands within 40 miles of the route thus indicated should be withdrawn from entry for homesteads, from pre-emption, and from sale by the government, until the company could survey, select, and definitely fix the line on which it proposed to build its railroad. Section 6. The company filed the map of its general route through Dakota territory, east of the Missouri river, in February, 1872, but it did not file its map of the definite location of its line until May, 1873. Why was this delay contemplated, and why was the line of the railroad required to be "definitely fixed" by a public record made and filed by the company? In our opinion, there were at least three objects to be accomplished by the filing of this map: First, that there might be a public and permanent record of the fixed line of this railroad, and thus of the limits of its right of way; second, that the definite location of the line of the railroad might be known to the secretary of the interior, and furnish the call for his adjustment of the land grant; and, third, that the date of the filing of this map might furnish a date for the determination of the validity of pre-emption, homestead, and other rights. If the sole or main purpose of the map of this line of definite location was to furnish a call for the land grant, or a date for the determination of the validity of rights that had accrued,

and it was the intention of congress that the railroad, when actually constructed, and the right of way granted, might be located elsewhere, no accurate survey, no great delay, was necessary. The exact limits of the land grant 20 miles distant from the line of the railroad were of little importance. They might have been fixed without material loss to the company by any engineer, without leaving his office, by drawing a straight line upon a map of the country from some fixed point upon the Red River of the North to another on the Missouri river, and certifying that as the fixed line of the railroad. But the main purpose of requiring this line to be definitely fixed was not only to furnish a call for the land grant, but also to provide a permanent record of the line of the railroad, and the limits of this right of way. Hence it was that some delay in definitely fixing the line was contemplated. Congress intended that the engineers of the company should have ample opportunity to carefully survey the practicable lines of construction along the general route, to discover any obstacles to the construction of the road on these lines, and avoid them, and, when all this was done, that the company should definitely fix its line of railroad; that it should irrevocably choose, and, by filing its map of definite location, announce its choice of, the line on which it elected to construct its road, and along which it would exercise the right of way, and the right to the necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations granted to it. It was vital to the success of the enterprise that the limits of this right and the location of these grounds should be carefully selected. A line of construction definitely fixed without careful preliminary surveys might be ruinous to the company. All this the company, undoubtedly, fully appreciated. It appreciated the purpose and effect of definitely fixing this line. It took ample time to make experiments and accurate surveys of many lines, and to make a careful and wise selection. It did not file its map showing the definite location of its line until May, 1873,—until more than a year after its general route had been selected. It did not file this map until after it had carefully chosen and surveyed its line, and partially graded its railroad upon it, past the town site on which the lots in question are situated. This selection was made by its own officers, in its own time, after every opportunity had been afforded it to make a satisfactory choice; and we think it exhausted the right of selection given by the act of congress, and definitely and irrevocably fixed the line of this railroad, and the limits of the right of way granted to it, as against third parties holding under patents of the United States.

It is said that the decision and report of the commissioners appointed under section 4 of the act, that the railroad and telegraph line of the defendant had been completed in a good, substantial, and workmanlike manner, and as in all other respects required by the act, and the approval of that report by the president, constitute a judicial determination that this railroad was constructed where it should be; that this is the decision by a special tribunal of a matter confided to it; that it cannot be attacked

collaterally; and that, as the United States have waived all objection to the location of the constructed road, the plaintiff, holding under them, cannot attack it. But the question now presented is, not whether the railroad company had 25 consecutive miles of railroad and telegraph line ready for the service contemplated when these commissioners reported, but whether the right of way granted to the defendant was limited to the 200 feet in width on each side of the line of railroad "definitely fixed" by its map, and partially graded, or whether it extended over a tract 200 feet in width on each side of the line of railroad on which it is now operating,—two miles north of, and parallel to, its fixed line. This question never was confided to the commissioners for their determination, and never was decided by them. The question they were authorized to consider and determine was whether or not the railroad and telegraph line were constructed in a substantial and workmanlike manner, so that they would be serviceable for the purposes of their construction; whether they were "ready for the service contemplated;" not whether the title of the company to the lands on which they were constructed was obtained by the grant of the right of way, or by the exercise of the power of eminent domain, or had not been obtained at all. Moreover, if there was any commissioner or tribunal charged with the duty of determining the question now presented, it was the commissioner of the general land office, and his issuance of the patent to the land in dispute to the plaintiff's grantor, without any reservation of the right of way to the defendant, would be a conclusive adjudication that these lands were not subject to any such right of way. *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, *Id.* 636. It is unnecessary to consider, in this case, what effect, if any, the action of the commissioners who examined this railroad, and of the president who approved their report, would have, if the question regarding this right of way arose between the company and the United States, alone, and we express no opinion upon that question. But as against this plaintiff, holding under a patent issued by the United States to his grantor without any reservation, when the public record made by the company of the definite location of its line two miles south of this land remained unchanged and without amendment, we are clearly of the opinion that such action was without any effect.

It is said that the right of way granted by this act should be held to extend for 200 feet on each side of the center line of the main track of the railroad, as originally constructed. It is not claimed that this right of way has been swung to the north and to the south from time to time, as the company has since changed its main track, as it must frequently have done, especially in large cities, where it has many tracks. It is not claimed that the company has ever amended its map of the definite location of its line to show where the line originally constructed was, or that there is any public record anywhere from which its location, and the limits of this right, can be learned. The only way these can be discovered now is from the testimony of the few witnesses who have knowledge of where the main track was laid 20 years ago, and the death of

these witnesses will soon compel a resort to evidence still less reliable. Lots and lands in this country are bought and sold on the faith of the public records. If this right of way is not anchored to the line fixed by the map of this company, the record of that map must prove a constant snare to purchasers of lands near this railroad. It is no answer to this position to say that the railroad is visible on the land it traverses, because it is common knowledge that lands are frequently bought and sold without a view of the premises, and because no view of the premises now could determine where the main track was 20 years ago. We are unable to persuade ourselves that congress ever intended to leave the location and limits of this right of way so undefined and undefinable.

After the most careful consideration of this case, we are unable to find any reason for the rule adopted by the supreme court, that the line "definitely fixed" by the map furnishes the only call for the adjustment of the land grant, that is not equally cogent and convincing to prove that it also furnishes the call for determining the limits of the right of way. If it does not do so, the filing of the map does not "definitely fix" the line of the railroad at all, but leaves it indefinite, and liable to be changed by the actual construction of the road. It was not essential to the adjustment of the land grant that the line of the proposed road should be definitely fixed after careful surveys, but it was vital to the interests of the company in its right of way, and in its right to grounds for buildings and improvements, that its line should be carefully selected and definitely fixed where the railroad could be economically constructed upon it. Patents issue to the company for the lands granted after the adjustment of the grant, and the map of definite location grows less valuable as a muniment of the title to these lands, but no patents issue for the right of way, and the only record that defines or evidences the limits of that right is this map. It is of paramount importance that there should be a public record, accessible to all, from which the extent and limits of this right may be ascertained. It would be intolerable that so valuable a right should be disconnected, as defendant's counsel claim it is, from the line definitely fixed by the map of the company; should attach itself to the center line of the main track of the railroad as originally constructed, 20 years ago, and should have no muniment of title, but the uncertain memory of witnesses of its construction, to fix its limits.

The result is that as against one holding under a patent of the United States, without reservation, the right of way granted to the Northern Pacific Railroad Company by the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," approved July 2, 1864, (13 Stat. c. 217, p. 365,) is limited to 200 feet in width on each side of the line of railroad "definitely fixed" by the company's map of definite location filed May 26, 1873, and, as the lots in question were not within these limits, they were not subject to the defendant's right of way, and it was error for the court below to instruct the jury to return a verdict in its favor.

It is unnecessary to notice other assignments of error, because the questions presented by them may not arise on a second trial. The judgment below is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

LITTLE JOSEPHINE MIN. CO. v. FULLERTON et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 286.

1. MINES AND MINING—ADJOINING CLAIMS—FOLLOWING VEIN—HARMLESS ERROR.

Plaintiff owned two mining claims, the veins of which united below the surface, and, at a much greater depth, met the vein of defendants' claim, which had been located long after the location of the older of plaintiff's claims. In ejectment for the ore below the point of meeting, which plaintiff claimed, under Rev. St. § 2336, as having the prior location, the only issue was whether the veins united or crossed each other. *Held*, that it was immaterial whether the location of plaintiff's junior claim was prior or subsequent to defendants' location, and rulings upon evidence on that question, if erroneous, were not prejudicial to plaintiff.

2. SAME—ORE WITHIN SPACE OF INTERSECTION OF VEINS—JUDGMENT ON GENERAL VERDICT—QUESTION NOT RAISED AT TRIAL.

A judgment on a general verdict for defendants in such action will not be reversed because it fails to define plaintiff's rights, under Rev. St. § 2336, to the ore within the space of intersection of the veins, where the question was not called to the attention of the court either before the verdict or when it was received, and where a statute of the state provides that a verdict for part of the premises claimed shall particularly specify such part.

3. APPEAL—REVIEW—MATTERS OF DISCRETION—DECISION ON MOTION FOR NEW TRIAL.

The denial of a motion for a new trial is not subject to review in the federal appellate courts.

In Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejectment by the Little Josephine Mining Company against William Fullerton, Edward F. Clinton, Job V. Kimber, Richard Mackey, Richard W. Moseley, and John B. Ballard, to recover possession of a vein of ore. Verdict and judgment for defendants. Plaintiff brings error. Affirmed.

John G. Taylor, (R. T. McNeal, on the brief,) for plaintiff in error.

Willard Teller, (Harper M. Orahoad and Edward B. Morgan, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The Little Josephine Mining Company, a corporation, brings this writ of error to reverse a judgment in favor of the defendants in error in an action of ejectment which it brought in 1889 to recover possession of a vein of ore it claimed to own, and which the defendants had taken possession of, about 800 feet below the surface of the earth. The defendants claimed

that they were the owners of this vein at that point, and entitled to its possession, by virtue of their ownership of a vein which there intersected the plaintiff's vein. The case was tried to a jury. The facts were that the plaintiff was the owner of the Slaughterhouse lode mining claim, which was patented in 1871 upon a location made in 1866 on the Slaughterhouse vein, which had a dip northwardly, and which, after passing out of its northerly side line extended down vertically, struck the Fagan vein about 800 feet below the surface. The Fagan vein was owned by the defendants. Its apex was within the boundaries of the Fagan lode mining claim, which was located on the surface some distance northerly of, and nearly parallel to, the Slaughterhouse claim. The Fagan claim was originally located May 3, 1876, but prior to its location a large portion of the tract included within its boundaries had been located, and was then legally held, as a part of the Wheeler lode mining claim. Prior to December, 1887, the defendants became owners of both these claims. On December 1, 1887, they filed amended location certificates of both the Wheeler and Fagan claims, the effect of which was to change their boundary lines somewhat, and to swing them clear of each other. The original discovery shaft of the Fagan claim was within the boundary lines of the original Wheeler claim, and the defendants sank a new discovery shaft on it December 1, 1887. Upon these amended certificates of location these two claims were patented before this action was brought. The Little Josephine mining claim, which is owned by the plaintiff, is situated between, and nearly parallel to, the Slaughterhouse and Fagan claims, and was located December 19, 1877. The Little Josephine vein, the apex of which is within the surface lines of this claim, dips northwardly, and at the depth of 467 feet below the surface it unites with the Slaughterhouse vein, and the vein thus formed by their union continues down with a dip northwardly, until it strikes the Fagan vein. The dip of the Fagan vein is southwardly, and it passes out of the southerly side line of the Fagan claim extended vertically downward before it meets the Slaughterhouse vein.

The plaintiff claims that at the point of meeting these two veins unite, and form a single vein, while the defendants maintain that they intersect each other like the parts of the letter "X." In their brief the counsel for the plaintiff say: "The main contention was whether at this point these two veins united and became one, or crossed each other on their dip, and continued on as distinct veins." On another page they say: "Practically speaking, this was all the contention there was at the trial." If a critical examination of the record does not fully justify this statement, it certainly strongly supports it, and in the consideration of the case we give the plaintiff the benefit of the doubt, and treat this statement of its counsel as true. The court below properly charged the jury that the Slaughterhouse location was older than the Fagan location; that if the two veins united, the plaintiff would be entitled to all the ore in the vein below the point of union; read to them section 2336, Rev. St., viz.: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be

entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union;"—and told them that what was required of them was to say, upon all of the testimony submitted, whether these two veins crossed each other or united at their point of meeting. It is conceded that this portion of the charge is correct, but it is assigned for error that the court below admitted in evidence the original certificate of the Fagan claim, rejected evidence tending to show that the original discovery shaft of that location was within the boundary lines of the prior Wheeler location, and charged the jury that the Josephine location was younger than the Fagan. Whether or not there was error in these rulings it is unnecessary to pause to consider, because it is perfectly evident that if they had all been reversed this could not have benefited the plaintiff. The only effect of opposite rulings would have been to have dated the Fagan location December 1, 1887, when the amended certificate was filed, instead of May 3, 1876, when the original certificate was filed, and thus to have made the Josephine location of December 19, 1877, senior to the Fagan location. But this could not in any way have affected the issue on trial. Both these locations were years junior to the Slaughterhouse location, which passed to patent in 1871. Moreover the Josephine vein united with the Slaughterhouse vein only 467 feet below the surface, and more than 300 feet before the united vein struck the Fagan vein. From the point of union of the Slaughterhouse and Josephine veins to the point of contact of this united vein with the Fagan vein, 800 feet below the surface, the Slaughterhouse, being the prior location, took the entire vein. The title to it related back to the Slaughterhouse location as early as 1871, and the court properly instructed the jury that, if this vein united with the Fagan, the plaintiff must prevail, under the statutes, because the Slaughterhouse location was the older on that ground. Under this state of facts it was entirely immaterial whether the location of the Josephine on its branch of the Slaughterhouse vein was prior or subsequent to the location of the Fagan vein, and error without prejudice is no ground for reversal. *Sanger v. Flow*, 4 U. S. App. 32, 1 C. C. A. 56, 62, 48 Fed. Rep. 152; *Dorsheimer v. Glenn*, 4 U. S. App. 500, 2 C. C. A. 309, 51 Fed. Rep. 404; *Railroad Co. v. Stoner*, 4 U. S. App. 109, 2 C. C. A. 437, 444, 51 Fed. Rep. 649.

It was claimed at the argument that the Josephine claim extended 375 feet farther east than the Slaughterhouse claim, and that as to this portion of the vein in dispute the title must depend upon the priority of the Josephine location over the Fagan location, but this claim finds no support whatever in the record before us, and can receive no consideration. The record discloses that the witnesses for the plaintiff testified that the Josephine vein united with the Slaughterhouse vein, but it is entirely silent as to the extent or exact location of either claim on the surface of the ground.

Neither the certificates of location, nor the patents, nor any other evidence of the extent or limits of any of these locations has been preserved in the bill of exceptions.

The denial of the motion for a new trial, which is also assigned as error, was a matter in the discretion of the court below, and is not subject to review in this court. *Railroad Co. v. Howard*, 4 U. S. App. 202, 1 C. C. A. 229, 49 Fed. Rep. 206; *McClellan v. Pyeatt*, 4 U. S. App. 319, 1 C. C. A. 613, 50 Fed. Rep. 686; *Village of Alexandria v. Stabler*, 4 U. S. App. 324, 1 C. C. A. 616, 50 Fed. Rep. 689.

The last assignment of error is that "the court erred in entering its judgment for the defendants without ascertaining and defining the rights of this plaintiff in and to the ore at the point of intersection and crossing of the Slaughterhouse and Fagan veins, and for a failure by said judgment and decree to completely fix and determine all the rights of the respective parties to the property in controversy."

But this was not a suit in equity. It was an action of ejectment, the trial of which resulted in a general verdict for the defendants. The court entered the customary judgment of dismissal on such a verdict. The argument used to assail this action of the court is that, as the jury must have found that the two veins crossed each other, the court should have entered a decree in favor of the plaintiff for the recovery of the ore in the space of intersection. This position is untenable. No request was made in behalf of the plaintiff for the court to instruct the jury to return a verdict in its favor for the ore in this space, if there was any, nor was the attention of the court called to this question in any way before the verdict, or when it was received. The Code of Colorado expressly provides that in an action of ejectment, "if the verdict be for all the premises claimed, as specified in the complaint, it shall in that respect be for such premises generally. If the verdict be for part of the premises described in such complaint, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed." Code Colo. § 269.

If the counsel for the plaintiff desired a verdict of the jury for the ore in the space of intersection, in case the jury found the veins did not unite, it was their privilege to pray the court for an instruction to that effect, or, when the verdict came in, to move that the jury be instructed to modify their verdict to that effect; and if that request was refused, and a proper exception taken, this court might have considered whether there was error in such a ruling of the court below. This privilege the counsel for the plaintiff waived. They chose to stake the whole case, and win or lose all, on the decision of the single question whether the veins united or crossed. This they had the right to do, and, as the court below was not requested at the trial to consider or determine the question now presented in this court, and did not act or refuse to act upon it, it surely committed no error here for this court to consider.

That the judgment of dismissal was properly entered upon this general verdict for the defendants is axiomatic. A general verdict

for the defendants in ejectment, which results from the trial of a hotly-contested issue of fact, certainly does not authorize the court to enter a judgment in that action in favor of the plaintiffs for the possession of any of the property in controversy. We are of the opinion that there was no material error in this case, and the judgment below is affirmed.

CITY OF MINNEAPOLIS v. LUNDIN.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 299.

1. MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPALS—WHO ARE.

Where a city engineer, declared by the charter to be the general superintendent of all work done by the city in the streets, appoints a superintendent of sewer construction, to have charge of that department of the work, and the latter employs a foreman, who controls a gang of men, with power to hire and discharge, and direct when, where, and how to work, such foreman is not a general vice principal of the city in relation to a workman under him who is injured by his negligent act. *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, and *Coal Co. v. Johnson*, 56 Fed. Rep. 810, followed.

2. SAME—DEFECTIVE PREMISES—FELLOW SERVANTS.

The duty of a city to use reasonable care to furnish a safe place for its employes to work in does not extend, in the construction of a sewer, to keeping the same safe at every place and every moment of time in the progress of the work; and if it becomes unsafe, through the omission of a foreman, who is not a vice principal, to inform a workman that a dynamite cartridge has failed to explode, the city is not liable for a resulting injury.

In Error to the Circuit Court of the United States for the District of Minnesota. Reversed.

David F. Simpson, for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The city of Minneapolis, the plaintiff in error, seeks to reverse the judgment against it recovered in the court below by Erick Lundin, the defendant in error, on the ground that the circuit court should have instructed the jury to return a verdict in its favor.

The charter of the city of Minneapolis provides that the city engineer "shall have supervision and general charge of all work done for the city, and all work done in any street, highway or alley in the city; may direct the manner of performing such work, and the construction of all sidewalks, street crossings, bridges or other structures in or upon such streets." Sp. Laws Minn. 1881, c. 76, § 10. One S. W. Sublette was the superintendent of sewer construction for that city under the direction of the city engineer. One John Holdquist was the foreman of a crew of about 50 men engaged in the construction of a sewer on Fourth avenue in that city under the direction of the superintendent, Sublette. This

superintendent gave his directions as to this piece of work to the foreman, and the latter hired and discharged the men in this crew, and directed them where to work and what to do. The members of this crew were all engaged, on the day of the accident, in constructing a sewer along a single block on Fourth avenue. Some of the men were opening the trench, others were laying the pipe, and others were filling the trench behind the pipe-layers. In opening the trench it was necessary to break up the rock found there by blasting it so that it could be removed, and sticks of dynamite about eight inches long were used for this purpose. Erick Lundin was a blaster employed in this crew, and it was his duty to prepare and fire the blasts of dynamite which were used to shatter the rock. He had been engaged in performing this duty for several weeks. Andrew Anderson was another blaster, whose duty it was to prepare blasts for Lundin to fire. This was the method of preparing and firing the blast: After five holes about two feet deep had been drilled near each other by machinery, one of these blasters took charge of these holes, cleaned them out, placed a stick of dynamite in each with a cap and wire attached to it, filled the holes with sand and tamped it down, and connected the wires leading from the dynamite with two larger wires which led to an electric battery some distance away, and when all was ready Erick Lundin fired the blast by the use of the battery. It not infrequently happened that some of the sticks of dynamite would not explode, and that the entire blast would be ineffectual. In that case it was the duty of the blaster who had loaded the holes to clean them out, and reload them. On September 18, 1890, while the workmen we have referred to were in the common employment of the city in the various capacities stated, Anderson prepared one blast, and Lundin prepared another, about 75 feet distant from him, and then fired both of them. Anderson's blast proved ineffectual, and he told the foreman, Holdquist, that "there was four holes went off and the other place didn't go off." Holdquist turned to Lundin, who stood by, but did not hear Anderson's statement that one of the dynamite sticks had not exploded, and told him to get some dynamite, and go down and reload these holes, because they had done no good. Lundin went away some distance, got five sticks of dynamite, and carried them down where Anderson was at work with a pump cleaning out these holes. He cleaned four holes, and Lundin reloaded them. As he was pumping out the fifth he struck a stone, at a depth of about eight inches, too large to come through the pump, and so fast that he could not pull it up without breaking it. Lundin then took a drill, put it in the hole to break the stone, and held it. He did not know that there was unexploded dynamite below the stone, but Anderson was the man who told the foreman that one of the sticks of dynamite had not exploded. Anderson struck the drill with a hammer, the dynamite exploded, and injured Lundin, the defendant in error. The judgment is based on the theory that the foreman, Holdquist, was the vice principal of the city, and that his direction to Lundin

to reload the holes, without telling him that Anderson, who had loaded them, and was about to clean them out, had said that the dynamite in one of them had not exploded, was the careless act that caused the injury. No other negligence is charged against the city.

Prima facie, all persons engaged in a common employment in the service of the same master are fellow servants. At common law, a servant who enters with others upon the common employment in the service of a common master assumes the ordinary risks of that service, including the risk of injury from the negligence of his fellow servants. It is the duty of the master, however, to use ordinary care to furnish reasonably safe machinery and instrumentalities with which the servant may perform his work, and a reasonably safe place in which he may render the service for which he is employed. It is also the duty of the master to use ordinary care to employ fit and careful coworkers to assist in the common service. These are absolute personal duties of the master, and cannot be so delegated as to relieve him from liability for their negligent discharge.

A vice principal is the representative of the master, and for his acts and negligence the master is responsible. An employe of a corporation may become such a representative in two ways:

First. He may be intrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, and in such a case he may be termed a general vice principal, because in all his acts relative to the business of the corporation he stands in the place of the master, and the latter is liable for his negligence in their performance.

Second. One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow servants, and in such a case he may be termed a special vice principal. He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employe he is not the representative of the master, nor is the master liable for his negligence in the performance of them. Whether or not the master is liable for the negligence of such a servant in a given case must be determined by the nature of the duty in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise it is not. *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, 919, 921; *Coal Co. v. Johnson*, 56 Fed. Rep. 810; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 165, 166, 6 N. W. Rep. 484; *Brown v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 553, 18 N. W. Rep. 834.

In our opinion, the two authorities first cited, *supra*, are decisive of the question here at issue. In the first case it was held that an engineer who, under the rules of a railroad company, was "re-

garded as conductor," and who had the direction and control of his engine and of his fireman upon it, was not a vice principal of the company, and that the latter was not liable for an injury to the fireman, caused by the engineer's negligent disregard of his orders. In the second case this court held that the fact that the foreman of a crew of 10 men had authority to direct them where to work and what to do, and was intrusted with the duty of propping the roof of a room in a mine, and keeping it safe for these workmen who were engaged with him in mining coal, did not make him a general vice principal where his crew was one of several working under the general direction of a pit boss and a general superintendent, but that the liability of the company for his negligence must be determined by the nature of the duty he was performing when he caused the injury.

That the foreman, Holdquist, was not the general representative or vice principal of the city of Minneapolis, this record clearly shows. He was not the general manager or superintendent of its entire business, or of any separate and distinct department of its business. The charter of that city declared that the city engineer should be the general superintendent of all work done for the city in any street, highway, or alley, and gave him full power to fix the time, place, and manner of performing it. The city engineer intrusted the work of that branch of this department which consisted of the construction of sewers to Mr. Sublette, whose very appropriate title was superintendent of sewer construction. Holdquist was the boss of 50 men, with authority to hire and discharge them, engaged in the performance of a single piece of sewer construction under the supervision of this superintendent. All the men employed by the city in the construction of sewers, whatever their grade or authority, were serving the same master in the same common employment and in the same department. No piece of work on any sewer constituted a department of the business of the city separate and distinct from any other work in such construction, and no one of the foremen or laborers below the rank of the superintendent, Sublette, could have been a general representative or vice principal of the city, if, indeed, he was. It follows that in the performance of his general duties of controlling the men in his crew, and directing them when, where, and how to work, Holdquist was a fellow servant of the defendant in error.

It remains to consider whether or not he was a special vice principal when he committed the alleged negligence complained of, whether or not he was then discharging the duties of his employment as foreman in the common service of constructing the sewers, or some absolute and personal duty of the master intrusted to him.

It was the absolute duty of the master to use reasonable care to employ ordinarily careful and suitable servants to construct this sewer, and the performance of that duty had been intrusted to this foreman. But it is not claimed that he was negligent in the employment of the man Anderson, who, with knowledge of the dynamite below, struck the fatal blow that caused the injury, or

that he failed in any other respect to carefully discharge this duty of his master.

It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him that there was dynamite in one of them. But the duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible. Each employe assumed the risk of this negligence of his fellow servants when he entered the common employment. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433; *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. Rep. 464; *Killea v. Faxon*, 125 Mass. 485.

The result is that the foreman was not the vice principal of the city, but was the fellow servant of the defendant in error in the performance of the only act of negligence disclosed by the record, and the circuit court should have instructed the jury to return a verdict in favor of the city. *Railway Co. v. Davis*, 3 C. C. A. 429, 53 Fed. Rep. 61; *Gowen v. Harley*, 56 Fed. Rep. 973, 980; *Monroe v. Insurance Co.*, 3 C. C. A. 280, 52 Fed. Rep. 777; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266; *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905; *Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. Rep. 972.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial.

EXCHANGE BANK v. HUBBARD et al.

(Circuit Court, S. D. New York. October 25, 1892.)

NEGOTIABLE INSTRUMENTS—DRAFTS—PROMISE TO ACCEPT.

Defendants, in order to enable a certain firm to buy cotton for them, promised the firm that they would cash such sight drafts as the firm should procure a certain bank to cash. The firm communicated this promise to the bank, which accordingly cashed the drafts, but defendants refused to pay them. *Held*, that defendants were liable to the bank precisely as if they themselves had directed the bank to cash the drafts.

At Law. Action by the Exchange Bank against Samuel T. Hubbard and others to recover money. On demurrer to the complaint. Demurrer overruled.

John R. Abney, for plaintiff.

Sullivan & Cromwell, for defendants.

WALLACE, Circuit Judge. This is a demurrer to a complaint in an action at law. The complaint proceeds upon the theory that the defendants are liable to the plaintiff for the amount of certain bills of exchange, as upon the breach of an agreement to accept and pay the bills. The complaint can be fairly read as stating that, to enable Hope & Co. to raise the money to buy 300 bales of cotton and ship it to the defendants, the latter promised Hope & Co. to accept and pay such drafts as Hope & Co. should procure the plaintiff to cash, the drafts to be drawn on defendants, and made payable on presentment at the city of New York; that the plaintiff, in reliance upon the promise of the defendants to Hope & Co., of which plaintiff had been informed by Hope & Co., as well as upon a telegram sent by defendants to Hope & Co., cashed the drafts in suit; that Hope & Co. used the proceeds to buy the cotton; that Hope & Co. shipped the cotton to defendants, and the defendants received it; and that the defendants neglected and refused to accept and pay the drafts upon proper presentment and demand.

The plaintiff's right of action does not depend upon the telegram sent by the defendants to Hope & Co. Its position is no better and no worse than if that telegram had not been sent, except to the extent that the message constituted a definite authorization to Hope & Co. as to the quantity of cotton to be purchased, the price to be paid, the mode of shipment, and some other details which need not be referred to. Read in the light of what had previously taken place between Hope & Co. and the defendants, the telegram contains a statement which may possibly be construed as authorizing the former to draw on defendants for the price to be paid to Hope & Co. for the cotton; but, standing alone, it does not purport to authorize Hope & Co. to procure the money from the plaintiff, or anybody else, upon the credit of defendants, and, if the statute of frauds were in the case, would have no effect as a promise in writing of the defendants to be answerable to the plaintiff for the debt of Hope & Co.

Upon the facts stated, it is claimed that the defendants authorized Hope & Co. to procure the money with which to buy the cotton from the plaintiff on such drafts as are set forth in the complaint. Defendants are therefore liable as principals for the contract of their agent, made within the terms of the authority conferred. If they had authorized Hope & Co. to borrow money for them, or on their credit, from the plaintiff, without regard to the form of the security to be given, they would have been liable as for money had and received for their use. Having authorized Hope & Co. to procure it upon sight drafts, they are liable precisely as though they had themselves directed the plaintiff to cash drafts drawn on them by Hope & Co. The demurrer is overruled.

ST. LOUIS S. W. RY. CO. v. HENSON.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 279.

1. APPEAL—OBJECTION NOT RAISED BELOW.

In an action by a husband for the alleged negligent killing of his wife, an objection that plaintiff has no legal capacity to sue will not be considered on appeal, where the objection is then made for the first time.

2. SAME—OBJECTIONS TO EVIDENCE.

An objection to the introduction of testimony which states no ground for the objection, deserves no consideration in the trial court, and will receive none in the appellate court.

3. DEATH BY WRONGFUL ACT—RECOVERY BY HUSBAND FOR LOSS OF WIFE'S SERVICES—MARRIED WOMEN'S ACT.

The Arkansas statute relating to married women, providing that their earnings shall be their sole and separate property, does not divest a husband of the right to his wife's services, nor, where her death has been caused by negligence, preclude him from recovering for the loss of such services.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas. Affirmed.

Statement by CALDWELL, Circuit Judge:

H. M. Henson, the defendant in error and plaintiff below, brought this suit in the circuit court of the United States for the eastern district of Arkansas against the St. Louis Southwestern Railway Company, the plaintiff in error, to recover damages for the alleged negligent killing of his wife by the railway company, while she was traveling in a boarding car attached to one of its trains. There was a trial before a jury, and a verdict and judgment for the plaintiff, and the company sued out this writ of error.

J. M. Taylor, J. G. Taylor, and Sam H. West, for plaintiff in error.

E. Foster Brown, Sterling R. Cockrill, and George H. Sanders, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is said in the brief of the learned counsel for the plaintiff in error that the plaintiff "had no legal right or capacity to institute this suit in his own name. Consequently, having no legal capacity to sue, the objections to the testimony of each of the witnesses offered at the proper time by the plaintiff in error should have been sustained, and no such evidence was legal under the complaint." But no such objection to the admission of the testimony was made in the lower court. The bill of exceptions states that "the plaintiff, to maintain the issue on his part, against the objection of the defendant then and there made to the testimony of each witness at the time made, and which objection the court overruled, and to which ruling the defendant at the time excepted." And the language of the assignment of errors is "that the court erred in permitting the witness O. J. Storm to testify before the jury, and admitting his testimony as evidence in this case against the objection of the defendant." This assignment is repeated in the same language as to every witness called by the plaintiff. A further assignment of error is "that the court erred in permitting any testimony to be introduced under the complaint and answer in this case." It will be observed that the grounds of the objection to the introduction of the testimony are not stated either in the bill of exceptions or assignment of errors. The objection that the plaintiff cannot maintain an action in his own name for the negligent killing of his wife is made for the first time in this court. It might have been raised in the lower court by a demurrer to the complaint, or by an objection to the introduction of the testimony, or by request for an instruction, but it was not raised in any of these modes and was not raised at all. The plaintiff in error proffered eight requests for instructions, not one of which questioned, and every one of which by implication conceded, the right of the husband to bring the suit, and rested the defense to the action on other grounds. It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of that court and decided by it. An objection to the introduction of testimony which states no ground for the objection deserves no consideration in the trial court and will receive none in this court. And a party cannot urge one ground in the trial court and another on appeal. These rules are essential to preserve the character of this court as a court of review. Elliott, App. Proc. §§ 770, 771. An appellate court can consider only such matters as are properly of record, and a matter not appearing of record has no existence as a predicate for error. When the record does not affirmatively show error duly excepted to in the lower court, and duly assigned for error there, the presumption obtains that no error was committed. As the right of the plaintiff to maintain this suit in his own name was not questioned, so far as the record shows, on the trial of the cause in the lower court, and was not there assigned for error, this court cannot consider it.

The remaining specification of error relied on is that the court refused to make certain sections of the married women's act of Arkansas a part of its charge to the jury. To have done so would

have been to confuse and mislead the jury. The act provides that a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or service on her sole and separate account, and that the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used or invested by her in her own name. The contention of the plaintiff in error is that, under this act, the husband has no valuable right in the services of his wife, and that he suffers no pecuniary loss by her death. This act does not put the wife on the footing of a concubine to her husband. It does not relieve her from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all Christian peoples. The statute does not purport to relieve a wife, and was not intended to relieve her, from the legal duty of performing these services, which it is the pleasure of every good housewife to render to her husband in sickness and in health, independently of any mere technical legal obligation, and which she would render despite any statute that could be enacted to the contrary. These rights and duties are imposed by a law having a much higher and better source than the common law, which simply imparts to them that legal sanction essential to their maintenance and protection in a court of law against invasion from any quarter. On this subject the court charged the jury as follows:

"The plaintiff is not entitled to recover anything except the actual value of her services to him, if any, in dollars and cents. It is not a question of sentiment, and you must disabuse your minds of that, gentlemen; it is a question of actual pecuniary compensation. He is not entitled to recover anything for the loss of her companionship, of her love and affection, or anything of that kind. That must not enter into your calculation as to the amount he should recover, but he is entitled to recover what the proof shows her services would be worth to him. * * * I will say to you, in regard to the relation of husband and wife, that while in this state it is true that, so long as the wife chooses, her earnings and her property are her own, and not subject to the control or direction or management of her husband, yet, if she chooses to give him her services, then he may have them; and in determining this question as to the value of her services, if you find from the testimony that she did, from the time of her marriage up to the time of her death, give him her services and her earnings, that is a circumstance to consider in determining whether or not she would continue to do so. If you shall find from the testimony that her services were given to him, the next question is, what were they worth in dollars and cents? You will not go into any field of imagination about this, but you must take it from the proof as given by the witness in this case, and you are the sole judges of that testimony. You are to say in dollars and cents what the value of her services should be."

This charge was more favorable to the defendant than it had any right to ask. The judgment of the court below is affirmed.

THOMPSON v. GATLIN et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 272.

1. FORCIBLE ENTRY AND DETAINER—RESTITUTION BOND—DAMAGES.

The restitution bond required of the plaintiff in a forcible entry and detainer suit by Mansf. Dig. Ark. § 3353, covers actual damages resulting from the dispossession, including the value of crops destroyed by plaintiff while in possession, but does not cover claims for malicious prosecution of the suit.

2. SAME—PLEADING—SEPARATE CAUSES OF ACTION.

Claims for actual damages on the restitution bond of a plaintiff in forcible entry and detainer, and for damages for malicious prosecution of the suit, which are not covered by the bond, constitute different causes of action, required by Mansf. Dig. Ark. § 5027, to be separately stated.

3. SAME—DAMAGES—PLEADING.

In an action for damages on the restitution bond given in a forcible entry and detainer case, failure to allege a determination of that case in plaintiff's favor is fatal.

4. SAME—MALICIOUS PROSECUTION—PLEADING.

A suit for malicious prosecution of a forcible entry and detainer case, is not maintainable in the absence of averments of want of probable cause, and the termination of the case in plaintiff's favor.

5. PRACTICE—PLEADING—DISMISSAL.

Plaintiff's refusal to comply with an order requiring him to separately paragraph his different causes of action, according to the local practice, justifies a dismissal of his case.

In Error to the United States Court in the Indian Territory.
Affirmed.

Statement by CALDWELL, Circuit Judge:

This suit was brought by Brutus E. Thompson, the plaintiff in error, against W. L. Gatlin and others, the defendants in error, in the United States court in the Indian Territory. The complaint alleged that the defendants wrongfully and maliciously instituted in the United States court in the Indian Territory an action of forcible entry and detainer against the plaintiff to recover the possession of 200 acres of land and the houses and other improvements thereon, and that in pursuance to the command of a writ of possession issued in the cause, the plaintiff was ejected from the premises, and the possession of the same delivered to the defendants in this suit, who wantonly and maliciously cut and tore down and damaged the fences, houses, and other improvements on the land, and destroyed a crop of cotton and broom corn by turning stock in upon the same. It is further averred in the complaint that the plaintiff, to the knowledge of the defendants, was without means to procure another home or shelter for himself and family, and that by reason of the exposure and hardship brought about by his wrongful expulsion from the premises his wife was made sick and suffered a miscarriage. It is averred that the defendants "unlawfully, wrongfully, and maliciously conspired together to deprive this plaintiff of the possession of his home and said two hundred acre tract of land and the improvements and crops thereon," and that the destruction of the improvements and crops on the land and the exposure of himself and family "was the direct result and purpose of such conspiracy, and that plaintiff was actually damaged by the said destruction of said fences, houses, and other improvements and of said crops of cotton and broom corn to the amount of \$2,089.25, a recovery for which said damages, however, is not asked in this suit; and that by reason of the plaintiff being deprived of the possession of said two hundred acre tract of land from the said — day of July, 1891, to the said — day of April, 1892, plaintiff suffered actual damages in the sum of four hundred and fifty dollars; and that by reason of his being

deprived of the right to maintain his residence in the house upon said two hundred acre tract of land, and of the consequent suffering of himself and family, he has sustained actual damages in the sum of ten thousand dollars." The alleged wrongful and malicious acts of the defendants are again recapitulated and a claim made for "further damages in the sum of ten thousand dollars as exemplary damages," and the complaint concludes by praying judgment for \$20,450. All these claims are stated as one cause of action, and in a single paragraph. The complaint does not allege want of probable cause for bringing the action of forcible entry and detainer, or that that action was terminated in favor of this plaintiff. The court, on motion of the defendants, required the plaintiff to paragraph his complaint. The plaintiff refused to comply with this order, whereupon the court dismissed his action for that reason, and this ruling is assigned for error.

Clifford L. Jackson, for plaintiff in error.

W. T. Hutchings, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The Code of Practice in force in the Indian Territory provides that "where the complaint contains more than one cause of action, it shall be distinctly stated in a separate paragraph and numbered." Mansf. Dig. Ark. § 5027. The plaintiff has chosen to divide his damages into four classes or heads, and to state the specific sum claimed under each head: (1) For the destruction of improvements and crops upon the land, the damages are alleged to be \$2,089.25, but for some reason, not stated in the complaint, a recovery of these damages "is not asked for in this suit." (2) For being deprived of the possession of the land from July, 1891, to April, 1892, the complaint claims "actual damages in the sum of four hundred and fifty dollars." (3) For depriving the plaintiff of his right to maintain his residence in the house upon the land the complaint claims "actual damages in the sum of ten thousand dollars." (4) And for maliciously and oppressively depriving the plaintiff of the possession of the premises and destroying the improvements on the same, \$10,000 are claimed as exemplary damages. The statute under which this action was instituted requires the plaintiff to execute a bond to the sheriff conditioned that he "will restore the possession of the lands, tenements, or other possessions in the complaint mentioned if restitution thereof be adjudged, and will pay the defendant all such sums of moneys as may be recovered against him by such defendant in the action for any cause whatever." Mansf. Dig. § 3353. Unless the action be malicious and without probable cause, the remedy of a party claiming to have been wrongfully dispossessed in an action of forcible entry and detainer is confined to his right to costs, and an action upon the bond required by the statute, and in such an action the plaintiff must allege the termination of the original suit in his favor. *Burton v. Railway Co.*, 33 Minn. 189, 22 N. W. Rep. 300; *Preston v. Cooper*, 1 Dill. 589; *Stewart v. Sonneborn*, 98 U. S. 187; *Closson v. Staples*, 42 Vt. 209.

The \$450 damages claimed under the second head are of identically the same character as those first set out, but not sued for; and both of these items of damages are such as could be recovered in an action on the bond. The \$2,089.25 and the \$450 items of the damages cannot be split into two suits, and a recovery had in each. A verdict and judgment in one suit would be a bar to the other. The claim of \$450 damages for the loss of the use and occupation of the land must, therefore, be regarded as representing the plaintiff's claim to damages on the bond, though imperfectly and insufficiently stated.

The damages claimed for malicious prosecution constitute a different cause of action, and should have been separately paragraphed. This cause of action was also imperfectly stated, in that the complaint did not aver want of probable cause, and the termination of the suit in plaintiff's favor. A recovery could be had for the damages specified under the first and second heads upon averments in the complaint and evidence that would not authorize a recovery for the other damages claimed. *Preston v. Cooper*, supra; *Stewart v. Sonneborn*, supra. The question whether these separate causes of action could be joined in one suit is not before us. The plaintiff cannot avoid paragraphing his complaint by imperfectly stating the different causes of action. The order of the court requiring the plaintiff to paragraph it was a reasonable one, and the plaintiff having defied the authority of the court in the premises the action was properly dismissed. *Eisenhouer v. Stein*, 37 Kan. 281, 15 Pac. Rep. 167. We may add that if the court erred in the matter it was not prejudicial error, for the complaint stated no cause of action of any kind. See cases above cited.

The judgment of the court below is affirmed.

ELDER v. RICHMOND GOLD & SILVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 183.

1. LIMITATION—SUIT TO REMOVE CLOUD ON TITLE.

A suit to remove, as a cloud on title, a claim founded on a judgment alleged to have been rendered without jurisdiction is not within Gen. St. Colo. 1883, c. 66, § 12, limiting the time within which bills for relief on the ground of fraud can be brought.

2. SAME.

Code Colo. § 401, prescribing the limitation for suing out writs of error, has no application to such a suit.

3. JUDGMENT—PRESUMPTION OF VALIDITY.

A judgment for defendant in an attachment suit, rendered for failure to reply to the answer, as required by Code Colo., is not invalidated by the fact that the record fails to show that notice of the filing of the answer was given in conformity with the requirements of the Code, as the presumption that the court rightly decided that such requirements were complied with is conclusive against collateral attack.

4. FEDERAL COURTS—CORRECTING ERRONEOUS JUDGMENT OF STATE COURT.

Errors in the judgment of a state court having jurisdiction are reviewable only by the proper state tribunals, and cannot be corrected by the federal courts.

5. JUDGMENT—VACATING—WANT OF JURISDICTION.

A judgment was rendered in a district court of Colorado, dismissing the action, and thereafter a motion to vacate was denied. Nearly three years after its rendition, and without intermediate proceedings, the judgment was set aside, and judgment rendered for plaintiffs. *Held*, that the latter judgment was absolutely void, as rendered without jurisdiction; Code Colo. § 75, requiring that a party aggrieved by a judgment must apply for relief within six months after adjournment of the term at which the same was rendered.

6. SAME—AMENDMENT AFTER TERM.

The power of amendment after the term does not extend to the correction of judicial errors, nor authorize the annulment of a judgment rendered nearly three years previously, and the rendition of another exactly opposite.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Bill by the Richmond Gold & Silver Mining Company against George W. Elder to remove a cloud from the title to parts of certain mining claims. Decree for complainant. Defendant appeals. Affirmed.

James B. Belford and George R. Elder, for appellant.

Dexter T. Sapp, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This was a bill in equity filed by the Richmond Gold & Silver Mining Company, the appellee, against George W. Elder, the appellant, to remove a cloud from the appellee's title to parts of mining claims situated in Gunnison county, Colo., described as follows, namely: An undivided one-third of the Sleeping Pet, an undivided three-fourths of the Mammoth lode, an undivided three-fourths of the Eastman lode, an undivided three-fourths of the Topeka lode, an undivided three-fourths of the Little Minnie lode, an undivided three-fourths of the Gray Copper lode, and an undivided three-fourths of the Silver Gem lode. The bill sets up two independent sources of title in the appellee to the property,—one by purchase from the patentees of the United States and their grantees, and another afterwards acquired by patents from the United States to the appellee issued in 1885 for the property, founded on a relocation of the mining claims. In the view we take of the case, it will not be necessary to consider this latter title.

The bill sets out the appellee's chain of title, from which it appears that one Albert M. Eastman once owned the property, and the conveyances from him constitute a necessary link in appellee's chain of title. The bill alleges, and the answer admits, that the appellant's claim of title rests on a judgment recovered by Billin, Huston & Co. against Albert M. Eastman and Benjamin H. Cramp on the 18th day of November, 1885, in the district court of Lake

county, Colo., in a suit begun by attachment on the 21st day of October, 1881, and in which the writ of attachment was on the 27th day of October, 1881, levied on the property in controversy as the property of Albert M. Eastman, and which was afterwards sold as his property under a special execution issued on the judgment. The bill alleges that the court was without jurisdiction to render this judgment, and that the same, and the proceedings thereunder, are void for that reason. The appellant, in his answer, asserts the validity of the judgment and proceedings, and avers that under them he acquired Eastman's title to the property, and that the title so acquired has relation to a date prior to the conveyance of the property by Eastman to the appellee or to its grantors; the attachment having been levied October 27, 1881, and the conveyances from Eastman, under which the appellee claims title, having been made in July, 1882.

The facts necessary to be considered in determining the validity of the judgment under which the appellant claims the property are as follows: On the 21st of October, 1881, Billin, Huston & Co. commenced a suit by attachment against Albert M. Eastman and Benjamin H. Cramp in the district court of Lake county, Colo., to recover more than \$10,000 alleged to be due to the plaintiffs from the defendants. The writ of attachment issued in the case was duly levied on the mining claims in controversy, as the property of Albert M. Eastman, on the 27th of October, 1881. The defendant Eastman appeared to this suit on the 14th day of April, 1882, and filed his answer, denying that the defendants executed the note sued on, and pleading want of consideration. No replication was filed to this answer, as required by the Colorado Code of Practice; and on the 10th of June, 1882, and during the same term, the court rendered the following judgment in the case:

"It appearing to the court that the plaintiffs herein have failed to file a replication or demurrer to the answer of said defendant, although the time for them in which so to do has long since expired, it is ordered that the default of said plaintiff, for so failing to reply to said defendant's answer, be, and the same is hereby, duly entered according to law; and, on motion of said defendant for judgment to be entered on said default, it is considered, ordered, and adjudged by the court that the said defendant, Alfred M. Eastman, go hence without day, and that he have and recover of and from said plaintiffs all his costs in this action expended, and that execution issue therefor."

On the 5th of August, 1882, Billin, Huston & Co. filed their motion, supported by affidavit, to set aside this judgment, which motion was pending until the 20th of March, 1883, when it was denied, to which ruling the plaintiffs excepted, and filed a bill of exceptions, but never sued out a writ of error, or otherwise prosecuted an appeal. On the 26th of May, 1885, the court, on motion of Billin, Huston & Co., set aside the judgment rendered in favor of Eastman on the 10th day of June, 1882, and on the 10th day of November, 1885, rendered a judgment in the case against Eastman for \$15,385.53, and sustained the attachment. The appellant's title to the property rests on a sale thereof on a special execution issued on this judgment.

The statute of Colorado of 1883 (Gen. St. c. 66, § 12) provides that

bills for relief on the ground of fraud shall be filed within three years after the discovery of the fraud, and the appellant pleads this statute in bar. But this is not a bill for relief on the ground of fraud, within the meaning of that statute. The bill challenges the jurisdiction of the court to render the judgment under which the appellant claims title. The question it presents is one of law, and not one of fraud in fact, which is not charged. Nor does section 401 of the Code of Colorado, prescribing a limitation of three years for suing out writs of error, have any application to the case.

We come now to the consideration of the question whether the court had jurisdiction to render the judgment under which appellant claims. It is undeniable that the district court of Lake county had jurisdiction of the parties and the subject-matter of the suit at the time it rendered the judgment of June 10, 1882. The legal effect of that judgment was to put an end to the suit. The technical name for the judgment is not material. It does not matter, for the purposes of this case, whether it be called a judgment of non pros, or by some other name. Nor is it material to inquire as to the effect of the judgment on the plaintiffs' right to bring another suit for the same cause of action. It was undoubtedly a final judgment, in the sense that it disposed of that suit, and the attachment proceedings therein. The Code of that state provides that, "if the defendant recover judgment against the plaintiff, * * * the order of attachment shall be discharged and the property released therefrom." Code Colo. § 110. It is objected by the appellant, against the validity of this judgment, that under the Code of Colorado (section 60) the court had no power to render a judgment by default against the plaintiffs for not replying to the answer until the defendant had given them 10 days' notice in writing that the answer had been filed. It nowhere appears from the record that such notice was not given. There is in the record an *ex parte* affidavit to that effect, but that cannot be considered for the purpose of impeaching the judgment of the court, when collaterally attacked. The court had jurisdiction of the parties and the subject-matter, and it had the power, and it was its duty, to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case, was erroneously decided, the jurisdiction of the court, and the validity of its judgment, would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. *Elliott v. Peirsol*, 1 Pet. 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. *Bronson v. Schulten*, 104 U. S. 410. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the state courts, nor can either reverse, vacate, or modify their judgments, in cases in which they

had jurisdiction of the parties and the subject-matter. *Randall v. Howard*, 2 Black, 585; *Nougue v. Clapp*, 101 U. S. 551; *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. Rep. 426. The judgment of June 10, 1882, even if it was erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition.

We come now to consider the validity of the judgment rendered in the case in favor of the plaintiffs, and against Eastman, on the 18th of November, 1885. This last judgment was rendered three years after the rendition of the judgment dismissing the action, and two years after the motion to vacate and set aside that judgment had been overruled. After the motion to set aside the first judgment was denied, there was no motion pending in the case, and no proceedings taken therein, for two years, during which time several terms of court were held. The general rule is that, after the term is ended, all final judgments of the court pass beyond its control, unless steps are taken during that term, by motion or otherwise, to set aside, modify, or correct them. *Bronson v. Schulten*, 104 U. S. 410. This general rule has been modified by legislation in some of the states, (*Bigelow v. Chatterton*, 2 C. C. A. 402, 51 Fed. Rep. 614;) and, by the Colorado Code, an aggrieved party, who has been unable to apply for the relief sought during the term at which the judgment was rendered, may make his application to the court, or judge at chambers, at any time within six months after the adjournment of the term, (section 75, Code Colo.) *Billin, Huston & Co.* availed themselves of this provision of the Code when they made their motion to vacate the judgment of the 10th of June, 1882; and when that motion was overruled, and the six months had elapsed, the judgment passed beyond the control of the court, and its jurisdiction over the same was ended. The action of the court, two years after this, in setting aside its judgment rendered three years before, and rendering another and a different judgment in the case, was not merely erroneous, but was absolutely void, for want of jurisdiction. This is not the case of the correction of a mere clerical error, or supplying an obvious omission, or amending the judgment to make it conform to the judgment actually rendered, and intended to be rendered, which may sometimes be done, upon proper notice. But the power of amendment after the term does not extend to the correction of judicial errors, or the rendition of a judgment which was neither in fact rendered, nor intended to be rendered. 1 Black, Judgm. § 154. In this case, no mere correction of a clerical error, or amendment of the judgment, was asked for, or attempted to be made. There was an entire annulment of the first judgment, and the rendition of another judgment, the very opposite of the one set aside. The case, having been finally disposed of years before, had passed out of the court's jurisdiction. It could neither vacate the first judgment, nor render a new one. The judgment of every court acting without jurisdiction is a nullity, and will be so held and treated in all courts in which it is sought to be used or relied on as a valid judgment. *Elliott v. Peirsol*, *supra*. The appellant's claim of title to the property in controversy, based on

this void judgment, and the proceedings had thereunder, is invalid and of no effect, as against the appellee's title, and the decree of the circuit court to this effect is affirmed.

EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES v. WINNING.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1893.)

No. 280.

1. CONFLICT OF LAWS—INSURANCE POLICY.

A policy of life insurance which is delivered and the first premium on which is paid in the state in which the assured resides is governed by the laws of that state.

2. LIFE INSURANCE—WAIVER OF NOTICE AND PROOFS OF LOSS—EVIDENCE.

Proof that, prior to a failure to pay a premium on a life insurance policy, the insurance company had declared its intention to forfeit the policy if such premium was not paid, and that, soon after the default in payment, the company declared the policy forfeited, and entered it as a lapsed policy in the company's books, is competent to establish a waiver of the provisions of the policy requiring notice and proof of loss.

3. SAME—ESTOPPEL—ASSERTION OF RIGHT—UNEQUAL KNOWLEDGE OF PARTIES.

Such evidence is also admissible as tending to raise an estoppel against the company, when taken in connection with testimony by the assured's administrator that he was led to believe that the policy was no longer in force, by finding a notice of the intended forfeiture among the assured's papers; especially where the company knew, before it assumed to declare such forfeiture, that its power to do so was doubtful, and had been denied, and that the question was in litigation, while the administrator had no such information.

In Error to the Circuit Court of the United States for the Western District of Missouri.

At Law. Action by William E. Winning, administrator of Edward C. Hiatt, deceased, against the Equitable Life Assurance Society of the United States, upon a policy of life insurance. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Henry Hitchcock, for plaintiff in error.

James H. Austin, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is a suit on a life insurance policy for \$2,500, which was issued on April 9, 1884, by the Equitable Life Assurance Society of the United States on the life of one Edward C. Hiatt. Hiatt paid the annual premium which became due on said policy on the 5th day of April in each of the years 1885, 1886, 1887, and 1888, but failed to pay the premium which became due on April 5, 1889. As the assured was a resident of Saline county, in the state of Missouri, at the time he became insured, and as the policy was delivered in that state, and the first premium was there paid, the contract evidenced by the policy is a Missouri contract, and is governed by the

laws of that state, within the rule announced in *Society v. Clements*. 140 U. S. 226, 11 Sup. Ct. Rep. 822. Under the laws of that state which were in force when the contract was entered into, the policy in suit did not become forfeited or void for failure to pay the annual premium on April 5, 1889, but the assured was entitled to such temporary insurance thereunder as might be purchased with three-quarters of the net value of the policy on that date, computed on the American Experience Table of Mortality, with 4½ per cent. interest per annum. Vide Rev. St. Mo. 1879, §§ 5983, 5985; *Society v. Clements*, supra. Hiett died on August 13, 1890, at the age of 35, and it is admitted that three-quarters of the net value of his policy on April 5, 1889, he having paid five full annual premiums previous to that date, was adequate to purchase temporary insurance to the amount specified in his policy for a period which expired on February 9, 1893. The Missouri statute securing the right to temporary insurance after the nonpayment of an annual premium, to which we have already referred, provides "that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured," (section 5985, supra;) and on the trial below the defendant company relied for its defense solely on the plea that Hiett's administrator did not give notice of his claim under the policy or submit proofs of death within 90 days next succeeding August 13, 1890. On the other hand, the plaintiff insisted that the provision requiring proofs of death to be submitted within 90 days had been waived by acts done and performed by the defendant company both prior and subsequent to the death of the assured.

As the assignments of error which we are called upon to review relate exclusively to the competency and sufficiency of the evidence which was received and relied upon in the circuit court to establish a waiver, it becomes necessary to state the character of that evidence somewhat in detail. It appeared from the face of the policy and the application therefor that, notwithstanding the laws of the state of Missouri, to which reference has been made, the defendant company nevertheless caused stipulations to be inserted therein that the policy should become void "if any premium or any installment of a premium was not paid when due," and that the assured should "waive and relinquish all right or claim to any other surrender value than that provided in the policy, whether required by the statute of any state or not." It was shown that a notice of the annual premium due on April 5, 1889, had been sent by the company to the assured in his lifetime, which contained a statement, in substance, that if such premium was not paid within one month after April 5, 1889, the said policy and all payments thereon would become forfeited. This notice was found by the administrator among Hiett's papers shortly after the death of the latter, and, as the administrator testified, it led him to believe that the policy was forfeited, and would not be paid, he having failed to find any receipt for the annual premium referred to in said notice among the papers of the deceased. It was further shown that the policy in

suit was formally declared forfeited for nonpayment of the premium of April 5, 1889, by a resolution of the insurance committee of the defendant company at a meeting held at the home office in New York on May 31, 1889, and that the policy was thereafter borne on the company's books both at its home office and at its St. Louis office as a forfeited policy.

The acts done and performed after the death of the assured which the trial court permitted to be proven with a view of establishing a waiver were substantially these:

It was shown that some time in the month of December, 1890, the plaintiff was informed by a traveling insurance agent, with whom he chanced to converse, that under the laws of Missouri the policy in suit had not lapsed in consequence of the nonpayment of the premium of April 5, 1889, but was still in force. Shortly after receiving such information the plaintiff authorized an insurance agent by the name of Burks, who resided in Saline county, Mo., to obtain from the defendant company the necessary blanks for the purpose of making out the customary proof of the death of the assured. Burks made an application for such blanks on December 18, 1890, by a letter addressed to the defendant's manager at St. Louis, Mo., and in such letter stated in substance that the blanks were wanted for the purpose of making proof of the death of "E. Hiet," who was insured in the defendant company. To such letter the company's representative at St. Louis replied, under date of December 19, 1890, that he had searched the records of the company "thoroughly," and had failed to find "the name of E. Hiet, or anything like it." The policy was thereafter placed for collection in the hands of plaintiff's attorneys, Messrs. Austin & Austin, of Kansas City, Mo., and the following letter was written by said firm to Benjamin May, the defendant's manager at St. Louis, Mo., on January 6, 1891:

"Dear Sir: We have in our possession for collection the tontine savings fund policy of your company, assurance on the life of E. C. Hiett. The number of the policy is 275,727. The assured, E. C. Hiett, is now dead, of which fact we are informed you have been notified. Will you please send us at once forms of proofs of loss as required by your company, upon receipt of which we will have the same made out in due form, and send to you.

"Please give this your prompt attention, and oblige,

"Yours, truly,

Austin & Austin."

On the 8th of January, 1891, the defendant's general agent replied to the foregoing letter, saying, in substance, that "the policy on the life of Mr. E. C. Hiett, * * * according to the records of the St. Louis office, was forfeited for nonpayment of premium due April 5, 1889." Under date of January 19, 1891, Messrs. Austin & Austin replied, in substance, that they claimed payment of the policy under the nonforfeiting law of Missouri, which entitled the assured to three years and eleven months extended insurance; and by return mail on January 20, 1891, they were advised by the company's agent at St. Louis that it was claimed by the company that the assured could waive the Missouri statute, and that the validity of such claim was pending before the supreme court of the United

States for its decision in *Wall v. Equitable Life*. Two other communications relative to the claim passed between the parties in the month of February following, but they are not of sufficient importance to deserve special notice. The following letter, however, was written by the defendant's attorneys at St. Louis, Mo., to the plaintiff's attorneys on March 2, 1891:

"Messrs. Austin & Austin, Attorneys, New York Life Building, Kansas City, Mo.—Dear Sirs: Referring to your letter of the 19th of January to Ben May, Esq., manager in this city of the Equitable Life Assurance Society of New York, we beg to say that the claim which you represent of policy No. 275,727, in the name of E. C. Hiett, has been placed in our hands by the company. We are instructed to say that the company are not prepared to acknowledge the claim which you make under the nonforfeiture law of this state, in view of the fact that the application for this policy contained, among other things, an express agreement, in consideration of the agreements contained in said policy, to 'specifically waive and relinquish all right or claim to any other surrender value than that provided in the policy, whether required by the statute of any state or not.' This, as the company is advised, excludes the claim made by you under the nonforfeiture law of Missouri. We desire to add for your information that the question thus presented has heretofore arisen, and is now pending on appeal in the supreme court of the United States in the case of *Equitable Life, &c., v. Clements, Admr.*, No. 340, Oct. term, 1890, in which we are of counsel for the company. We expect that the case will be argued and submitted within a few weeks from now, and that the decision thereof will be conclusive of the claim made by you. Under these circumstances, we submit whether your client's interest would be prejudiced by waiting until such decision is made, which presumably will be not later than May next, and of which we will promptly advise you. If, however, you should think best to bring suit against the company without waiting for that decision, we will thank you to advise us without delay, and in what court you will probably proceed.

"Yours, truly,

Hitchcock & Finklenburg."

The receipt of the foregoing letter was acknowledged by Messrs. Austin & Austin on March 4, 1891, and in May following they replied thereto more fully as follows:

"Kansas City, Mo., May 12th, 1891.

"Dear Sirs: In accordance with the suggestion made by you in your letter of March 2d last, concerning the claim of Hiett against Equitable Insurance Association on policy No. 275,727, we decided to not commence suit until we should hear from the supreme court upon the case of *Clements, administrator, against your company*. We note to-day that the supreme court of the United States has decided the case adversely to your company. Please let us know at your earliest convenience if the company will insist upon suit on the policy held by us, or will settle with us without suit, and what proofs, if any, it would be necessary for us to send in order to satisfy the company, if they desire to settle the matter without suit.

"Yours, truly,

Austin & Austin."

"Messrs. Hitchcock & Finklenburg, Attorneys at Law, 404 Market St., St. Louis, Mo."

To the foregoing letter the following reply was sent:

"St. Louis, Mo., May 14th, 1891.

"Messrs. Austin & Austin, Attorneys, &c., N. Y. Life Building, Kansas City, Mo.—Dear Sirs: Acknowledging your favor of the 12th inst., in reference to claim of Hiett vs. *Equitable Life, &c.*, Assn. on policy No. 275,727, I beg to say that I will, without delay, communicate with the Equitable Life Assurance Society in respect of said claim, and what course they may deem advisable to take in regard to it, and advise you.

"Yours, truly,

Henry Hitchcock."

Some further correspondence took place during the months of May and June, 1891, in which the plaintiff's attorneys pressed for a definite answer as to whether the claim would be paid without suit, and the defendant company, in reply, excused its delay for not giving a definite answer. By a letter written as late as June 24, 1891, the attorneys for the defendant company advised the plaintiff's attorneys that they had requested the company to instruct their manager at St. Louis to forward blank proofs of loss. The letter concluded with the following statement: "Upon receipt of your proofs I do not doubt they will promptly act in the matter." On the 2d of July following a letter was written in behalf of the defendant company, inquiring when the assured died. To such inquiry plaintiff's attorneys replied, on the following day, that he died on the 13th day of August, 1890, and thereafter, on July 9th, and again on July 11, 1891, the claim was for the first time advanced, in letters written on behalf of the company, that the failure to submit proofs of death within 90 days after August 13, 1890, constituted a valid defense to the policy. No blank proofs of loss appear to have been furnished by the company to the plaintiff or his attorneys at any time, notwithstanding the repeated requests therefor, but on July 10, 1891, proper proofs of loss were submitted to the defendant company, which were received by it without protest or objection, and were thereafter retained.

Numerous errors have been assigned in the proceedings of the circuit court, but, taken altogether, they only present two material questions for our consideration, which may be stated as follows: Did the trial court err in permitting the plaintiff to show, with a view of establishing a waiver, that the defendant company had declared its intention to forfeit the policy if the premium of April 5, 1889, was not paid at maturity, and in permitting the plaintiff to further show that the company had in fact carried that purpose into execution on May 31, 1889, by declaring the policy forfeited, and by entering it on its books, both at its home office and at its St. Louis agency, as a lapsed policy? Secondly. Did the trial court err in refusing to charge at the conclusion of all of the testimony that there was no evidence from which the jury could find that the provision relative to proofs of loss had been waived, and that the jury should accordingly return a verdict in favor of the defendant?

In considering these questions it is important to bear in mind that the law does not favor forfeitures of any character, and that a provision in an insurance policy requiring notice and proofs of loss to be submitted within a given number of days after a loss or a death has occurred is a provision which is inserted exclusively for the benefit of the insurer, to enable it to inquire into the circumstances attending a loss or a death within a comparatively short period after it has occurred. For both of these reasons it has been repeatedly held that the provision in question is one which the insurer may easily waive, and that a waiver may be implied from any acts or conduct on the part of the insurer that are apparently inconsistent with an intention to insist upon a literal

compliance with the condition. It is invariably held that a refusal by an insurer to pay a claim, after a loss has occurred, because of a breach of any of the substantive provisions of the policy, or because the policy was not in force, or because the loss occurred in consequence of a risk not covered by the policy, is in itself a waiver of the provision requiring notice and proofs of loss to be submitted within a specified number of days after the loss occurs. The cases to this effect are almost too numerous for citation, and only a few will be referred to. *Taylor v. Insurance Co.*, 9 How. 391, 396, 397; *Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co.*, 34 Conn. 561, 570, and citations; *Thwing v. Insurance Co.*, 111 Mass. 93, 110. In some of the more recent cases it has also been ruled that the provision in question may be waived by acts done by the insurer after the time has expired within which notice and proofs are required to be submitted, and that no new consideration is necessary to support a waiver of that character. In the case of *Prentice v. Insurance Co.*, 77 N. Y. 483, 489, where the policy required notice of death to be forthwith given and full proofs to be submitted within twelve months, and no notice or proofs were submitted for more than two years after the death occurred, *Andrews, J.*, said, in affirming the judgment against the insurer:

"It is now understood to be the doctrine of this court that no new consideration is required to support a waiver by an insurance company of a condition in respect to the time of serving proofs of loss, and that it may be done by acts or conduct occurring subsequently to the breach of the condition indicating an intention to waive such condition, although there is no new consideration, and although there may be no technical estoppel."

The same remark was repeated by *Church, C. J.*, in *Brink v. Insurance Co.*, 80 N. Y. 108, 112, and it was further said that—

"The filing of proofs of loss by a specified time is a condition made for the benefit of the company, which it may avail itself of or not; and if it determine to waive it, it cannot afterwards recall the waiver, and insist upon the forfeiture."

In the case of *Goodwin v. Insurance Co.*, 73 N. Y. 480, 496, the court of appeals of that state further declared that—

"When an insurance company, by means of its officers or agents, in response to a claim for a loss, fails to say anything about the time of presenting the proofs after it has expired, but claims some other defense, the presumption is that it does not intend to interpose any other besides that named, and it is a fair inference to be derived from the fact that it was silent on the subject, that it designed to waive the violation of such condition."

We find nothing in other decisions from that state to which we have been referred (to wit, *Devens v. Insurance Co.*, 83 N. Y. 168, and *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. Rep. 991) which works any sensible modification of the law of waiver in its application to such provisions of insurance policies as are now under consideration. It seems to be the well-settled doctrine in that state, as it is elsewhere, that an insurance company must promptly disclose its purpose, if it intends to rest its defense to a claim for insurance on the technical ground that notice and

proofs of death were not submitted within the time specified in its policy. If it treats with the assured on other grounds, and asserts that the policy has become forfeited, or that other substantive conditions of the contract have been broken, it must assume the risk of having its conduct in that behalf construed as a voluntary abandonment of other less meritorious defenses.

In view of the authorities, and what has been said, we think it is manifest that the circuit court acted properly in refusing to charge that there was no evidence from which the jury could legitimately infer that the provision relative to proofs of loss had been waived by the defendant company. And in expressing that opinion we overlook for the time being all of the evidence tending to show that the policy had been declared forfeited long prior to August 13, 1890; and confine our attention to acts done and performed more than 90 days after the death of the assured. The letter of March 2, 1891, heretofore quoted, contained an explicit statement, as we feel bound to construe it, that the company refused to pay the claim, and rested its refusal on the ground that the assured had waived the benefit of the Missouri statute; that the policy, in view of such waiver, had been lawfully forfeited; and that, if the supreme court of the United States decided to the contrary of such contention, the decision would be conclusive of the liability of the company on the Hiett policy. It is due to the attorneys by whom that letter was written to say that in making such statements they merely repeated what had already been said by the company's St. Louis manager to the plaintiff's attorneys in a letter written on January 20, 1891; and from that time forward until July 2, 1891, it seems obvious that the correspondence was carried on by the respective parties on the theory outlined in both of said letters,—that the sole point in controversy was whether the state statute could be waived, and that the decision of the United States supreme court on that point in the pending case would be conclusive of the insurer's liability or nonliability. We accordingly conclude that, in view of the statements contained in said letters, the circumstances under which they were written, and the attitude of the parties during the long period covered by the correspondence, the jury had an undoubted right to infer and to find that the defendant company intended to abandon every other defense but the one founded on the alleged waiver of the Missouri statute, and, in any event, to abandon the defense now sought to be interposed. It is insisted, however, that the conduct of the company to which we have last alluded was no evidence of a waiver of the provision with respect to notice and proofs of loss, because it was not shown on the trial that the company had knowledge of the precise date of Hiett's death until July 3, 1891. The company certainly had knowledge long prior to that time that the condition of the policy with respect to notice and proofs had not been complied with. It had been informed as early as December 19, 1890, that the assured had died some time previous to that date, and no proofs were thereafter submitted until July 10,

1891. But a more conclusive answer to the foregoing suggestion is this: It was the province of the jury to find when the company first learned of the date of Hiatt's death; and in determining what was the intention of the defendant company, and upon what defense it really intended to rely during the period covered by the correspondence, it was also the province of the jury to say what weight it would attach to the single circumstance that the company may not have known the precise date of Hiatt's death during a portion of that period. The negotiations that were in progress for more than six months, and the conduct and acts of the company during that period, constituted some evidence of a waiver which the jury was clearly entitled to consider.

But the testimony introduced with a view of establishing a waiver of the condition with respect to notice and proofs of loss did not relate exclusively to the conduct of the company after the death of the assured, but to its prior conduct as well; and at this point we turn to consider what weight, if any, should be accorded to the circumstance that the company had actually declared the policy forfeited, and no longer in force, long prior to the death of the assured.

It is a well-established doctrine, as we have heretofore shown, that if an insurance company refuses to pay a loss, after it has occurred, because of an alleged breach of any of the substantive conditions of the policy, it thereby waives the necessity of furnishing notice and proofs of loss except on the trial. And this doctrine rests upon the ground that such conduct of the insurer is tantamount to a statement that preliminary proofs of loss are not desired, and upon the ground that the law will not require the assured to do an utterly useless act. It cannot well be supposed or assumed that an insurance company desires preliminary notice and proofs of loss under a given policy, except on the assumption that it is a subsisting obligation, and that such notice and proofs will be of some service in enabling it to make a timely examination of the circumstances attending the loss. Where the insurer has declared the contract at an end for an alleged breach of its conditions long prior to the occurrence of a loss, and in the mean time has done no act recognizing its validity, such action, in our judgment, should have the same effect in absolving the assured from his obligation to furnish notice and preliminary proofs that is given to a refusal to pay a loss after it has occurred because of an alleged breach of some of the substantive provisions of the contract. Looking at the reasons on which the rule is founded, we cannot say that a statement after a loss that a policy has been forfeited, and a refusal to pay on that ground, should have any other or different effect on the right of the insurer to insist upon notice and preliminary proofs, than a formal declaration of a forfeiture before a loss has occurred. In either event it is a fair inference from the conduct of the insurer that notice and preliminary proofs are not desired, and that the preparation and submission of such papers would be a useless ceremony. These views, we think, find abundant support in the adjudged cases. In *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. St. 15, 24, 25,

a policy had been declared forfeited for nonpayment of an annual premium, some time before the death of the assured. In an action to recover the amount of such policy the company resisted payment, among other grounds, upon the plea that no notice or proofs of loss had been furnished as required by the policy. With reference to that defense, Mr. Justice Paxson, in behalf of the court, uses the following language:

"The proofs referred to were not essential. The plaintiffs had proved the death of Mr. Magarge. Further they were not bound to go. The defendant company denied all liability under the policy. They had declared it forfeited months before the death of the assured. Their position was that as to the assured there was no policy. It was precisely as if they had denied ever having issued one. How, then, could they call upon the representatives of the assured to furnish proofs of death under the policy?"

In the case of *McComas v. Insurance Co.*, 56 Mo. 573, it was held that in a suit on a policy of life insurance, where the company in its defense denies all responsibility, and refuses to pay anything, such defense amounts to a waiver of notice and proofs of death. To the same effect, in substance, are the decisions in *Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co.*, 34 Conn. 570, and *Insurance Co. v. Coates*, 14 Md. 285.

We must accordingly conclude that the circuit court properly admitted the proof that the defendant company had declared its purpose to forfeit this policy for nonpayment of the premium prior to April 5, 1889, that such purpose was in fact carried into effect shortly thereafter, and that it was subsequently treated by the company as a lapsed policy. This testimony was not only competent to establish a waiver of the provision with respect to notice and proofs of loss, but we think that it also tended to raise a technical estoppel against the company, when taken in connection with the administrator's testimony, which tended to show that he was led to believe that the policy was no longer in force by finding a notice of the intended forfeiture among the assured's papers. It will not do to assert that the parties to this controversy had equal information as to their respective rights when the loss occurred and for 90 days thereafter, or that they stood during that period on a plane of perfect equality. The defendant company knew as early as August 15, 1884, when the Clements suit was instituted, that the power to declare a forfeiture of the policy, which it had assumed to exercise, was at least doubtful under the Missouri statute; that the power had been denied, and that the question was then in litigation. Hiett's administrator had no such information. Under these circumstances the company should not be heard to insist that the administrator ought to have known that the policy was in force on August 13, 1890, and to have acted accordingly, when it appears that by its own previous act in asserting a right and intention to forfeit it it had misled the administrator to his prejudice by inducing him to believe that it had lawfully exercised the power of forfeiture months before the assured's death.

The result is that the record before us fails to disclose any material error in the proceedings of the circuit court, and the judgment of that court is therefore affirmed.

PEACE RIVER PHOSPHATE CO. v. GRAFFLIN.

(Circuit Court, D. Maryland. November 3, 1893.)

1. CONTRACT—ACTION—DEFENSES.

Where a contract of sale provides for monthly shipments of cargoes, and a special understanding exists as to certain vessels, it is a good defense to an action thereon that the vessels did not sail at the respective times agreed.

2. SAME—SHIPMENTS UNDER—DELAY IN ARRIVAL.

Where shipments are made in due time as stipulated by the contract of sale, the shipper is not responsible for delay in the arrival.

3. SAME—PERFORMANCE.

Where by a contract for the sale of phosphate rock of a certain quality, to be delivered in Baltimore by vessels, the quantity to be paid for to be determined by the output there, the cargoes, both as to quantity and quality, are at the seller's risk during the voyage, and the question of compliance with the contract as to quality is to be determined upon tender of delivery, and not when the shipment is made.

4. SAME—FAILURE TO DELIVER MATERIAL—MEASURE OF DAMAGES.

Where a contract for the delivery of phosphate rock is without special agreement as to damages for its breach, and there are no special circumstances indicating the contemplation or mutual understanding of the parties, the amount of damages recoverable for failure to supply the rock as agreed is the difference between the contract price and the market price at the time and place of delivery, and not for loss of profits, or for expenses entailed by lessening of business.

At Law. Action by the Peace River Phosphate Company against George W. Grafflin for breach of a contract for the sale and delivery of phosphate rock. Plaintiff demurs to pleas of defendant, and excepts to defendant's bill of particulars of damages claimed in recoupment. Demurrer sustained in part and overruled in part. Exceptions to bill of particulars sustained.

Edgar H. Gans and Beverly W. Mister, for complainant.
Thomas Lanahan and Frank Gosnell, for respondent.

MORRIS, District Judge. The plaintiff, by the sixth and seventh counts of its declaration, declares upon a contract of sale of phosphate rock by the plaintiff to the defendant. The legal effect of the contract, as understood by the plaintiff, is set out in the declaration, but at the argument of the demurrer the contract itself was produced, that the court might construe it. It is as follows:

"Baltimore, Md., Oct. 20, 1891.

"Sold to George W. Grafflin, Esq., Baltimore, Md., for account the Peace River Phosphate Company, New York, about twelve thousand tons of Peace River Phosphate Rock, at eight dollars per ton delivered alongside buyer's wharf, Baltimore, on a basis of 60 per cent. bone phosphate of lime, not over 2 per cent. moisture, Dr. Gascoyne's test. Proportionate allowance for any deficiency; no charge for excess. Shipments to be made as nearly as possible monthly from January, 1892, to January, 1893. Sizes of cargo at seller's option, to conform to vessels procured by sellers. Terms: Cash for freight on arrival of cargoes, and one-half net amount of invoices by sight drafts against documents; balance payable within thirty days. Buyer to furnish sellers with acceptable sworn weigher's certificate of output weights free of expense. Buyers and sellers not subject to any contingencies beyond their control.

[Signed]

"[Indorsed:] Accepted, Oct. 22, '91.

"A. L. Taveau & Co.
G. W. Grafflin."

The declaration alleges that, at sundry times during the year 1892, the plaintiff, in compliance with the contract, shipped cargoes of phosphate rock to the defendant at Baltimore, from Punto Gordo, Fla., which the defendant received and paid for, except that in the fall and winter of 1892, with full knowledge of defendant, three vessels were dispatched to him which he did not pay for. That the cargo of the Agnes Manning he accepted, but paid only a draft for one-half of the invoice price of the cargo, and as to the cargoes of the other two vessels, viz. the Alice and the William E. Downes, he refused to receive or pay for them at all. In the seventh count it is further alleged that the cargoes were of the quality and dryness mentioned in the contract, and that, after notice of the chartering of the vessels to sail from Punto Gordo, the defendant agreed to accept and pay for these cargoes at the prices mentioned in the contract.

The pleas which are demurred to set up as a defense that the Alice and the William E. Downes did not sail from Punto Gordo at the respective times agreed upon between the plaintiff and the defendant; that the said cargoes were not tendered alongside defendant's wharf in Baltimore within the respective times agreed upon; that the cargoes were not, when tendered at defendant's wharf, of the quality contracted for.

The contract stipulates that the shipments are to be made as nearly as possible monthly during the year, and the declaration alleges that there was a special understanding with respect to the shipments by the Alice and the William E. Downes. In such contracts the time of shipment is material, and a plea asserting that the vessels did not sail at the respective times agreed upon is, in my judgment, a good plea. *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19; *Pope v. Allis*, 115 U. S. 371, 6 Sup. Ct. Rep. 69; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. Rep. 701. The demurrer to the third plea is overruled.

The fourth plea, which sets up that the cargoes were not tendered alongside defendant's wharf in Baltimore within the respective times agreed upon, does not, as it appears to me, answer anything in the contract or the declaration. The contract contains nothing as to when the delivery is to be made, but only as to the time of shipment; and the special agreement alleged in the declaration alleges an agreement with respect to the chartering and sailing of the two vessels mentioned, and not as to their arrival. It would appear, therefore, that if the shipments were made in due time, as stipulated by contract or by special agreement, the plaintiff was not responsible for delay in their arrival. The demurrer to the fourth plea is sustained.

The fifth and sixth pleas set up that the cargoes of the Alice and the William E. Downes were not, when tendered alongside defendant's wharf in Baltimore, of the quality called for by the contract. These pleas involve the question, at whose risk were the cargoes during the voyage? The contract price per ton was for phosphate rock delivered in Baltimore, and the number of tons to be paid for was to

be determined by the output there. If any part of the cargo was lost on the voyage, the defendant could not be required to pay for it. Not until it was tendered at defendant's wharf, so far as the contract discloses, could the defendant inspect and ascertain if the quality was as contracted for. It seems to me, therefore, a reasonable construction of the contract that the cargoes, as to the quality as well as to quantity, were at the plaintiff's risk during the voyage, and that the question as to quality is whether the phosphate rock complied with the contract at the place where it was tendered to the defendant, and not when placed on board the vessels. The demurrer to the third, fifth, and sixth pleas is overruled.

The defendant's seventh plea set up that by the plaintiff's failure to fulfill the contract the defendant was greatly damaged in his business, and claims the right to recoup his damages from the plaintiff's demand. Upon demand for a bill of particulars of his damage the defendant filed a statement claiming that by plaintiff's failure to supply phosphate rock according to the contract the product of his factory had been during six weeks lessened 3,000 tons, and that the factory expenses continued as usual, and that the useless expense and the profit on what he might have manufactured amounted to \$7,000. That this deficiency of production necessitated during the next busy season extra labor, costing nearly \$3,000, and that his total claim of loss was nearly \$10,000. The contract is an ordinary commercial contract for the sale and delivery of a commodity to be supplied during the period of a year. Nothing is said in the contract as to what use the defendant intended to make of it, whether to sell again or to use in manufacture. There are no special circumstances stated in the contract, or alleged in any of the pleadings, which indicate that it was within the contemplation of the parties, or mutually understood in making the contract, that the plaintiff was to make good any loss of profits or lessening of business which defendant might suffer by breach of the contract. The losses claimed are, in my opinion, too remote and speculative. The direct and immediate damages resulting from breach of such a contract would ordinarily be the difference between the contract price and the market price at the time and place of delivery. *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. Rep. 500. I think, therefore, that the exception to the sufficiency of the bill of particulars of defendant's claim of damage must be sustained.

WRIGHT v. PHIPPS et al.

(Circuit Court, E. D. New York. December 1, 1893.)

ABATEMENT—DEATH OF PARTY—FORECLOSURE SUIT—REMOVAL AND REMAND.

A foreclosure suit abates by the death of the owner of the equity of redemption, and if it is a removed cause it cannot be remanded until the representative of the legal title is brought in as a defendant.

In Equity. Suit to foreclose a mortgage. On motion to remand to the state court. Denied.

Armstrong & Fosdick, (Edward S. Clinch, of counsel,) for plaintiff.

Strong & Cadwalader, for defendant Helen F. Attrill.

Charles H. Tweed, for defendant Huntington.

Stewart & Boardman, for defendant Hatch.

BENEDICT, District Judge. This action is brought to foreclose a mortgage upon certain land at Rockaway, made by the defendant Phipps. The parties defendant are Frederick A. Phipps, the mortgagor; Henry Y. Attrill, to whom Phipps conveyed the property in question prior to the commencement of this action; Helen F. Attrill, wife of Henry Y. Attrill; and Frederick S. Hatch and Collis P. Huntington, judgment creditors of Henry Y. Attrill. The plaintiff is a citizen of the state of New York. The defendants Hatch and Huntington are residents of the state of New York. The cause was removed from the state court to this court upon the ground of a separable controversy between the plaintiff and Henry Y. Attrill, who was a citizen of the state of Maryland. The defendants Phipps and Helen F. Attrill suffered a default in pleading. In the month of January, 1892, the defendant Henry Y. Attrill died, and subsequent to the commencement of the action the interest of Henry Y. Attrill in the property in question was sold by the sheriff under the execution in favor of the defendant Hatch, so that now the only parties to the controversy, aside from the plaintiff, are Hatch and Huntington, who have no interest whatever in the dispute. In this state of the case the plaintiff moves that the cause be remanded to the state court, upon the ground that the controversy between the plaintiff and the defendant Henry Y. Attrill has been terminated by his death. The motion to remand is opposed upon the ground that by the death of Attrill the action has abated, and cannot proceed until some parties are brought in to represent the legal title to the property in question. The question to be decided, therefore, is whether an action to foreclose a mortgage upon real estate can proceed without bringing in as party defendant the owner of the legal title to the property. Upon this question my opinion is adverse to the plaintiff's contention.

It is urged that notice of *lis pendens* having been filed rendered it unnecessary to make parties subsequent purchasers; but that, in my opinion, does not relieve the plaintiff from the necessity of having the legal title to the property represented in an action brought to foreclose a mortgage upon it. The object of the action is to cut off the legal title to the property by a foreclosure of the mortgage upon it. Such an action cannot proceed until the cause is in such a situation that the decree to be made will bind the parties owning the equity of redemption in the property. Upon the ground that this suit is abated by the death of Henry Y. Attrill, the motion to remand is denied.

In re CHINESE RELATORS.

(Circuit Court, S. D. New York. November 21, 1893.)

1. CHINESE IMMIGRANTS—CERTIFICATE—EVIDENCE.

Where the passport certificate and papers of a Chinese immigrant are regular, and such as the statutes declare to be prima facie evidence of the facts therein stated, their effect is not to be overcome by the sworn statement of a special inspector that he was told by an interpreter that the immigrant had made to the latter certain statements inconsistent with the papers.

2. SAME—DECLARATIONS.

If declarations of a Chinese immigrant on his examination at the port of entry are to be used to overcome the prima facie case made by his certificate and papers, they must be taken under oath, and reduced to writing in the usual way.

Petition by certain Chinese immigrants for writ of habeas corpus. Petitioners discharged.

Edward Mitchell, U. S. Atty., and Chas. D. Baker, Asst. U. S. Atty., for collector.

B. C. Chetwood, for relators.

LACOMBE, Circuit Judge. In each of these cases it is conceded that the passport, certificate, and papers are regular, and such as under the statutes are declared to be prima facie evidence of the facts set forth therein. The statute does not permit the Chinese person seeking entry into the United States to produce any other evidence of his right to such entry. These papers prima facie show him to be within the privileged, not within the prohibited, classes. All that is presented in opposition is a statement under oath made by the special Chinese inspector that an interpreter told him that the Chinese immigrant made to him certain statements as to his occupation and intentions. This is not evidence of the truth of the statements. If declarations of the immigrant upon examination at this port are sought to be used to overcome the prima facie case, they should be taken under oath, and reduced to writing in the usual way. Relators discharged.

UNITED STATES v. BROMILEY.

(District Court, E. D. Pennsylvania. November 23, 1893.)

IMMIGRATION—CONTRACT LABORERS—NEW INDUSTRIES—WHAT ARE.

The manufacture of fine lace curtains, which has been carried on in this country for only about three years, and is still confined to two or three establishments, and which was brought into existence by the McKinley tariff law, and will probably disappear if the protection thereby given is withdrawn, is a "new industry," within the exception to the prohibition of the contract labor law of 1885.

At Law. Trial of James Bromiley, treasurer and manager of the Eastlake Manufacturing Company, on the charge of violating the United States laws prohibiting the importation of contract labor from foreign countries. Verdict directed for defendant.

Ellery P. Ingham and Harvey K. Newitt, for the United States.
Maxwell Stevenson and George W. Shoemaker, for defendant.

BUTLER, District Judge, (charging jury, orally.) The defendant is indicted under the provisions of two statutes, one of them being that of 1885, and section 6 of the act of 1891. The only importance that attaches to the statute of 1891 is that it makes a violation of the former statute a misdemeanor, liable to indictment and punishment criminally. It is only necessary, therefore, that you shall know what are the terms of the statute of 1885, so far as relates to this case, to be able to apply the testimony and decide it. It is enacted that from and after the passage of this act it shall be unlawful for any person, company, partnership or corporation in any manner whatever to prepay the transportation, or in any way assist or encourage the importation or immigration of any alien or aliens, any foreigner or foreigners, into the United States, territories or District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or immigration of such aliens into this country. The terms of this section are very sweeping. They make it unlawful to assist foreigners to come to this country, either by paying their passage or by entering into agreement to employ them when they arrive here, or otherwise, but the statute is limited in its effect by subsequent provisions, which I will read:

"Provided, that this statute shall not apply or be so construed as to prevent any person or persons, partnership or corporation from engaging under contract or agreement skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not previously established in the United States."

So that you see the effect of the statute is to prohibit generally the importation of foreigners into this country by assisting them to come, by paying their passage and entering into contract to employ them here, except where they are needed as skilled workmen in some industry that has not previously been established here, for which, therefore, the necessary employees cannot be obtained. The evidence makes some things very clear. This lace company commenced business in the spring or early part of 1892. They needed menders. What menders are, has been described to you. They are skilled workmen. The defendants were unable, as they tell you, to find such work people here. They sought to find them, and advertised. They inquired extensively but were unable to obtain workmen or workwomen competent for their work. Subsequently they did import the people, named in the indictment. They are not here on trial. The defendant is a Mr. Bromiley, who was the treasurer of the company and its manager. Now, if Mr. Bromiley as treasurer and manager of the company was a party to the employment of these people—engaged them—paying their passage; if he was a party to this participating in it actively, he is responsible just as is every other member of the company who participated. It is not even necessary that he should have alone done it personally—but if he entered into an arrangement with the other members of the company (I believe

he was a director) this is enough—He tells you what was done,—and that he is not more responsible than the others. The president tells you that he gave the orders for the employment of these people. If it was talked over by the directors and officers, and Mr. Bromiley was one of them, and advised it, he thus participated in it. The president was simply the agent in executing their order, and he is responsible for it if there is any responsibility, as well as Mr. Bromiley. Now, Mr. Bromiley himself tells you that he gave no order, that he did not authorize Mr. Clerk to write any letter, yet he says the business was talked over by the directors and officers of the company with him. Being superintendent of the mill, you will see that, almost of necessity, he would be consulted about it. Now, if he participated in it, if he entered into the resolution to bring these people over, then he is just as responsible as if he had been acting on his own account and had written the letter.

But the question in the case is a different one. Was this a new industry? Were these people brought here on account of it? If it was a new industry, and they were brought here on this account, neither the lace company nor Mr. Bromiley can be held responsible under the statute for what was done. Now, what is the evidence on this subject? At most it amounts to no more than that since 1890 there have been some eight or ten establishments manufacturing fine lace curtains. The witness who tells you that there are so many, personally knows but of two. He only knows of more by repute. No other witness before you knows of more than two, possibly three. Two at Wilkesbarre, and I think there was some intimation that there is one at Scranton. There is no evidence of any manufactory of fine lace in this country prior to 1890, unless it was in the one establishment at Wilkesbarre, and I am not sure that fine lace was manufactured there before 1890, or before the establishment of what is known as the McKinley tariff law. So that it is a new industry; it is still, perhaps, an experiment. I have no hesitancy in saying to you that in 1890, 1891 and 1892 it was a new industry. How successful it has been we do not know. It was a new industry not established, and, according to the testimony, is not established at this date. It is an industry in which several firms are struggling for existence, experimenting, hoping; and if the former condition of things had continued, no doubt it would have become established. The evidence warrants you in believing that it was started by the McKinley tariff law. If that is interfered with, it will probably disappear. Even the witnesses called by the government tell you that skilled menders, such as the defendant required and imported from England, could not have been employed in this country, unless, to use the expressive terms of the witnesses, they were stolen from other mills. I do not hesitate to say your verdict should be for the defendant.

A verdict of not guilty was accordingly rendered.

UNITED STATES v. McCABE. SAME v. MAGEE. SAME v. LEACH.
SAME v. MACE.

(Circuit Court, S. D. New York. November 3, 1893.)

1. ELECTIONS—FRAUDULENT REGISTRATION—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5512, for fraudulent registration, must designate the acts done by the accused in and about his registration, which resulted in a fraudulent registration of him by the inspectors of election, and an indictment in which the only act charged against the defendant is that he "fraudulently registered" is fatally defective.

2. SAME—PLACE OF REGISTRATION.

When, as in the state of New York, the requirements of the law as to the registration of voters are different in different parts of the district within the jurisdiction of the court, an indictment under Rev. St. § 5512, for fraudulent registration, must specify the election district in which the fraudulent registration was effected.

At Law. Indictments in the name of the United States against Frank McCabe, William Magee, John S. Leach, and James W. Mace for fraudulent registration. On demurrer to the indictments. Sustained.

Edward Mitchell, U. S. Atty., and John D. Mott, Asst. U. S. Atty.
Henry D. Hotchkiss, for defendants.

BENEDICT, District Judge. These cases come before the court upon demurrers to indictments found under section 5512, Rev. St. U. S. The indictments are alike, and, in my opinion, are all defective, in that the only act charged upon the defendant is that he "fraudulently registered." These are the words of section 5512, Rev. St. U. S., but in my opinion they are not sufficient to describe the offense. In order to effect the registration of a voter in the city of New York, acts must be done both by the voter and the inspectors of election. The voter is required to make formal application for registration, and to answer under oath questions thereupon put to him by the inspectors. The inspectors are required, thereupon, to adjudge whether the applicant is lawfully a voter in that district, and, if so, to declare their judgment by an entry on the book of registration. Strictly speaking, therefore, the voter cannot "register." All that he can do to effect his registration is to apply to be registered, and to answer questions propounded by the inspectors. It is therefore necessary, in my opinion, for an indictment under section 5512 to designate acts done by the accused in and about his registration, which resulted in a fraudulent registration of him by the inspectors. For lack of this particularity, the indictments in question are, in my opinion, bad.

They are also, in my opinion, bad for the reason that they do not specify the election district in which the fraudulent registration was effected. While, in general, it is sufficient to describe the locality of an offense as within the jurisdiction of the court, the rule must be different in cases of prosecutions like the present, for the reason that the law of the state which provides for the registration of voters is different in different parts of the district. In a part of

the district a person can be registered without any application or other act done on his part, while in the city of New York a personal application is required. In order that the accused should be informed of the statute he is charged with having violated, it is, in my opinion, necessary that indictments under this statute should disclose the election district in which the fraud charged was committed.

Upon these grounds, judgment must be for the several defendants upon the demurrers.

UNITED STATES v. BROWN.

(Circuit Court, S. D. New York. November 3, 1893.)

1. ELECTIONS—PROCURING FRAUDULENT REGISTRATION—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5512, for unlawfully, knowingly, and fraudulently advising and procuring one to register as a voter, need not set forth the particular words of the advice or method of procurement employed.

2. SAME—PROCURING FRAUDULENT REGISTRATION—INDICTMENT.

An indictment under Rev. St. § 5512, for unlawfully procuring or advising one to register, must set forth the acts done by the accused with intent to effect a fraudulent registration. U. S. v. McCabe, 58 Fed. Rep. 557, followed.

3. SAME—PLACE OF REGISTRATION—INDICTMENT.

When, as in the state of New York, the requirements of the law as to the registration of voters are different in different parts of the district within the jurisdiction of the court, an indictment under Rev. St. § 5512, for unlawfully procuring or advising one to register, must specify the election district in which the unlawful acts were committed. U. S. v. McCabe, 58 Fed. Rep. 557, followed.

At Law. Indictment by the United States against Frederick W. Brown for unlawfully advising and procuring others to register. On demurrer to the indictments. Sustained.

Edward Mitchell, U. S. Atty., and John D. Mott, Asst. U. S. Atty. Henry D. Hotchkiss, for defendant.

BENEDICT, District Judge. This indictment contains nine counts, all framed under section 5512 of the Revised Statutes. The first count charges Brown with advising James F. Brady to fraudulently register; (2) for procuring Frank McCabe to fraudulently register; (3) for advising Frank McCabe to fraudulently register; (4) for procuring John S. Leach to fraudulently register; (5) for advising John S. Leach to fraudulently register; (6) for procuring Allen L. Marien to fraudulently register; (7) for advising Allen L. Marien to fraudulently register; (8) for procuring William Magee to fraudulently register; (9) for advising William Magee to fraudulently register. The several counts for advising are, in general, the same, and the counts for procuring are, in general, the same. In my opinion, the indictment must be held defective for the reason that the place of registration does not appear. I do not consider it necessary, in an indictment for unlawfully, knowingly, and fraudulently advising one to register as a voter, that the particular

words of the advice or method of procurement employed should be set forth; but, for the reasons stated in *U. S. v. McCabe*, 58 Fed. Rep. 557, I think it is necessary to state the election district, and the counts for advising are bad because the place of registration is not stated. The counts for procuring are bad for using the word "register," instead of stating acts done by Brown with intent to effect a fraudulent registration. Let judgment be entered for the defendant upon the demurrer.

WARREN v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. November 8, 1893.)

No. 35.

IMMIGRATION—DETENTION AND RETURN OF UNLAWFUL PASSENGERS—DUTY OF VESSEL'S OFFICERS.

Under section 10 of the immigration act of 1891, (26 Stat. 1086,) the agent of a vessel, who is ordered to detain on board and return certain immigrants unlawfully brought to this country, is bound to so detain them at all hazards, and will only be relieved therefrom by vis major, or inevitable accident. The word "neglect" in the provision for a penalty in case of "neglect to detain" is used in the popular sense of "fail" or "omit."

In Error to the Circuit Court of the United States for the District of Massachusetts.

At Law. Indictment of Frederick Warren for violation of the immigration law of March 3, 1891. Defendant was convicted in the court below, and brings the case here on writ of error. Affirmed.

Benjamin L. M. Tower, (Joshua D. Ball, on the brief,) for plaintiff in error.

Frank D. Allen, U. S. Atty., (Henry A. Wyman, Asst. U. S. Atty., on the brief.)

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

WEBB, District Judge. This case arises on the rulings of the circuit court at the trial of an indictment under section 10 of the act of March 3, 1891, (26 Stat. 1086.) The plaintiff in error admitted that certain aliens, who are named in the indictment, embarked for the United States from a foreign port upon a certain vessel called the *Kansas*, and did therefore unlawfully come to the United States upon and by means of said vessel; that upon their arrival he was the agent of said vessel at Boston, and was then and there duly notified, in accordance with the laws of the United States, by the superintendent of immigration, that the said aliens, naming each, were then and there likely to become a public charge in the said United States, and were not then and there entitled, under the laws of the United States, to be admitted into the said United States; that the said Warren was then and there, as agent of the said vessel, by the superintendent of immigration, duly notified and ordered to

detain the said aliens, who, in this notice and order, were respectively named, and to immediately return them, and each of them, upon the same vessel, to the foreign port or ports from which they had come to the United States. He also admitted that he did not in fact detain on board the same vessel, the *Kansas*, the aliens named in the indictment, and did not in fact return them to the port from which they came, but that they escaped from said vessel. No objection was made to the sufficiency of the indictment.

At the trial, after making the aforesaid admissions, the defendant offered evidence to prove that there was no negligence or neglect in detaining the said aliens, and that they escaped without any negligence or neglect on his part. This evidence was excluded as immaterial, to which ruling the exception of the defendant was duly taken and allowed. The court further ruled that the defendant was bound at his peril, and at all hazards, to detain the aliens on board the said vessel, and that nothing would relieve him of his obligation to do so, except vis major or inevitable accident. To this ruling also exception was allowed. The defendant did not pretend that the escape was through inevitable accident or vis major.

The correctness of these rulings is now the only matter for consideration, and it is evident, if the ruling that nothing short of vis major or inevitable accident would relieve from the duty to detain and return the aliens, the evidence offered, of the absence of neglect or negligence, was immaterial, and was properly excluded. So this case in fact presents only a single question: Was the ruling as to the duty of the defendant right? For the determination of this question it becomes necessary to examine the whole of chapter 551 of the Statutes of 1891, on the tenth section of which the indictment is based. Such examination clearly shows that the aim and purpose of the act, and the inflexible intention of congress, were to protect the health, the morals, and the safety of the people of this country by the absolute exclusion of immigrants who might endanger the welfare of the community in any of these respects. The first section specifically enumerates the classes of aliens to be excluded, and among those specified are "persons likely to become a public charge." Section 2 forbids the settlement, compromise, or discontinuance of proceedings for violation of another act relating to the importation and migration of foreigners under labor contracts. Section 3 relates to advertisements printed or published in foreign countries for the assistance or encouragement of immigration. Section 4 denounces penalties against owners of vessels who shall solicit, invite, or encourage the immigration of any alien into the United States. Section 5 is merely amendatory of the act of February 26, 1885. Section 6 makes subject to a fine of \$1,000, or imprisonment not exceeding one year, or both, any person who shall bring into or land in the United States, or who shall aid in so doing, any person not lawfully entitled to enter the United States. Section 7 provides for the appointment of a superintendent of immigration, and makes him an officer in the treasury department, under the control and supervision of the secretary of the treasury. Section 8 provides that upon the arrival by water of alien immi-

grants it shall be the duty of the master or agent of the vessel bringing them to make report to the proper inspection officers of the name, nationality, and last residence of every such alien before any of them are landed. The inspection officers are thereupon required to inspect all such aliens, either on board the vessel in which they have arrived, or at some definite time and place to which by the order of said officers they have been removed. The decision of the inspection officers adverse to the right of any alien to land is made final unless appeal be taken to the superintendent of immigration, whose action may be reviewed by the secretary of the treasury. This section also makes it the duty of the commanding officer of the vessel in which such alien immigrants came to the United States "to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers," and declares that "any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor, and punished by fine or imprisonment or both." Section 9 extends jurisdiction of state officers over immigrant stations, for the preservation of the peace, and arrest of persons violating state laws.

This brings us to the tenth section, under which this prosecution is begun. It is unquestionable from the preceding sections that the intention of congress was the absolute exclusion from this country of all immigrants of the classes named in the act. Owners, officers, and agents of steam and sailing vessels coming from foreign ports with alien passengers, were fully and plainly warned and notified not to bring such prohibited persons. To guard against all possibility of such persons gaining admittance, duties were imposed on the owners and agents and officers of the vessels to make special report of alien passengers, to retain them on board, or only to land them at designated places, for the sole purpose of inspection, until they had been thoroughly inspected. For willful or negligent violation of those provisions of the act penalties were imposed. Congress, in the tenth section, dealt with the disposal of immigrants found on inspection to belong to the prohibited class, and brought to the United States in contravention of the previous sections; and it is to be noted that removal from the vessel to places on shore for convenience of inspection it is expressly declared "shall not be considered a landing during the pendency of such examination." The tenth section directs that all rejected persons shall, if practicable, be immediately sent back on the vessel by which they were brought in. The condition of practicability is simply a recognition of the contingency that the vessel might not be about to return to the port or country whence she had come. She might be bound to some other place, or she might be detained a long time for necessary repairs, or might be condemned as unseaworthy, or for other sufficient reasons would not be available for the reconveyance of the unlawful comers into the United States; but in every such case the immigrants were to be detained at the expense of the owners of the

vessel on which they came. They are regarded and treated as if still passengers under the care and control of the vessel's owners. Furthermore, if the master, agent, consignee, or owner of the vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, he shall be deemed guilty of a misdemeanor, and be punished. The duty to receive back on board arises either when there has been a wrongful landing, or a removal to an appointed place for inspection. Detaining on board is required when the inspection has been had without any removal from the vessel, as well as when the alien, having been off the vessel, is sent back; and the obligation to return always exists. To secure payment of fines imposed, the clearance of the vessel is refused till they are paid.

We cannot doubt, after thus examining the statute, that the tenth section imposes on masters, owners, agents, and consignees absolutely the duty to do the things required of them respectively. It admits of no excuse. They must at their peril conform to the provisions of the statute. They took the risk, when they brought the alien from a foreign port, that he would be adjudged not lawfully suitable to be admitted here, and must be taken back. The statute is analogous to acts regarding the sale of unwholesome or diseased provisions, or the keeping and storage of dangerous explosives, or the sale of intoxicating spirits. The safety and protection of the public is the end sought. Upon every one rests the duty to see to it that no act or omission of his shall endanger that safety; and, if he fails of the full performance of that duty, good intention, or the absence of evil intention, will not excuse him. The responsibility may be regarded similar to that resting upon a sheriff in case of an escape. He cannot excuse himself by showing that he had exercised care to keep his prisoner. Notwithstanding this view of the aims and purpose of the statute, if it cannot without violence be construed so as to effect its intention, it will be found a case where the legislature, by inadequate or inconsistent expression, has fallen short of its design. And in support of the contention that this is such a case, stress is laid on the expression "neglect to detain;" but we have no doubt that, in view of the general purposes of the statute, the word "neglect" must here receive a common and popular signification, as the equivalent of "fail" or "omit." The employment of the term "neglect" in this sense is neither infrequent nor unfamiliar, and assigning to it here any more restricted or narrow definition would defeat the whole end of the statute,—a result to be tolerated only when necessary. It follows, therefore, that the rulings of the court below were correct, and the judgment must be affirmed.

Judgment of the circuit court affirmed.

CORBIN CABINET LOCK CO. v. YALE & TOWNE MANUF'G CO. et al

(Circuit Court, D. Connecticut. November 23, 1893.)

Nos. 778, 779.

1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—ACQUIESCENCE.

When validity is denied, and the state of the art shows that the invention is at best a narrow one, proof of acquiescence on the part of purchasers alone, coupled with complainant's affidavit showing that the only large competing manufacturer was notified when he first brought out his goods that complainant claimed infringement, and that thereupon "negotiations were entered into which resulted in an arrangement satisfactory to complainant," whereby said competitor "was permitted to continue the sale of its goods," is not sufficient to show such acquiescence as will warrant a preliminary injunction, in the absence of any details of the alleged arrangement or any affidavit from the competitor in regard thereto; especially when complainant's former superintendent denies that any such arrangement was made at the time stated, or for several years afterwards.

2. SAME—ACQUIESCENCE—CIRCUMSTANCES TO BE CONSIDERED.

In determining the completeness of acquiescence, the fact that complainant and one other are the only large manufacturers of the class of goods in question, and that it requires a very large investment to make the necessary line of patterns, are circumstances to be considered.

3. SAME—VALIDITY—ESTOPPEL—PRELIMINARY INJUNCTION.

A patentee who has assigned his patent should not be allowed, when sued for infringement thereof, to prevent the operation of the estoppel applicable in such cases, merely upon his ex parte affidavit, presented on a motion for preliminary injunction; for the questions of consideration, good faith, and the effect of his action on the action of complainant, can only be satisfactorily determined by a hearing on the merits.

4. SAME.

The mere fact that an inventor, who has assigned his patent, subsequently becomes an officer in a corporation which is alleged to be an infringer does not render applicable to such corporation the estoppel which operates against him personally.

In Equity. Bills by the Corbin Cabinet Lock Company against the Yale & Towne Manufacturing Company and Frank W. Mix for infringement of patents. On motion for preliminary injunction. Granted as against said Mix only.

Mitchell, Hungerford & Bartlett, for complainant.
Betts, Atterbury, Hyde & Betts, for defendants.

TOWNSEND, District Judge. These are two motions for preliminary injunctions to restrain the infringement of letters patent No. 295,270 and No. 309,238, granted to the complainant, as assignee of the defendant Frank W. Mix, for improvements in locks and keeper plates. At the hearing the motion in the second suit was withdrawn. The motion herein considered is upon patent No. 295,270, dated March 18, 1884, for an improvement in piano locks. It is not an adjudicated patent, but complainant claims such acquiescence as should have the force and effect of a prior judgment. The defendants admit infringement, but deny either patentability or acquiescence.

It is not necessary to the disposition of the motion to discuss the evidence as to the prior state of the art. It has, therefore,

seemed desirable that the consideration of the question of patentable novelty should be deferred until final hearing. *Sessions v. Gould*, 49 Fed. Rep. 855. The facts as to acquiescence appear to be substantially as hereinafter stated. The complainant corporation has been engaged since 1882 in the manufacture of locks of the class to which the lock in suit belongs. The defendant Mix was superintendent of said company from 1882 until 1891. In 1884, shortly after the grant of said patent, the complainant commenced to advertise and put upon the market locks embodying the construction claimed in said patent. They sold readily, and the demand for such locks has since increased, "until the present sales thereof amount to many thousand dollars per annum," amounting altogether to nearly \$200,000. Among complainant's purchasers have been large dealers in and makers of desks and similar articles of furniture, and they have, without exception, acquiesced in the validity of said patent. The sharpest and ablest competitor in complainant's business has heretofore been the Eagle Lock Company, of Terryville, Conn. These two concerns have, until recently, practically controlled the market in this class of locks. Prior to 1888, said Eagle Lock Company had bought desk locks from the complainant, to fill its orders. About five years ago said company brought out a lock which complainant claimed infringed said patent. Thereupon "complainant notified said company, and negotiations were entered into which resulted in an arrangement satisfactory to complainant, whereby said Eagle Company was permitted to continue the sale of its goods." No evidence upon this point, other than that contained in the above quotation, was presented by complainant. The Eagle Company has continued its manufacture of such locks down to the present time. The defendant Mix claims that the complainant had made no arrangement or agreement with said Eagle Lock Company concerning said locks prior to the time when he left the complainant company in 1891. No affidavit of the representatives of the Eagle Lock Company was produced.

The question is whether, upon these facts, the complainant has sustained the burden of proof of such definite public acquiescence as to raise a reasonable presumption of the validity of said patent. "Acquiescence, in reference to this subject, is a voluntary submission, against interest, to an asserted right." 3 Rob. Pat. § 1185. Such public acquiescence must be of that part of the public which is cognizant of the extent of the monopoly. *Lantern Co. v. Miller*, 8 Fed. Rep. 314; *Tappan v. Bank Note Co.*, 2 Fish. Pat. Cas. 195; *Sewing Mach. Co. v. Williams*, Id. 133. But here the affidavits introduced to show acquiescence were made, not by manufacturers, but by dealers in cabinet furniture. They were made on printed blanks, and were as emphatic in the assertion of public acquiescence in the validity of the patent in the suit which was withdrawn as in that of the pending suit. There was no evidence of acquiescence on the part of any manufacturer of locks, other than as hereinbefore stated. The failure of complainant to state the details of its arrangement with, or to obtain an affidavit from, said Eagle Company, seems

most significant in view of the surrounding circumstances of the case.

That complainant and the Eagle Lock Company were, until recently, the only large manufacturers of this class of locks, and that it requires the investment of a great amount of capital to make such a line of patterns as are necessary in order to successfully carry on this business, are circumstances to be considered upon the question of the completeness of the acquiescence. *Sargent v. Seagrave*, 2 Curt. 553; *Foster v. Moore*, 1 Curt. 279; *Guidet v. Palmer*, 10 Blatchf. 217. I have been unable to find any case where such circumstances alone have been held equivalent to a previous adjudication, upon a contested hearing, in favor of the patent. It does not seem to me that a court ought to grant a preliminary injunction on such incomplete and indefinite evidence, where the validity of the patent is denied, the state of the art shows that the invention of the patent in suit is at best a narrow one, and where the financial ability of the defendant corporation has not been assailed. *Standard Elevator Co. v. Crane Elevator Co.*, 56 Fed. Rep. 718.

But complainant claims that the defendants are estopped to deny the validity of the patent, because of the assignment to it by the defendant Mix, who is now an officer of the defendant company. The defendant does not deny the application of said doctrine to an assignor of a patent for a consideration, but it claims that said doctrine has no bearing upon the facts in this case. It appears that Mix, being in the employ of complainant, and believing himself to be the first inventor of an improved locking device, took said device to the solicitor of complainant, and authorized him to make an application therefor, in his name, but without any consideration other than that arising out of his employment. Owing to the citation of anticipations, the application was modified by complainant's solicitor so as to claim a patent upon narrower and somewhat different grounds from those stated in the original application. Whether, under these circumstances, any different rule should be applied, is by no means certain. *Burdsall v. Curran*, 31 Fed. Rep. 918; *Cropper v. Smith*, 26 Ch. Div. 700. But it does not seem that an assignor of an invention ought to be allowed, by his *ex parte* affidavit on such a motion, to escape the operation of the doctrine of estoppel. The questions of consideration, of good faith, and as to the effect of his action upon the action of complainant, can only be satisfactorily determined by a hearing upon the merits. *Greenwood v. Bracher*, 1 Fed. Rep. 858. These conclusions are supported by the cases of *Barrel Co. v. Laraway*, 28 Fed. Rep. 141, and *Onderdonk v. Fanning*, 4 Fed. Rep. 148. In the former case the defendant was the assignor of the patents in suit. But the opinion of Judge Shipman seems to indicate that the question of estoppel should not be determined in favor of an infringer upon *ex parte* affidavits. In *Onderdonk v. Fanning*, the infringer was the assignor of the invention before the issuance of the patent. There is no evidence which connects the defendant corporation

with the circumstances relied on to constitute an estoppel against the defendant Mix.

Let an injunction issue, restraining the individual action only of the defendant Frank W. Mix.

UNION PAPER-BAG MACH. CO. et al. v. WATERBURY et al.

(Circuit Court, S. D. New York. December 6, 1893.)

1. PATENTS—INVENTION—PAPER BAGS.

When there has once been embodied the conception of a flat-bottomed paper bag, capable of being folded flat, and easily distended into an unsupported box, there is no invention in changing the shape or order of the folds, without producing any new or beneficial result.

2. SAME.

Reissue patent No. 10,083, granted April 11, 1882, to Mark L. Deering for improvements in the manufacture of paper bags, is void for want of invention. 39 Fed. 389, overruled.

In Equity. This is a suit for infringement of reissued letters patent No. 10,083, granted April 11, 1882, to Mark L. Deering, for improvements in the manufacture of paper bags.

The first claim of the patent in controversy was, at final hearing, held to be valid by this court, and a decree was entered in favor of the complainants for an injunction and an accounting. Subsequently the defendants obtained leave to file a bill of review based upon newly-discovered evidence. Issue was joined upon the bill thus filed, and the cause now comes on for hearing upon the new testimony thus taken. A full and accurate description of the supposed invention will be found in the former decision of the court. 39 Fed. 389. Decree vacated, and bill dismissed.

George Harding and Francis T. Chambers, for complainants.

Albert H. Walker and Frederic H. Betts, for defendants.

COXE, District Judge. Three questions arise upon the new evidence. First. Is the Deering patent anticipated by the alleged Wittkorn use? Second. Is it anticipated by the alleged Besserer use? Third. Does the patent disclose invention in view of the bags, which, beyond all doubt, are proved to have been made by Wittkorn prior to 1877? The question of prior use, and particularly as it relates to the Wittkorn testimony, is a close one. Were it an ordinary question, depending upon a mere preponderance of proof, the decision would necessarily go to the defendants, for Wittkorn and the other witnesses are uncontradicted and unimpeached. But the fact that the witnesses were testifying as to events which transpired 15 years before, uncorroborated by any anticipating structure made at the time, may justify the conclusion that their statements are not established beyond a reasonable doubt. It is, however, unnecessary to discuss this defense as the cause must be determined upon the question of invention. The nature of the supposed invention as described by the patentee "relates to forming paper bags with such bottoms that said bags, when distended, shall have flat bottoms of rectangular form on which to stand erect and unsupported when

filled." The manner of constructing these bags, by folding and pasting the paper, is stated in the claim as follows:

"(1) The herein-described process or method of forming paper bags by making in a sheet of paper or blank the folds B and C, then pasting together the two sides A¹ A², forming a bellows-sided body or tube of the bag, then spreading open one end of said body or tube, then forming the inwardly-projecting triangle folds H H, side laps, G G, and laps I J, which latter are secured in place by pasting or otherwise, substantially as described."

The patent is described by one of the officers of the complainant company, with the clean-cut terseness characteristic of a business man, as "a method patent for making a satchel-bottom on our bellows side-fold bags." Although the prior art was very inadequately developed at the former hearing the court was manifestly in doubt upon the subject of patentability. It now appears that bags, which in function and appearance so closely resemble the Deering bag that only an expert can tell the difference, had been made by methods so similar that they differed only as two persons would differ in folding a piece of paper to produce a given structure. The thing produced—the bag—was, for business purposes, practically the same. It is true, strictly speaking, that the Wittkorn bags did not have the satchel bottom, but satchel-bottomed bags were old and the envelope-shaped fold was so well known in this and every analagous art that it would seem the natural one to adopt. It is difficult to see how it required an exercise of the inventive faculties to put the satchel bottom into either of the two types of Wittkorn bag. One bag maker may select one form of fold, another bag maker another form, and so on, but they are not inventors if all accomplish, substantially, the same well-known result, the differences being of form only. The one who first embodied the conception of a flat-bottomed bag capable of being folded flat and easily distended into an unsupported box was very likely entitled to rank as an inventor. But after this had once been done it did not require invention to change the shape or order of the folds, unless some new or beneficial result was obtained. If a contrary contention be maintained where is the court to stop? Where shall the line be drawn? If invention resides in the mere sequence of steps, as many patents may be granted as new ways are suggested of folding the bag.

It is said that the Wittkorn bag was made on a former, but the Deering bag can also be made in this way and there is nothing in the patent to exclude the idea that blocks or other mechanical appliances may be used. The defendants' expert thinks the use of the former a distinct advantage; but whether this be so or not it will hardly be disputed that the method of making a Deering bag today by the use of a former would infringe the patent and that the same method in 1876 would anticipate it. A construction narrow enough to make a method which employed a block a different process would also negative the theory of the defendants' infringement. If Deering had never lived the paper bag industry would have been as far advanced. The changes which he made, assuming them to be improvements, are those that would naturally occur to the skilled bag maker. The two principal advantages—the flat folding and easy

transformation into a square box—were equally possessed by the Wittkorn bags.

It is true that the Deering bag is now a commercial success, millions being used annually, but this is due to the fact that they are made by machinery and are sold at an almost nominal price. Deering had nothing to do with this; the credit belongs to the inventors of the labor saving machines. Deering simply folded paper into a convenient bag. So did Wittkorn. Deering's bag would collapse for transportation and storage and open by a "flip through the air." So would Wittkorn's. If machinery had been invented for the latter it is probable that Deering's bag would no longer have been made by hand. If no machinery had been invented at all it is probable that both would have had a limited local success. The Wittkorn bag, like No. 5, for instance, certainly possesses some merits over the Deering bag which are obvious to the ordinary beholder, but for practical purposes the two are so nearly alike that it is like splitting hairs to attempt to distinguish them. That something magical lurks in the folds of the Deering structure or in the order of their production, that it required the effort of an inspired genius to fold the well-known satchel bottom on the old Wittkorn bags is an argument which surely does not satisfy the judgment, it appeals rather to one who has "listened with credulity to the whispers of fancy." The attempt to avoid the overwhelming force of the Wittkorn exhibits has been able and ingenious, but the conclusion cannot be resisted that the differences between the Wittkorn and Deering methods depend upon such a refinement of reasoning and are of a character so unsubstantial that invention cannot be predicated of them.

The proposition that there is nothing to show that the Wittkorn evidence was newly discovered, cannot, I think, be maintained on the pleadings and proofs. Even were it a question of proof only the testimony has convinced me that the evidence was discovered after the final hearing not only, but that it could not by the exercise of ordinary diligence have been discovered sooner.

It follows that the former decree must be vacated and the complainants' bill dismissed, but without costs.

POHL et al. v. HEYMAN.

SAME v. F. & M. SCHAEFER BREWING CO.

(Circuit Court, S. D. New York. November 20, 1893.)

PATENTS FOR INVENTIONS—EXPIRATION—LAPSE OF FOREIGN PATENT.

The lapsing of an Austrian patent before its full term of 15 years, because of failure to pay the annual tax, does not cause a United States patent for the same invention to expire at that time. *Pohl v. Brewing Co.*, 10 Sup. Ct. Rep. 577, 134 U. S. 381, followed.

In Equity. These were two suits brought by Cari Pohl and Charles Zoller against Nathan H. Heyman and the F. & M. Schaefer Brewing Company for infringement of a patent. Heard on pleas to the jurisdiction. Pleas overruled.

Joseph M. Deuel, for complainants.
Witter & Kenyon, for defendants.

TOWNSEND, District Judge. These are two suits for infringement of letters patent of the United States, No. 213,447, granted March 18, 1879, to Carl Pohl. Defendants plead to the jurisdiction of the court, alleging that the patentee obtained an Austro-Hungarian patent for the same invention on April 19, 1877, for one year, which was prolonged for another term of one year, or until April 19, 1879, when complainants' term expired; that on August 13, 1879, judgment to that effect was duly rendered in the registry of patents in the imperial royal ministry of commerce at Vienna; and that, by reason thereof, said United States patent expired April 19, 1879. It was stipulated that Carpmael's Patent Laws of the World, and a copy of the order of the imperial royal ministry of commerce, and a copy of the letters patent in suit, should be considered as duly proved in the case.

Counsel for the defendants, in his brief, says that the question raised by this plea is whether or not the law of Gramme Electrical Co. v. Arnoux & H. Electric Co., 21 Blatchf. 450, 17 Fed. Rep. 838, is still the law of this circuit. He claims that that case has never been overruled, and that the only decision to the contrary is contained in an obiter dictum in Roller-Mill Co. v. Walker, 43 Fed. Rep. 575. The precise point raised here was raised in said cases. In the latter case the court rendered a decision, on other grounds, for the defendants, and afterwards wrote a further opinion, ruling the point in question for the plaintiffs, in order that it might be taken to the supreme court of the United States. The decision of the supreme court, on the appeal, was put upon other grounds, and no reference was therein made to this particular question. The question, therefore, has been considered, and will be discussed, independently of the opinion in Roller-Mill Co. v. Walker, although such independent consideration has led to the same result.

The order referred to, of the imperial royal ministry of commerce, states that "the longest duration of all privileges granted, without any distinction, is fixed at fifteen years, which longest duration runs uninterruptedly, in so far as the patentee fulfills the conditions mentioned, and that the original duration of fifteen years is due, without any exception, to each Austrian patent which has been granted according to the imperial patent of the 15th August, 1852;" also, in substance, that the patentee need only pay in advance for one year, and that reference to one or more years in a patent has the exclusive purpose to designate that the patent annuity has been paid in advance for one or more years; that the patent is really granted for 15 years, and such payment only prevents its termination before the expiration of the term by reason of the failure to pay the tax; that, to avoid erroneous interpretations in foreign countries, a new form of Austrian patents was adopted in July, 1884, which removes any doubt as to what was the duration of the Austrian patent.

By the terms of said Austro-Hungarian patent, there was granted to Carl Pohl an exclusive privilege for the term of one year, under all conditions and with all operations mentioned in the most high patent of August 15, 1852. The single question raised on the pleadings is whether the United States patent terminated with the expiration of the Austro-Hungarian patent, 32 days after the United States patent was issued. In *Bate Refrigerating Co. v. Hammond Co.*, 129 U. S. 151, 9 Sup. Ct. Rep. 225, it was held that when a foreign patent is granted for a short term, which the patentee as matter of right may have renewed by further payments, and such short term is renewed, the United States patent is not terminated by the expiration of the short term, but that the term of the foreign patent includes such renewals. In *Pohl v. Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. Rep. 577, which was a suit on the patent now in question, defendant pleaded that a German patent granted to the complainants, of September 6, 1877, for 15 years, for the same invention, by reason of the failure of complainants to pay annuities and work the patent, became forfeited in 1880, and the term thereof expired. The court said:

"There is nothing in the statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of issuing the United States patent, or that it is to be limited by any lapsing or forfeiture of any portion of the term of such foreign patent by means of the operation of a condition subsequent, according to the foreign statute. In saying that 'every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent,' the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent."

This seems to mean that the term of the United States patent shall be dependent upon something which is fixed and definite in the foreign patent and laws, and shall not be subject to be terminated by the occurrence or nonoccurrence of certain facts which would require extraneous proof. *Bate Refrigerating Co. v. Hammond Co.* establishes, I think, that the term of the Austro-Hungarian patent was 15 years at the time the United States patent was granted, and I think that *Pohl v. Brewing Co.* indicates that the term of the United States patent could not be shortened by failure to pay the tax on the Austro-Hungarian patent.

The difference between a patent for 15 years, liable to be terminated by the nonpayment of the annual tax, and a patent for 1 year, which will be continued for 15 years if the annual tax is paid, seems to me to be a difference of form, and not of substance.

Complainants insist that the construction of the Austrian patent laws which appears in the order of the imperial royal ministry of commerce in Vienna is binding upon this court. The defendants insist that the court is bound to examine into the foreign law itself, and to hold to the contrary of any exposition that is apart from facts. Even if defendants are right in this claim, after having carefully examined the foreign statute, I must hold that the

exposition of it given by the order of the minister of commerce is correct. It seems to me that Gramme Electrical Co. v. Arnoux & H. Electric Co., supra, has been overruled by Bate Refrigerating Co. v. Hammond Co. and Pohl v. Brewing Co., supra.

The pleas of the defendants are overruled, with costs.

BROWN FOLDING MACH. CO. et al. v. STONEMETZ PRINTERS' MACH. CO.

(Circuit Court of Appeals, Third Circuit. November 10, 1893.)

No. 27.

PATENTS FOR INVENTIONS—PRINTING PRESS AND FOLDING MACHINE—CARRYING MECHANISM.

Letters patent No. 343,677, granted June 15, 1886, to John A. Stonemetz for improvements in a mechanism for carrying sheets of paper from a printing press to a folding machine, said improved mechanism being so constructed that it may be folded when not in use upon the folding machine by means of holes in the carrying mechanism which engage with pins on the folding machine, are infringed, as to all the claims, by a device manufactured under letters patent No. 331,762, issued December 8, 1885, to R. T. Brown, for folding such a connecting mechanism upon the folding machine by means of hinges. 57 Fed. Rep. 601, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Bill by the Stonemetz Printers' Machinery Company against the Brown Folding Machine Company and others for infringement of letters patent, and for relief on the ground of interference. A demurrer to the bill was overruled. 46 Fed. Rep. 72. A cross bill was filed, and thereafter stricken from the record. *Id.* 851. There was a final decree for complainant as to infringement, but for defendants as to the interference. See 57 Fed. Rep. 601. Defendants appeal from so much of the decree as is against them. Affirmed.

James K. Hallock, for appellants.

J. C. Sturgeon, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The bill charges infringement of Stonemetz's patent No. 343,677, of June 15, 1886; and also an interference between this patent and two others issued to R. T. Brown (owned by the defendants) on July 14, 1885, and December 8, 1885, respectively, numbered 331,762, and 332,444. The circuit court having sustained the former charge and dismissed the latter, the defendants appealed, and assign as error so much of the decree as is against them.

The only question involved is one of fact: Was Stonemetz first to invent the device covered by his patent? While there is some contention that he was anticipated by others than Brown, the main reliance is on Brown. A careful examination of the evidence

has satisfied us that the conclusion reached by the circuit court is right. The anticipatory devices set up, other than Brown's, present no difficulty whatever. They show nothing suggestive of Stonemetz's device. As between Stonemetz and Brown the proofs do not leave the mind in doubt that the former was the original inventor. Brown's disclaimer, in taking his patent, No. 331,762, is of itself, a sufficient answer to the claim now made in his favor. The statement of facts and analysis of testimony made by the circuit court are entirely satisfactory; and to avoid unnecessary enlargement we adopt them. The decree is affirmed.

EDISON ELECTRIC LIGHT CO. et al. v. MT. MORRIS ELECTRIC LIGHT CO. et al.

SAME v. UNITED ELECTRIC LIGHT & POWER CO.

(Circuit Court of Appeals, Second Circuit. November 8, 1893.)

1. PATENTS FOR INVENTIONS—INJUNCTION—LACHES.

Persons who establish a plant for the use of infringing electric lamps pending a suit to test the validity of the patent, which is brought and pressed with reasonable diligence, have no equities to prevent an injunction because the patentee delayed suing them until the patent was sustained in the test suit. 57 Fed. Rep. 642, affirmed.

2. SAME—EQUITIES—INFRINGEMENT USERS—LICENSEES.

An equity to be supplied with electric lamps by the manufacturing patent owner, at reasonable rates, may arise in favor of one who, pending a suit to test the patent, and while foreign decisions thereon were conflicting, has purchased from an infringing manufacturer an expensive plant, requiring the lamp for its operation; but this equity does not apply as between an exclusive licensee for a given territory, who has expended large sums on the faith of the patent, and an infringer, who has invaded such territory pending the test suit. 57 Fed. Rep. 642, affirmed; Edison Electric Light Co. v. Sawyer-Man Electric Co., 3 C. C. A. 605, 53 Fed. Rep. 592, limited.

3. SAME—PECUNIARY LOSS.

The fact that an infringing user of an electric lamp necessary to the operation of its plant has made great expenditures looking to future extensions of its business is no ground for refusing to enjoin it from going into new territory and buildings, or from continuing to light buildings which it first lighted after the patent was sustained by the circuit court in a test case; and the great pecuniary loss which the infringer would suffer by an unqualified injunction only gives it an equity to be allowed to use the patented lamp, for a reasonable compensation, in the buildings it had lighted prior to the decision in the test suit. 57 Fed. Rep. 642, modified.

Appeals from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bills by the Edison Electric Light Company and the Edison Electric Illuminating Company of New York against the Mt. Morris Electric Light Company and others, and the United Electric Light & Power Company, for infringement of a patent. Preliminary injunctions were granted below, (57 Fed. Rep. 642,) and defendants appeal from the orders granting the same. Modified.

Benj. H. Bristow and Paul D. Cravath, for appellants.
Charles E. Mitchell and Eugene H. Lewis, for appellees.
Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. These appeals are from orders of the circuit court for the southern district of New York, which granted preliminary injunctions to restrain the infringement by the defendants of the second claim of letters patent No. 223,898, dated January 27, 1880, to Thomas A. Edison, for an incandescent electric lamp. The patent is commonly called the "incandescent lamp" or the "filament" patent. The Edison Electric Light Company, hereinafter called the Light Company, is the owner of the patent; the second complainant, hereinafter called the Illuminating Company, "is the sole and exclusive licensee of the right to use and vend incandescent electric lamps under such patent in and for the city of New York, for that portion of the city lying below Seventieth street; and it seems not to be disputed that the lamps used by the defendants are so used within that portion of the city."

The Illuminating Company was incorporated in December, 1880, for the purpose of producing electricity, and distributing it for light, heat, and power, in the city of New York, and on March 23, 1881, made its first contract with the Light Company, by which it secured an exclusive right to use the Edison patents, among which was the incandescent lamp patent, in certain portions of the city. It has paid to the owners of the Edison patents, for its exclusive rights, in cash and in stock at par, more than a million dollars, and its investments for the purpose of a general system of incandescent lighting have been exceedingly large. In May, 1885, the Light Company commenced its suit against the United States Electric Lighting Company to test the validity and establish the scope of the lamp patent, which was decided by the circuit court for the southern district of New York on July 14, 1891, (47 Fed. Rep. 454,) and by this court, upon appeal, on October 2, 1892, (3 C. C. A. 83, 52 Fed. Rep. 300.)

The United Electric Light & Power Company, now an extensive incandescent lighting company, was organized in February, 1887, and commenced business in 1888. "It thereafter, in 1889, entered into such relations with the United States Illuminating Company that the business of the two companies was conducted, practically, under one management." The last-named company was organized in February, 1881.

The Mt. Morris Company was organized in 1886 for the purpose of furnishing electric power and electric light, both arc and incandescent. In 1888 it commenced to furnish incandescent light, which is now the principal part of its business. Each of these companies has a very large capital, has invested large sums in its business, and each asserts that the principal part of its investment would become valueless, if it could not pursue the business of incandescent lighting.

It is said that the lamp patent will expire in November, 1894.

The defendant companies are anxious to supply themselves with the Edison lamps. The Light Company is prevented from selling, for use within the territory occupied by the defendants, to other than its exclusive licensee. The Illuminating Company has recently declined to sell the patented lamps to the defendants. No question was made before the circuit court, or is made upon this appeal, as to the validity or scope of the second claim of the patent, or as to the fact of its infringement by the defendants.

The defendants rest their opposition to the orders of the circuit court entirely upon the equities which are alleged to exist in their favor, and to be large and imposing. The defense of laches or delay on the part of the owners of the patent in enforcing or prosecuting their rights by litigation, of neglect to give infringers timely notice of the monopoly which the owners claimed, and their acquiescence in the conduct of infringing and rival companies,—a defense which has become familiar in this litigation,—has been again urged. The facts in the former cases were insufficient to justify this defense, and these defendants, which did not come into existence until a year or two after the test suit was commenced, and which did not begin the business of incandescent lighting for a period of three years thereafter, have no important new facts to present. It is sufficient to quote with approval the remarks of Judge Lacombe upon this point:

"This defense of laches or delay on the part of the owners of the patent was urged upon the court of appeals at very great length, upon most voluminous evidence, in *Edison Electric Light Co. v. United States Electric Lighting Co.*, 3 C. C. A. 83, 52 Fed. Rep. 300, and that court decided that no case was shown to authorize the refusal of an injunction on any theory of laches or equitable estoppel, by reason of undue delay in bringing suit, or acquiescence in known infringement. Subsequently the same point was urged upon the same court, again at great length, in *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. Rep. 592, and the same opinion expressed. The facts presented here do not change the situation, so far as the complainants are concerned. The same measure of delay is shown, and the same excuse for that delay is also shown. Twice has the court of appeals held that the original test suit (that against the United States Electric Lighting Company) was timely begun, and pressed with proper diligence. It has also held that, such suit proceeding with due diligence, no other infringers of the patent can be heard to complain, with reason, that separate suit was not brought against them. Further discussion of the same facts in this court is unnecessary, and out of place. The situation is not changed by the circumstance that these are different infringers, with a different history from that of the defendants in the earlier suits." 57 Fed. Rep. 644.

The defendants next urge that they are illuminating, and not manufacturing, corporations, and have an equitable claim to consideration "growing out of the obscurity of the patent, and the fact that, prior to the decision of the federal court in this circuit sustaining and construing it, there were conflicting decisions upon it in foreign countries," and invoke in their favor the general remarks of this court in the *Sawyer-Man Case*, discriminating between manufacturing companies, who were competitors of the Edison companies, and users of lamps. The court said:

"The users who have supplied themselves with electric lighting plants from the infringers, which required for their operation lamps of the patent, are, of course, infringers. But those who did so before the decision of the circuit court sustaining the patent, and at a time when judicial decisions in foreign countries interpreting the patent were in conflict, and who are now willing to accept their lamps from the complainants upon reasonable terms, have much stronger equities than the manufacturing infringers. These equities the court will not disregard, but what would be reasonable terms, if an application were made to the court in behalf of these cases, is a question which can only be determined in each case upon its peculiar circumstances."

This language was used with reference to the condition of the electric lighting business, which was then being pressed upon the attention of the court, in which the owner of the patent, being a lamp manufacturer, had the ability to supply the patented lamps to users who had previously supplied themselves with electric lighting plants from the infringers. The court was not speaking of cases in which the Light Company had, by its contracts, precluded itself from supplying lamps in a particular territory to any person or corporation except its own exclusive licensees. It was not discussing the equities as between an illuminating company which was the exclusive licensee of the Light Company, and an infringing competitor upon the territory of the licensee. In such a case the remarks of the court in the Sawyer-Man Case, with reference to the alleged equities of manufacturing infringing corporations, which were competitors of the Edison companies, are quite applicable. An illuminating company, the exclusive licensee of the Edison Company, which has made a large pecuniary investment upon its confidence in the strength and validity of the patent, and in the ultimate success of the litigation in which its life was at stake, and has made an enormous outlay in the attempt to render incandescent lighting successful upon a large scale, has an imposing equity to protection by the courts, as against a competing infringer, who has sold and used the very lamps which have been declared, as the result of an expensive litigation, to be the exclusive property of the owner and licensee. In such a case, the equitable owner of the patent is entitled to protection at the hands of a court of equity, provided too great pecuniary injury is not thereby visited upon the infringer. It is by no means the duty of a court of equity to cause an infringer, who is a user, to suffer a pecuniary calamity, which ruins him, and is far out of proportion to the benefit which the owner of the patent would otherwise be entitled to receive.

The strength of the defendants' case lies in the alleged extent of injury which they would suffer from an entire stoppage of the supply of incandescent lamps. It is insisted by their counsel that they would be ruined, and thus an immense pecuniary loss would be caused. This result is not absolutely certain. Similar unfulfilled prophecies have been made before in the progress of this litigation. It is not certain that noninfringing lamps may not be used, which can be partially successful; but we have a well-grounded fear that an absolute inability to obtain any Edison lamps for any portion of the business heretofore conducted by the defendants will create a pecuniary injury so extensive as to be inequitable.

Turning to the consideration of the modifications of the orders, which may properly be made, the defendants ask for an absolute reversal, and that they be permitted to use the Edison lamps, not only for their present, but also for their future, incandescent business, the only restriction being that they pay a reasonable price therefor. They desire that the illuminating company be compelled to furnish lamps to which it has an exclusive right, and that by their use the defendants shall be enabled to extend their competitive business as widely as their capacity and enterprise will permit. The affidavits of Mr. Brown, for the defendant companies, say that a very large proportion of the investment of each company is for the purpose of taking advantage of future business; that the stations of each company are very much larger than the present requirements of the business demand; that each has one unused station, which was constructed for the purpose of meeting future demands; that many miles of the ducts which each has leased are unoccupied, having been leased by the defendants to accommodate the growth of their business; and that the cables which they have constructed have a greater carrying capacity than the present requirements of the business demand in order to meet future needs. He further says that no effort has been made for the past two or three years, by either of them, to extend their business. The growth has been due to unsolicited application.

The defendants, in desiring to obtain an unlimited future capacity of ownership of the patented lamps, for the purpose of extending their competitive power, are asking too much. We perceive no controlling equity which should cause us to compel the Illuminating Company, which owns an equitable title to the lamp patent, to sell lamps to a competitor for the purpose of enabling it to utilize the unused portion of its plant, and extend its business into unoccupied territory, and thus permit it to deprive the owner of all the material benefit of the patent during the comparatively brief residue of its life. Neither is there a controlling equity which requires a court to permit the defendants to use the complainants' patent in buildings which have been lighted by either of them since July 14, 1891,—the date of the decision by the circuit court in the test suit. At that time the defendants knew that the validity of the patent had been declared by a federal court in the district in which they lived. Ignorance in regard to the character and meaning of the patent, then, in a measure, ceased to exist. They presumably knew that the owner of the legal title had parted with its equitable rights to the use of the patented lamps, upon the territory which they were occupying, to a rival lighting company, and that the licensee was not a manufacturer. From that date, the defendants knew that they were in danger of being ultimately declared infringers, and that desired privileges must be obtained, not from the manufacturer, but from a competitive user of the patent.

Let the preliminary injunctions already granted by the circuit court be modified so as to enjoin each defendant against the use of infringing lamps in any building or place not now lighted by either of them, or not lighted by them, respectively, prior to July 14, 1891,

with liberty to the complainants to renew the motion, if, in their judgment, the defendants refuse, upon reasonable terms, and for reasonable prices, to pay for patented lamps in buildings in which the use of such lamps is not enjoined. The orders should also require each of the defendants to file, within a specified time, with the clerk of the circuit court, a list of the buildings then lighted by them, respectively, which were not thus lighted prior to July 14, 1891.

So much of the orders of the circuit court as directed preliminary injunctions is sustained, without costs to either party, but the cases are remanded to that court, with instructions to modify its orders in the manner and to the extent hereinbefore stated.

NEW YORK FILTER CO. v. SCHWARZWALDER et al.

(Circuit Court, S. D. New York. October 16, 1893.)

PATENTS FOR INVENTIONS—INJUNCTION—CIRCULARS TO USERS OF INFRINGING ARTICLE.

One who, without unreasonable delay, begins suit against a manufacturer for infringement, will not be enjoined, in the absence of any showing of intention not to press the suit, from notifying such manufacturer's customers, in a temperate and courteous form, of his claim of infringement, and that he intends to enforce his rights against users as well as manufacturers.

In Equity. Bill by the New York Filter Company against Henry Schwarzwaldner and August Finck, users, and the O. H. Jewell Filter Company, manufacturer, to restrain the infringement of letters patent. Motion by the O. H. Jewell Filter Company to restrain the complainant from issuing circulars to defendant's customers, asserting the complainant's exclusive right, and stating that he intends to enforce the same. Denied.

Philipp, Munson & Phelps, for complainant.

Deyo, Duer & Bauerdorf, for defendants.

LACOMBE, Circuit Judge. The New York Filter Company is the owner of letters patent No. 293,740, issued February 19, 1884, to Isaiah S. Hyatt, for an improvement in the art of filtration. It has brought suit in this circuit (March, 1893) against the defendants Schwarzwaldner & Finck, proprietors of the Murray Hill Baths, in the city of New York, for infringement of the patent. The alleged infringing apparatus was bought by these defendants from its manufacturers, the O. H. Jewell Filter Company, a corporation created under the laws of the state of Illinois. By consent of the original parties, this latter corporation has been made a party defendant, and the present suit has therefore become one brought by the owner of the patent against the makers of alleged infringing apparatus. A considerable number of defendant's filtering plants have been sold in different states to users, and they are being extensively offered for sale throughout the United States. Com-

plainant is sending out notices to such users, and to persons who are by it believed to be contemplating the purchase of the alleged infringing plants, of which notices the following is a fair sample:

"New York Filter Co., Main Office, 145 Broadway.

"New York, Feb. 9, '93.

"W. W. Hoppin, Esq., Pres't Providence Dyeing, Bleaching & Calendering Co., Providence, R. I.—Dear Sir: We understand that you have purchased, and intend to use in your establishment, a filter, in connection with the use of a coagulent, which infringes our patent; and we think it only fair to you and ourselves to apprise you of the fact that this company owns the only patents covering the use of a coagulent in the filtration of water, and that the use of it by any other manufacturer of filters is entirely unauthorized, and an infringement of our rights. We have notified the various manufacturers of filters that we intend to enforce our claims, but some of them persist in infringing our patents, in the hope that we will submit to it, rather than engage in expensive litigation. We do not believe you will encourage a position of this sort, and therefore acquaint you with the facts.

"Yours, truly,

New York Filter Co.

"Jno. C. Symons, Secy."

The defendant filter company thereupon makes this motion for an order restraining and enjoining complainant from further interfering with the business of the petitioner, and especially from conveying written or printed notices, threats, or warnings to its customers or intended customers, threatening them, directly or indirectly, with an infringement suit or suits in case of their using or procuring said petitioner's filtering apparatus, and for an order restraining the bringing of further suits.

It appears that, long prior to the commencement of the present suit, the assignor of the complainant brought suit in the United States circuit court for the northern district of Illinois against the predecessors of defendant company, charging infringement of the same patent, with the usual prayer for relief. After answer, and the taking of some testimony, that suit was, upon motion of the complainant therein, dismissed without prejudice, upon payment of costs. Notices similar to that quoted above were sent out during the pendency of that suit. Why the original suit was dismissed by the then owner of the patent does not appear, and, in the absence of further proof on that point, the fact that it was begun and discontinued is immaterial to the decision of the present motion. There is nothing to show any unreasonable delay on the part of this complainant in bringing its suit, and the facts in proof as to the Illinois suit do not support the inference, as defendants contend, that the notices now complained of are being sent out maliciously, or in bad faith. The affidavits submitted by the complainant assert that it is the intention to press this suit against the manufacturing infringer to a conclusion, and there is nothing in the defendants' papers to discredit that assertion. The notices, too, are temperate and courteous in form; and the question presented on this motion is thus a very narrow one, viz. whether the owner of a patent, who is prosecuting a suit for infringement against manufacturers, will be restrained by the court from notifying the customers of such manufacturers that such owners claim the apparatus

to be an infringement, and that they intend to enforce their rights against users as well as against manufacturers.

Counsel for the defendant corporation cites the following authorities in the federal courts in support of his contention, which may be briefly referred to: *Emack v. Kane*, 34 Fed. Rep. 46. In that case the court evidently reached the conclusion that the circulars were not issued because the owner of the patent "believed that his patent was infringed, and intended to prosecute for such infringement," but "solely to intimidate and frighten customers away from the manufacturer, and with no intention of vindicating the validity of the patent by a suit or suits." In that case the owner of the patent had dismissed three suits brought against users as soon as the manufacturer had been made a party thereto, and proof had been taken, "the dismissals being entered under such circumstances as to fully show that [Kane, who issued the circulars,] knew he could not sustain the suits upon their merits;" and the circulars, in that case, expressly stated that the manufacturer would not be sued. *Allis v. Stowell*, 16 Fed. Rep. 783; *Id v. Engine Co.*, 31 Fed. Rep. 901; *Birdsell v. Manufacturing Co.*, 1 Hughes, 64; *National Cash Register Co. v. Boston Co.*, 41 Fed. Rep. 51,—undoubtedly sustain defendants' contention. But the learned judges who decided those cases apparently assumed that recovery against the maker of an infringing apparatus, and satisfaction of the damages and profits awarded against him, would pass that particular apparatus out of the limitation of the monopoly created by the patent, and that the user thereof could not thereafter be interfered with. The law, however, is settled otherwise by the supreme court. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, which holds that recovery against the maker is no bar to an action against the user for damages resulting from his use, and for injunction against further use. Such being the law it is difficult to conceive upon what theory a courteous notification to such user that his apparatus is claimed to be an infringement, and that the owner of the patent intends to apply to the courts to vindicate his right to his monopoly, should be forbidden by the courts, especially when it is quite certain that, should the owner fail to give such notice pending the continuance of his litigation with the manufacturing infringer, the user will insist, when he is sued, that the owner's laches should prevent recovery. *Edison Electric Light Co. v. Equitable Life Assur. Soc.*, 55 Fed. Rep. 478. These views are in accord with *Kelley v. Manufacturing Co.*, 44 Fed. Rep. 19; *Tuttle v. Matthews*, 28 Fed. Rep. 98.

As to the proposition that the court will interfere on any theory of preventing multiplicity of suits, there is nothing now submitted to show that such multiplicity is to be apprehended, even if a motion of this kind be the proper remedy. There is only one suit now pending, and nothing to indicate that suits are about to be brought against other users until there has been some adjudication of the rights of the owner of the patent in its suit with the manufacturer. If, when complainant has prevailed in that suit, (should he so prevail,) has established the validity of his patent, and shown that the

apparatus which defendant makes and sells is an infringement, users of such infringing machines refuse to accept that result, and individually insist upon continuing their use, complainant may sue each and all of them, though they number 10,000, without thereby instituting such a multiplicity of actions as the courts will enjoin.

STEWART et al. v. SMITH.

(Circuit Court of Appeals, Third Circuit. November 10, 1893.)

No. 12.

DESIGN PATENTS—ODD FELLOWS' DESIGN FOR DECORATING RUGS.

Design patent No. 18,703, granted October 23, 1888, to William T. Smith, for an Odd Fellows' design for decorating rugs, consisting of the selection of certain Odd Fellows' symbols, and the grouping thereof in an orderly and tasteful manner, so as to form what many would consider an attractive panel, large enough to cover the face of the rug within the border, involves novelty and invention, and is valid. 55 Fed. Rep. 481, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill by William T. Smith against John and George Stewart, trading as John Stewart & Son, for infringement of a design patent. There was a decree for complainant in the court below, the opinion being pronounced by Butler, District Judge, and reported in 55 Fed. Rep. 481. Defendants appeal. Affirmed.

Hector T. Fenton, for appellants.

Joseph C. Fraley, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

DALLAS, Circuit Judge. This suit was brought for infringement of letters patent of the United States, No. 18,703, granted to William T. Smith, complainant and appellee, upon October 23, 1888, for a "design for a rug, consisting of a center panel, ornamented by representations shown, and an ornamental border surrounding the whole, as shown in the photographic print accompanying this specification." Upon the panel shown in the photographic print and in the exhibit produced there are portrayed certain selected Odd Fellows' symbols, so arranged as to present the appearance of an orderly and ornamental group or pattern, and this is surrounded by an ornamental border having the same general effect as the frame of a picture.

It is alleged that the circuit court erred in its construction of the patent, in sustaining its validity, and in finding that it had been infringed; but the several questions raised by the assignments were all carefully considered by the learned judge below in an opinion so exhaustive and so satisfactory to us as to render their further discussion unnecessary. The main point in the case, and the only one as to which we have experienced any difficulty, is as

to whether the composite impression or ornament described and claimed involved or disclosed such novelty and invention as is requisite to sustain a design patent. The learned judge below said that if the question of novelty and invention, under the terms of the statute, had been raised for the first time in this suit, his judgment possibly would have been different; and we strongly incline to the opinion that, but for the prior adjudications upon the subject, a finding that this patent is not supported by invention, within the meaning of the law, would have been correct. But we think he was clearly right in his understanding and application of the earlier decisions, several of which he has discussed, and in his refusal to depart from them; and therefore we are constrained to accept his conclusion.

The decree of the circuit court is affirmed.

BABCOCK et al. v. CLARKSON et al.

(Circuit Court, D. Massachusetts. November 22, 1893.)

No. 3067.

1. PATENTS—LIMITATION.

The rejection of claims on the ground that they cover a function, and the substitution of others which cover the mechanism for producing the result, do not import a limitation of the patent.

2. SAME—PRIOR ART—JUMP SEATS.

The Clarkson jump seat, (patent No. 300,847,) in which there is a combination of a falling tailboard and two seats, so connected by levers and hinges that the movement of the tailboard upwards will drop the rear seat out of use, and move the front seat backwards, so as to preserve the proper center of gravity, is not a pioneer invention, and the patent is not infringed by a combination having similar movements, but which leaves the back seat in use, instead of taking it out of use.

In Equity. Suit by Frank A. Babcock and others against Joseph T. Clarkson and others for infringement of a patent. Bill dismissed.

Edward P. Payson, for complainants.

Thomas W. Porter, for respondents.

CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of letters patent No. 300,847, issued June 24, 1884, to Joseph T. Clarkson for jump seat. The respondents deny the title of the complainants, but I have not found it necessary, for the present purpose, to consider this question. The patent is for a folding or turn-down seat and a sliding seat of a carriage. The claims alleged to be infringed are as follows:

"(1) The combination of pivotal tailboard, b, rod, a, pivotal lever, c, and sliding seat, d, substantially as specified."

"(3) The combination of a sliding front seat and a rear turn-down seat, thereto hinged, with automatic devices, arranged to simultaneously actuate said seats, substantially as specified."

"(5) The combination of a hinged tailboard, a sliding front seat, a rear turn-down seat, hinged to such front seat, with devices connecting said tailboard

and seats, whereby the opening and closing of said tailboard will actuate said seats in the manner described.

"(6) The combination of a sliding front seat and a rear seat hinged thereto, and arranged to be vibrated upward and downward upon its hinges as the front seat is slid backward and forward, substantially as specified."

The alleged infringing device is shown in the drawing annexed to letters patent No. 497,765, issued May 23, 1893, to Joseph T. Clarkson for shifting-seat carriage.

The respondents, in the second place, contend that they do not infringe, because the patent is so limited as not to cover their device—First, by the voluntary action of the patentee in the patent office; and, secondly, by the prior state of the art. As to the first point, it is shown that the claims of the patent as first drawn and presented to the patent office were as follows:

"First. The automatic mechanism before described, whereby the seats in a vehicle may be changed by operating the rear footboard, or by being operated in connection with the same, substantially as and for the purpose described.

"Second. The combination of an automatic jump seat with a body for use on two-wheeled vehicles, wherein by any mechanism the seats and rear footboard are operated together, substantially as and for the purpose hereinbefore specified and set forth."

The commissioner rejected the application with the following words:

"The claims must be for the particular mechanism of the invention, and not for its function,—the accomplishment of a particular result. The application is therefore rejected."

The patentee thereupon struck out the claims, and substituted those which now appear in the patent. I do not think, however, that the above-quoted words of the commissioner require the patentee to limit his invention, but rather that they specify the form in which he shall make his claim; that is, by claiming the mechanism, rather than its function. There being no requirement that the claims shall be limited, it follows that the words substituted in pursuance of the requirement cannot be held to import a limitation. As to the defense founded on the prior state of the art, the respondents cite the patents to Wood, No. 105,758; Aspinwall, No. 134,452; Morrill, No. 274,633; Chapman, No. 227,612; Minard, No. 34,261; Angus, No. 252,411; Bink, No. 214,547; Theakston, No. 253,238; Wells, No. 285,450; Bauer, No. 283,370; Jackson, No. 265,606; Fawcett, No. 272,420; Gale, No. 204,891; and the English patent to Mordecai Robert Maythorn, No. 601, of March 6, 1871. From these it appears that it was known that there might be jump seats and sliding seats and falling and swinging tailboards; that the back of one seat might be turned down to form another seat; that one seat, when not required for use as a seat, might be swung up so as to form a back for another seat; that one seat might be moved out of the way, and serve no purpose, while the other seat alone was used; that either seat might be connected with the tailboard by levers so as to have a correlative motion therewith; and, finally, that when one seat is moved so as not to be in use, the other seat may be moved so as to keep the center of gravity of the load in

substantially the same place as before, as appears in the patents to Aspinwall and Chapman.

Now, the patentee, stating his invention in the terms of his drawing and specification, has devised a combination of a falling tailboard and two seats, so connected by levers and hinges that the movement of the tailboard upwards will at once drop the rear seat entirely out of use, and move the front seat backwards so as to preserve the proper center of gravity. He claims that this is a pioneer invention, being the first mechanism in which the tailboard is connected with both seats, and must be so construed as to cover a combination of a falling tailboard and two seats so connected that the movement upwards of the tailboard will move the rear seat into position to act as a back to the front seat, and at the same time give the proper backward sliding motion to the front seat. In view of the state of the art, I think this construction of the patent is too broad. His invention seems to me not to be a pioneer invention, but only one step in the series of inventions in sliding and swinging seats and tailboards. He has, as it seems to me, selected out of all the known movements of these elements a certain set, which are made to result from his mechanical combination of devices. The carriage of the respondents seems to me to show another set of movements, and a mechanical combination which shall produce them. It is true that in both cases the movements of the rear seat are similar, in that they are upward and downward movements, but they are different in their character, inasmuch as one brings the seat out of use and the other leaves it in use. The functions performed by the two mechanisms are therefore different.

The bill must be dismissed, with costs.

STANDARD FOLDING BED CO. v. OSGOOD et al.

(Circuit Court of Appeals, First Circuit. October 17, 1893.)

No. 55.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—COMBINATION—EQUIVALENTS.

Infringement is not prevented by the substitution of a well-known equivalent for one element in a patented combination, although the working of the combination is thereby slightly varied, especially when no new or useful result is obtained, and the only effect is the production of an inferior device.

2. SAME—INVENTION—FOLDING BEDS.

The gist of the Welch patent No. 397,766 is a suspended folding bed, in which the movement of the foot legs is obtained directly from the suspended mechanism, and this is a useful and patentable invention, though perhaps not of wide scope, considering the prior state of the art. 51 Fed. Rep. 675, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Suit by the Standard Folding Bed Company against Charles E. Osgood and others for infringement of a patent. The court below dismissed the bill. 51 Fed. Rep. 675. Complainant appeals. Reversed.

Edwin T. Rice, Jr., (Cary & Whitridge, on the brief,) for complainant.

John H. Whipple, for defendants.

Before COLT, Circuit Judge, and WEBB and CARPENTER, District Judges.

COLT, Circuit Judge. This case turns upon the question whether the defendants infringe the first claim of letters patent No. 397,766, granted February 12, 1889, to Lyman W. Welch, for improvements in folding beds. The invention has reference to that class of beds known as "suspended," as distinct from "supported" beds. In suspended beds the bed proper is hung from the standard; in supported beds the weight of the bed proper is supported from below. In suspended beds, as the bed body is lowered from the standard it describes an upward and outward movement, and, as it is raised, a downward and inward movement. The advantage of this double movement is that it enables the standard to be made shallower, and thus economizes space. The suspending devices having this eccentric movement are described in the earlier Welch patents of February 3, 1885, and June 14, 1887.

The invention covered by the present patent is for foot legs which automatically fold in or out by the movement of the suspending mechanism, as the bed is turned up or down. This had never been done before. In the prior Williams patent of April 19, 1881, there is shown a bed essentially of the supported class, and the mechanism to fold and unfold the legs is connected with the standard. The so-called "Eclipse" bed, invented by W. D. Snyder, is of the Williams type, and does not contain the invention of Welch. The Adgate and Hickman patent, No. 262,882, is for a suspended bed, but it describes no mechanism for folding the legs. The Laskey patent, No. 314,032, shows a bed suspended by slotted arms or links, but with no folding leg device. It is unnecessary to refer to the other patents cited by defendants. It is sufficient to observe that there is not found before the Welch invention any folding bed where the movement of the foot legs is obtained directly from the suspending mechanism, and this is the gist of the Welch invention. It may not have been an invention of very wide scope, looking at the state of the art at the time, but it was nevertheless, in our view, a simple, useful, and patentable improvement in the folding bed art.

The first claim of the patent is as follows:

"The combination with the standard and bed proper of the crank lever, c, pivotally mounted at its middle to the face of the bed rail, the suspending chain or connector, C, secured at one end to the bed proper, and at the other end to one end of the said crank lever, the legs, D, hinged to the bed proper, and the rod, E, connecting the other end of said crank lever with the legs, D, said parts being respectively arranged as shown, whereby said crank lever is held at all times aligned with that portion of the connector to which it is attached."

This claim sets forth a combination of devices by means of which the foot legs are automatically folded and unfolded by the movement of the suspending mechanism. The defendants make a bed in

which a similar movement of the foot legs is obtained from the suspended mechanism, but, in place of the suspending chain or connector of Welch, they have substituted the slotted arm of the Laskey patent, extending it beyond the point of attachment to the rail. The effect of this change is that the bed is not suspended during the whole of the folding and unfolding movement, but turns upon a bearing during a portion of the time. But a charge of infringement cannot be overcome by the substitution of a well-known equivalent for one element in a patented combination, although the result of the working of the combination as a whole may be slightly different, especially where no new or useful result is obtained, and the only effect is the production of an inferior device. With this exception the defendants' bed contains all the elements in combination which are found in the first claim of the Welch patent. There is nothing in the disclaimer of the patent or in the proceedings in the patent office which limit Welch to the use of a flexible connector in this combination. For these reasons we are of opinion that the first claim of the Welch patent is valid, and that the defendants infringe.

Decree of the circuit court is reversed, and the case remanded, with directions to enter a decree in favor of the plaintiff, sustaining the validity of the first claim of the Welch patent, and adjudging that this claim has been infringed by the defendants, and ordering an injunction and account.

KRAUSS et al. v. JOS. R. PEEBLES' SONS CO. et al.

(Circuit Court, S. D. Ohio, W. D. September 15, 1893.)

No. 4,621.

1. TRADE-MARKS—INFRINGEMENT—INJUNCTION—PLEADING—PARTIES.

Where a distiller granted the sole and exclusive control of his bottle product for five years, and agreed not to permit others to use his trade labels, a bill by the grantee to enjoin infringement of the trade-marks was defective which failed to make the distiller a complainant, or state a reason for not doing so.

2. SAME—SALE IN BULK—RESALE IN BOTTLES.

The sale of whisky in bulk under a trade-mark by a distiller does not justify the vendee in bottling for retail, and in using on the bottles the trade label which the distiller uses on smaller bottles of the same brand of whisky when prepared by himself for the retail trade.

3. EQUITABLE RELIEF—WHEN REFUSED—FRAUD.

Where a distiller mixes 35 per cent. of other whiskies, bought for the purpose, with his own brand of whisky, and sells the mixture under his trade label, with cautions to avoid imitations, and to the effect that the mixture was "bottled at the distillery warehouse, and is warranted perfectly pure and unadulterated," a court of equity will not protect the distiller or his privies in contract from infringement of the trade-mark thus fraudulently used.

In Equity. Suit by Otto A. Krauss and Krauss, Hart, Felbel & Co. against the Jos. R. Peebles' Sons Company and Jos. S. Peebles to restrain infringement of trade-mark. On motion for a preliminary injunction. Denied.

Statement by TAFT, Circuit Judge:

This is a motion for a preliminary injunction. Jurisdiction existed by reason of the diverse citizenship of the parties, the defendants being citizens and residents of Ohio, Krauss a citizen of New York, and Krauss, Hart, Felbel & Co. a corporation organized under the laws of West Virginia. The complainants in their bill sought to restrain the defendants from selling bottled whisky under a trade-mark and in a style of bottling alleged to have been originated and to be owned by Jas. E. Pepper & Co., a firm engaged in distilling and bottling whisky at Lexington, Ky. The interest of the complainants in the subject-matter and their right to bring the action was claimed to arise under a contract set forth in the bill, made on January 22, 1892, by Otto A. Krauss and Jas. E. Pepper & Co., in which Krauss agreed, among other things, to purchase at a fixed price from Pepper & Co. 30,000 cases of bottled whisky a year, in equal monthly installments, and as much more as required, on condition that Pepper & Co. should furnish the same promptly, and keep the whisky up to its then standard of quality, and should sell bottled whisky to no one else except to a firm in San Francisco, and should give Krauss "the entire control of the trade of said bottled whisky [then] now existing, or which may [might] accrue during the term of this contract, and any renewal thereof."

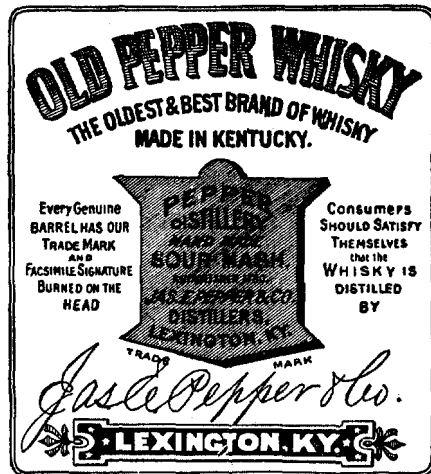
The contract contained stipulations as to payment, credit, etc., not important here. Pepper & Co. further agreed to bill all their bottled whisky to Krauss, who obligated himself to fill existing contracts of Pepper & Co. with Peebles' Sons Co., and Meyer & Co., of Cincinnati. The contract continued: "Party of the first part (Pepper & Co.) further obligates himself not to furnish to any person any labels now used, except that they may furnish to the Jos. R. Peebles' Sons Co. such labels as they are now using with the firm name of Jos. R. Peebles' Sons Co. on the same. The said party of the first part further agrees to furnish proper desk room to the party of the second part at their distillery or office for the use of agent for the party of second part, their agency books, and all the facilities that are now enjoyed by party of the first part for cartage and general purposes, free of cost to the party of the second part. The party of the first part agrees to furnish, free of cost, to the party of the second part, all glass and other signs that in the judgment of the party of the first part may be needed for the proper advertising of goods. Party of the first part further agrees that in case of the death of Jas. E. Pepper that it shall be so arranged that the executors of his estate shall be empowered to carry out the provisions of this contract with the party of the second part, and, in case of the sale of the said distillery of the party of the first part, such sale shall be made subject to the provisions of this contract, and with the obligations upon the part of the purchaser to comply with the terms of this contract. Party of the first part further agrees to neither bottle or cause to be bottled whisky under any brand or label except the Old Pepper whisky brand or label, of which whisky so labeled the party of the second part has entire control as hereinbefore set forth."

Krauss further agreed to purchase from Pepper & Co. 1,000 barrels of bourbon and 500 barrels of rye in bulk each year of the contract, at the option of Pepper & Co. It was further stipulated that when this contract was signed all existing contracts except those before mentioned "relating to the sale and delivery of said whiskies bottled at" Pepper's distillery should cease. The contract became immediately operative, except as to amount of whisky to be delivered and received, which term was to come into full force March 1, 1893.

The bill avers that Krauss, with the knowledge and approval of Pepper & Co., conveyed all his rights under the contract to his co-complainants, Krauss, Hart, Felbel & Co., the West Virginia corporation before mentioned. The bill further alleges that since the year 1886, and prior thereto, Pepper & Co. had been continuously engaged in manufacturing, selling, and dealing in hand-made sour mash Kentucky whisky near Lexington, Ky., and that during all said time they had been bottling large quantities of said whisky at their said distillery, and putting the same on the market in cases of a dozen bottles of the character hereafter described; that they had at great expense extensively advertised the same, so that the sales had grown to

more than 2,500 cases monthly, and that complainants had also spent large sums in further advertisement of the same. The bill proceeds: "Your orators further show that said whisky so bottled and sold as aforesaid was bottled in imported, seamless, white flint glass bottles of a very attractive character, of such size that each would hold one-fifth of a gallon, and that the same, on account of their sizes, became known to the trade as 'Fives,' and that these bottles were labeled with the following device and trade-mark, which the said firm of Jas. E. Pepper & Co. adopted in the year 1880 to indicate the origin and quality of said whisky, and that it had been bottled by the said Jas. E. Pepper & Co. at their distillery near Lexington, Ky., to wit." There is then pasted in the bill a gold label, with words and figures printed thereon, as follows:

EXTRA CAUTION:
Anyone refilling this bottle without destroying
the labels is criminally liable and on detection
will be prosecuted to the full extent of the law.



The label is gilt, the letters are white, some with black shading, and the shield or trade-mark proper is red. The bill, after describing the foregoing, states that during the year 1893 Pepper & Co. had added a cautionary mark to the top of the label against refilling the bottle without destroying the label and had inserted in the red shield the words "Established 1780."

The bill proceeds: "Your orators further show that for the purpose of further identifying and distinguishing their whisky so bottled at their distillery as aforesaid said firm of Jas. E. Pepper & Co. pasted diagonally across the back of each of the bottles so labeled as aforesaid a paper slip, on which was printed in black letters the following: 'This whisky is distilled under the same formula and process used by the grandfather and father of our Mr. Jas. E. Pepper more than one hundred years ago. Bottled at the distillery warehouse, and warranted perfectly pure and unadulterated.' Below the lines so printed as aforesaid in black was printed on said slips the following in red color: 'Genuine only when bearing our unbroken facsimile signature across the stopper. Consumers should see that the signature is unbroken, otherwise this bottle may be filled with inferior spirits.' Over the lines so printed in red color was imprinted the chirographical [sic] of said firm, 'Jas. E. Pepper & Co.' In addition to the foregoing, and for the purpose of further marking and identifying the goods of the said Jas. E. Pepper so bottled as aforesaid at their distillery,

there was pasted over the cork or stopper of each of said bottles a paper slip or label, with parallel red lines on either side, which extended down upon two sides of the neck of said bottles, on which, between the red lines, was the chirographical [sic] of said firm, 'Jas. E. Pepper & Co.,' that, in addition to the foregoing, and for the purpose of further marking and identifying the goods of the said Jas. E. Pepper & Co. as bottled at their said distillery near Lexington, Ky., there was imprinted upon the cork of each of said bottles the words, 'Jas. E. Pepper & Co., Distillers, Lexington, Ky.,' so placed as to be seen and read through the glass neck of said bottles. They further show that the said bottled whisky is known to the public and to buyers and dealers as 'Old Pepper Whisky,' and is represented and identified as such and as bottled at the distillery by the aforesaid trade-marks, devices, and labels." After averring that by reason of the popularity of the whisky and the extensive advertisement thereof by Pepper & Co. and complainants, it has acquired a wide reputation and extensive sale, making the trade-marks of great value, the bill alleged that before the Krauss contract, Peebles' Sons Company, defendant, had purchased large quantities of whisky made by Pepper & Co., and had bottled portions of it, but only in quart bottles and flasks, and never in bottles containing one-fifth of a gallon, and that on such quarts and flasks the Peebles Company had been allowed by Pepper & Co. to use the gold label above described, but that it had never been allowed to use any of the other imprints, marks, and devices described; that such use of the gold label had been permitted by Pepper & Co. only as an accommodation, without compensation, and with no obligation on Pepper & Co. to continue such permission; that the Peebles Company had never been permitted to use the label on "fives," or with the other marks and the style of bottling adopted by Pepper & Co., to show that the whisky had been bottled at the distillery.

The bill then sets out at length a contract made by the Peebles Company with Krauss, Hart, Felbel & Co., in which the Peebles Company is given the exclusive right to sell the distillery-bottled goods of Pepper & Co. within a certain territory, including Cincinnati and vicinity, and stipulates to maintain a certain price upon them. The bill charges that the Peebles Company violated this contract by selling such bottled goods outside of the agreed territory. The bill further charges that the Peebles Company, knowing complainants' right under the contract with Pepper & Co., and with the purpose of injuring their sole and exclusive rights to the use of the trade-mark upon whisky made and bottled by Pepper & Co., fraudulently put up whisky in bottles exactly like those used by Pepper & Co., and procured labels exactly like Pepper & Co.'s labels in every respect, including colors and arrangement, and are selling the same at prices less than those at which complainants can sell them; that the main label used by the Peebles Company is identical with that used by Pepper & Co., except that beneath it are the words "Our Specialty," printed over which, on the same line, are the words, "The Jos. R. Peebles' Sons Company;" that a caution label and a slip across the cork are used by the Peebles Company upon their bottles, arranged exactly as the caution labels and slips are upon the Pepper bottles, which, though they contain different printed matter, make the Peebles bottle so close an imitation of the Pepper bottle that only a close observer could detect the difference; and this is done for the purpose of misleading the public, consumers, and dealers into buying the Peebles bottles on the faith that they are the Pepper bottles, filled at the distillery, and that it has had this effect, to the damage of the complainants more than \$25,000.

The complainants pray for a temporary, and, after a final hearing, a permanent, order of injunction restraining the Peebles Company from labeling any bottles containing whisky in the manner described, or in any manner similar to the labels and trade-marks of the said firm of Jas. E. Pepper & Co., or the combination thereof previously described, and for an accounting for bottles already sold.

Much evidence in the form of affidavits and exhibits was produced at the hearing in support and against the motion. From this, certain undisputed facts appeared. Jas. E. Pepper & Co. were a firm composed of James

E. Pepper and another which began to distill whisky at Lexington, Ky., in 1880. Until 1886 they did nothing but a distilling business, and sold their product in barrels, into the heads of which were burned the words, shield, trade-mark, and signature which were afterwards printed on the gold bottle label described in the bill. Before and after 1886 the defendants, who were large wholesale and retail grocers and liquor dealers of Cincinnati, purchased large quantities of Pepper whisky for ageing and bottling. Defendants bottled only in quart bottles and flasks. Before 1886 defendants used on their bottles a white label of their own, upon which were the words: "Old Pepper Whisky, Bottled by Peebles' Sons Co." In 1886 Pepper & Co. began to bottle their own whisky at Lexington, in the form described in the bill. They then adopted the gold label and the other distinguishing marks already referred to, and used only white flint seamless bottles, containing one-fifth of a gallon, or "Fives" as they are known to the trade. Bottles of this kind were well known to the trade, and had been used by other dealers.

The distillery bottling was undertaken rather to advertise the brand of Old Pepper whisky than to make a profit on the whisky sold thereby. This continued to be the purpose until 1890, as plainly appears from a letter of Pepper & Co. to the defendants, written in December, 1889. To further carry out this purpose, Pepper & Co. furnished to a number of dealers who bought their whisky in bulk the gold labels above described, to be placed upon bottles in which such dealers resold the whisky. In several cases a blank space was left at the bottom of the label upon which the name of the bottling firm was to be printed, with the words, "Our Specialty." Pepper & Co. encouraged Peebles' Sons Co. in pushing the bottling and the sale of the whisky by allowing them a certain amount of whisky to pay cost of advertising, and labels were furnished at the cost of Pepper & Co. to Peebles' Sons Co. down to the time of the Krauss contract and later. After 1890 the distillery bottling trade of Pepper & Co. grew to such proportions as to be very profitable. It does not appear that the defendants, or any of the other customers of Pepper & Co., ever bottled under the Pepper gold label in "fives" or with the other dressing of the bottle used on Pepper's distillery-bottled goods as described in the bill until March, 1893.

Up to that time, the Peebles Company considered that they had no right to bottle Old Pepper whisky, (i. e. bourbon,) under the gold label, in "fives." This clearly appears in a letter written by defendants to complainants in 1892. After March, 1893, however, defendants began to bottle in "fives" with the gold label and other dressing to be hereafter described. Pepper & Co. refused to furnish gold labels for this purpose, as formerly, and so defendants had them printed themselves. Defendants had on hand for several years as much as \$40,000 worth of Pepper whisky in original barrel packages, and had this amount at the time of the filing of the bill herein. All this whisky had been bought by defendants directly from Pepper & Co., or from others with Pepper & Co.'s knowledge, and at their instance. Defendants, in addition to the bulk whisky which they bottled and sold, also had a contract with Pepper & Co. for the purchase and sale of the distillery-bottled "fives" within a described territory, and it was this contract which Pepper's contract with Krauss bound the latter to fulfill, and for which the subsequent contract between Krauss, Hart, Felbel & Co. and Peebles' Sons Co. was evidently a substitute. The defendants had so much whisky on hand that they wished to sell part of it to Krauss, Hart, Felbel & Co. after their contract with Pepper & Co. An agreement as to price could not be reached. The failure of complainants to buy this whisky, together, it may be, with other circumstances, caused defendants to feel a resentment both against complainants and Pepper & Co., and led their Joseph S. Peebles, November 24, 1892, to write a letter to T. C. Barnes, the agent of Pepper & Co. and of the complainants, in which, after declining to sell at a price offered, he said: "We are not very anxious to sell our whisky now. We have made arrangements to bottle every barrel of 1886 whisky. We think we are going to adopt Jas. E. Pepper & Co.'s style of bottling goods, so-called ten years old, and before we get through Jas. E. Pepper and Krauss, Hart, Felbel & Co. will wish they had bought our whisky. To-n, I am in for war. There is no use disguising the fact.

Do not feel as though I had been treated right in regard to Pepper whisky, and I propose to sell every gallon of Pepper whisky at a price that will make me more money and do us more good, and give Jas. E. Pepper the lick he deserves. You can send him this letter, if you want to."

In March of this year (1893) defendants began to bottle the whisky made and sold them by Pepper & Co. in "fives," with the gold label of Pepper & Co. on the bottle, and the words underneath it: "Our Specialty, The Joseph R. Peebles' Sons Co." This was the same label which they had theretofore used on their quart bottles and flasks. The "fives" bottles were white flint bottles like those of Pepper & Co. On the quart bottles defendants had used a cap, but now, on their "fives," a slip was pasted across the cork, resembling the slip used on Pepper & Co.'s bottles in colors and arrangement, on which was printed in black letters the following: "This bottle is guaranteed to contain the genuine Jas. E. Pepper & Co. whisky, providing this label, which bears our facsimile signature, is unbroken." And across this legend appeared in red the facsimile signature, "The Joseph R. Peebles' Sons Co." In addition to this, diagonally across the back of the bottle, on the side opposite that on which the label appears, was a somewhat broader slip of paper, about the size of a similar slip on Pepper & Co.'s bottles, containing in black printing the following: "Owing to the fact that we are large holders of the famous Jas. E. Pepper & Co. matured whiskies, and in order to supply the constant and repeated demands for our bottling of said brand, we have decided to place before the trade and public Jas. E. Pepper whisky that we will guarantee old and pure. This whisky was purchased by us from Jas. E. Pepper & Co. at the time it was made, and is ripe and mellow, and we will guarantee the contents of this bottle exactly as represented. Observe that our label over the cork bears our unbroken facsimile signature thus: 'The Joseph R. Peebles' Sons Co.'" In the center of this slip appears in a circle of red the white figures 1840, with the word "Trade" above and "Mark" below them. These figures in the red circle are the business trade-mark of the Peebles Company, to indicate the date the founder of the house, Joseph R. Peebles, began business. The defendants offered their Pepper whisky thus bottled in "fives" for sale all over the country at less prices than those at which complainants were selling the distillery bottled whisky in cases of "fives" before this competition began, and seriously interfered with complainants' sales.

It was developed upon the hearing by the defendants that up to and including most of the year 1891 Jas. E. Pepper & Co. bottled nothing in these cases of "fives" under the gold label but Old Pepper whisky made by themselves, but it was admitted that after November, 1891, the demand for the distillery bottling became so great that Pepper & Co. could not supply it with their own whisky, and so bought other brands of Kentucky bourbon whisky, said to be more expensive, older, and made by the same formula as their own, and blended these different brands with their own, and bottled the mixture under the same label and trade-mark. In December, 1891, 33 per cent. of other brands was used and blended. In January, 1892, the amount of other brands mixed reached 66 per cent. of the entire output; in February 65 per cent. In March all the whisky bottled was Pepper whisky. In April 57 per cent. of the output was not Pepper whisky; in May 17 per cent., in June 41 per cent., in July 31 per cent., and in August 31 per cent. In September no whisky seems to have been bottled. In October 37 per cent. of the output was not Pepper whisky, in November 15 per cent., in December 51 per cent., in January, 1893, 30 per cent., in February 40 per cent., and in March 39 per cent., in April 40 per cent., in May 40 per cent., and in June last 40 per cent. The figures show that for the last 18 months nearly 36 per cent. of the whisky sold by Pepper & Co. in their distillery bottling has not been whisky made by them. It appears that the defendants became aware of this fact in the summer of 1892, but have dealt somewhat in the Pepper distillery bottling since that time.

William Lindsay, Bronston & Allen, and Foraker & Prior, for complainants.

Jones & James, for defendants.

TAFT, Circuit Judge, (after stating the facts.) For the sake of convenience and brevity, Krauss, Hart, Felbel & Co. will be referred to as Krauss, the Joseph R. Peebles' Sons Co. as Peebles, and Jas. E. Pepper & Co. as Pepper.

The first question is whether Krauss has the right to bring this action. Ordinarily the mere sale by the maker of an article of merchandise does not entitle the vendee to sue a third person for piracy of his vendor's trade mark. In the case at bar, Pepper has not assigned his trade-mark to Krauss, for he continues to make whisky, and to bottle it under his trade-mark, and to transfer, not his trade-mark, but the finished product bearing his trade-mark, to Krauss. Still it is manifest that the terms of the Pepper-Krauss contract are such that Krauss has a deep and substantial interest in preventing unlawful competition with Pepper's bottled whisky by the wrongful use of Pepper's trade-mark. Krauss is given sole and exclusive control of Pepper's bottle product for five years. Pepper agrees not to permit others to use his trade labels. Krauss could doubtless require Pepper to file a bill to protect his trade-mark, and, in the event of Pepper's refusal to do so, might file the bill himself. The defect in the bill as filed is that no reason is shown why Pepper was not made complainant. As this defect can be cured by amendment stating the reason, or by making Pepper a complainant, I shall pass to the merits of the case.

Peebles is placing upon bottles of whisky filled and offered for sale by him the trade label and trade-mark originated and used by Jas. E. Pepper & Co. This is not denied. The burden is on Peebles to show that he has a right to do so. His counsel contend that the right may be maintained,—First, on the ground that the whisky contained in the bottles is whisky made by Pepper & Co., and was sold to Peebles in barrels, upon which was Pepper's shield trade-mark; and, second, on the ground that Pepper gave Peebles the right to use the trade-mark and gold label by express contract. I do not think that Peebles' conduct, complained of in this case, can be justified on the first ground. It is doubtful whether the sale of merchandise in bulk under a trade-mark of the maker carries with it as incident thereto the right in the vendee to use the same trade-mark as a trade-mark on smaller and retail packages. It is true that the vendee cannot be prevented from stating the truth in reference to his wares, and that he may place upon his packages the statement that their contents were made by the real maker, and that they were sold by him under his trade-mark, but it seems to me it is a different thing for the vendee to use the trade-mark as such. Such use might be characterized as the use of the maker's sign manual to guaranty that the contents of the smaller packages are his manufacture, whereas the truth of that assertion depends wholly on the good faith of the vendee. However this may be, the complaint in the present case is not that Peebles uses the Pepper shield trade-mark alone, but that he uses the gold label containing the trade-mark,—a peculiar arrangement of colors, and other distinguishing marks. The gold label is not used on whisky barrels. It is peculiarly adapted to use upon bottles. It was for that pur-

pose that it was originated by Pepper and used by him. Now, it is manifest that the sale of merchandise in bulk by a manufacturer does not justify the vendee in using on his retail packages the label which the manufacturer uses upon the same merchandise only when prepared by himself on smaller packages for the retail trade.

Coming now to the second ground upon which Peebles' right in the premises is contended for, the question is one of fact. Pepper admits that from 1886 until the latter part of 1892 he permitted Peebles to use his bottle trade label known as the "gold label" on quart bottles and flasks filled and sold by Peebles, and that he furnished these labels to Peebles at his own expense. He says that he did so merely to accommodate Peebles, without consideration, and that he was under no obligation to continue the license to use the labels. I am clearly of the opinion that the circumstances under which permission to use the gold label was given to Peebles and continued for six years do create an obligation on Pepper's part to allow Peebles to use the gold label in the manner he has always used it, at least until Peebles shall have sold all the Pepper whisky which he bought on the faith of his being able to bottle and sell it under the gold label. The truth is the use by Peebles of the gold label was originally a favor to Pepper in advertising Pepper whisky. Pepper's letter of December, 1889, expressly states that he only bottled it himself to advertise his brand of whisky, and of course it would still further advertise his brand if his wholesale customers bottled and sold under the same brand. As a further evidence of this purpose, Pepper's allowance to Peebles of a certain amount of whisky in each consignment for advertising purposes is significant. On the faith of the use of the gold label, Peebles has bought Pepper whisky, and built up a trade of his own. It would, of course, be a pecuniary loss to him to be compelled to change his label and the appearance of his goods, the excellence of which have doubtless become associated in the mind of the buying public with this gold label and other marks used by him. But Peebles, in his correspondence, admits that his license to use the gold Pepper label upon his bottling of Pepper's bourbon whisky (and we have here to do only with bourbon whisky) was limited to quart bottles and flasks, and that it did not extend to "fives." This fully corroborates the contention of Pepper and Krauss that Pepper alone had the right to use the gold trade label on "fives," and that it was only used on bottles filled by Pepper at the distillery. As we have found that Peebles' right to use the gold label was based only on contract, the right would seem to be limited to the terms of that contract. It follows, then, that Peebles cannot justify his use of the gold trade label on his bottling of Pepper whisky in "fives," either on a contract implied from the purchase of the Pepper whisky or an express irrevocable license.

Counsel for defendants contend that, even if Peebles cannot show a right, expressly or impliedly conferred by Pepper, to use the gold label on "fives," Pepper cannot get any relief—First, because what he seeks protection for is not and cannot constitute a trademark in law; and, second, because the trade label and caution

notices which he uses on his bottles contain false representations of material facts calculated to deceive the public.

The right upon which a claim for relief must be based in this case is a very narrow one. It is not the exclusive right to use a trade-mark and trade label generally, but only the exclusive right to use them on a bottle of a certain size and quality, and with a certain arrangement of caution and other notices. Neither the size nor quality of the bottles is peculiar to claimants, nor could it be. Nor does the general arrangement of caution notices seem to have been new with the claimants. It is well settled that one cannot assert a trade-mark right in a peculiar form of package, or in a particular size or quality of covering. After plaintiffs' exclusive right to that which constitutes a lawful trade-mark is established, then the similarity in the size, form, and manner of packing plaintiffs' and defendants' goods is a circumstance of great significance in determining whether defendant intends to mislead and has misled the public into taking his goods as the plaintiffs'. But the size, form, and manner of packing are not a part of trade-mark property. I am very doubtful, therefore, whether Pepper has not, as a matter of law, by allowing other bottlers of his whisky to use his gold label, to indicate only that the contents are Pepper whisky, on their bottles, lost the exclusive right to use his trade label upon "fives" to indicate particular bottling. It is not necessary, however, to definitely decide the question of law just discussed, for the reason that, whatever the correct answer, there is a ground upon which all equitable relief must be refused to complainants, and the motion for the preliminary injunction must be denied.

The one important and prominent idea which the gold label and the caution notices upon the Pepper bottles are intended to make clear to the public is that the bottles contain whisky distilled by Jas. E. Pepper & Co., unmixed with any other whisky. The trade-mark of the shield is one which for more than 10 years has been placed on whisky barrels containing nothing but whisky distilled by Jas. E. Pepper & Co. The whisky had come to be known as "Old Pepper Whisky." The words "Old Pepper Whisky," placed upon a bottle, are an express statement that the bottle contains "Old Pepper Whisky." The shield trade-mark, and the words which accompany it, were obviously first adopted for use upon barrel packages of Old Pepper whisky; but to place such a trade-mark upon a bottle is to say to the purchaser that the contents were drawn from such barrels. "Consumers should satisfy themselves that the whisky is distilled by Jas. E. Pepper & Co." Can any construction of these words, however ingenious, escape the meaning that the whisky contained in the bottle upon which they are placed is whisky distilled by Jas. E. Pepper & Co.? "This whisky is distilled under the same formula and process used by the grandfather and father of our Mr. Jas. E. Pepper more than one hundred years ago." What whisky? The whisky contained in this bottle, of course, which the purchasing public has been assured by the gold label was Old Pepper whisky, distilled by Jas. E. Pepper &

Co. Finally we have printed upon the caution notice: "Bottled at the distillery warehouse, and warranted perfectly pure and non-adulterated." The manifest advantage which "distillery" bottling has in the bottled whisky trade arises from the improbability that a distiller bottling whisky at his own distillery warehouse would bottle any whisky but that which he had distilled, and which could be drawn from the original packages in the warehouse. The purpose of stating that the whisky was bottled at the distillery warehouse, therefore, is to clinch the proof that nothing is contained in the bottle but whisky made by Jas. E. Pepper & Co., unadulterated by mixture with it of anything else. It is proven and admitted that Jas. E. Pepper & Co., for the 18 months preceding July, 1893, instead of bottling pure, unadulterated Old Pepper whisky has bottled a mixture of Pepper whisky and other whiskies, of which mixture 35 per cent. was not Pepper whisky. In some months the mixture contained less Pepper than foreign whisky; in other months it contained more. The average proportion of Pepper to other whisky, however, in the output of 18 months, was as 65 to 35. To bottle such a mixture, and sell it under the trade label and caution notices above referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used. It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainants and Pepper are not to be protected in a deception of the public, even if it works to the advantage of the public. It is hardly necessary to say that the statement that the whisky is pure Pepper whisky is material. The importance attached in the whisky trade to the fact that bottled whisky is of the make of a particular distillery is manifest both from common knowledge and also from the great particularity of statement and variety of proof offered of this in the various bottle trade-marks, labels, and advertisements shown in this case. In view of the false and material statements contained in the trade label and caution notices of Jas. E. Pepper & Co., both that firm and their privies, the complainants in this suit, who may be reasonably presumed to have known the mode in which Pepper was carrying on his business, must be denied the equitable relief they ask. I am inclined to think that the actual knowledge of complainants of the fraud is not material, for the reason that the only right they have in this controversy depends wholly on Pepper. Moreover, it is quite improbable that with an agent to represent them at the distillery, complainants should not have received actual notice of the facts.

The only case which it is necessary to refer to is that of *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436, where the principle which must govern this court in cases like the present is authoritatively settled. It was there held that "a court of equity will extend no aid to sustain a claim to the trade-mark of an ar-

ticle which is put forth with a misrepresentation to the public as to the manufacturer and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine." Mr. Justice Field refers to the leading English case of *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, and 11 H. L. Cas. 523, and quotes with approval this language of the court, as follows:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representation; for if a plaintiff makes any material false statement in connection with the property he seeks to protect he loses, and very justly, his right to claim the assistance of a court of equity."

"Where a symbol or label claimed as a trade-mark is so constructed or worded as to make it contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be maintained."

See, also, *Buckland v. Rice*, 40 Ohio St. 526; *Palmer v. Harris*, 60 Pa. St. 156; *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, (N. Y. App.) 31 N. E. Rep. 990.

The distinction sought to be made between a trade-mark containing an express statement of a falsehood and words intentionally so used as necessarily to raise an implication that is false, cannot be supported either on reason or authority. Moreover, in the present case, the false statements are express.

Counsel for complainants rely much on the case of *Appeal of Pratt*, 117 Pa. St. 401, 11 Atl. Rep. 878. In that case it appeared that farmers engaged in making butter under a trade-mark "Darlington" did not always use their own cream, and in rare instances, in an emergency, even bought butter made by others and sold it. The court disregarded this deception of the public, apparently on the maxim "de minimis non curat lex." Chief Justice Paxson does use some language, however, in *arguendo* that cannot be supported as sound. He gives as one reason for not entertaining the defense that complainants' trade-mark contained a false representation, the fact that the public were not complaining, and he, in effect, says that the fact that such a false representation was made would not justify defendant in appropriating complainants' trade-mark. The principle laid down in *Medicine Co. v. Wood* is always applied in trade-mark infringement cases, and the public is never present in them complaining. In such cases also the defendant is usually seeking to appropriate complainant's trade-mark, and to profit by the same fraud which he pleads as a ground for refusing complainant's relief. The reason why relief is refused complainant in such cases has nothing to do with defendant's rights or wrongs. It is that the court will not protect a fraudulent business of a plaintiff, however much in the wrong the defendant may be. If the reasoning of Chief Justice Paxson in the case referred to were sound, the principle of *Medicine Co. v. Wood* could never be followed.

Pepper offers as an excuse for bottling a mixture that the demand for his goods had so increased that he could not supply it with Pepper whisky. What was this demand for? Plainly for pure and unadulterated Pepper whisky, bottled at the distillery. If this could not be honestly supplied, then it could not be supplied at all in such a way as to keep the business within the protection of a court of equity. Whether Peebles, by selling, as agent of Pepper and complainants, the distillery bottled goods, connived at the sale of the mixture as pure Pepper whisky after he knew its exact origin or not, is wholly immaterial. Relief is refused to Pepper and his privies because of his misrepresentations to the public.

The motion for a preliminary injunction is denied.

JACKSON v. MUNKS.

(Circuit Court, D. Washington, N. D. September 16, 1893.)

No. 174.

1. LIBEL OF REVIEW—WHEN LIES.

A libel of review in admiralty will lie in favor of a surety on the release bond of a vessel, who was absent from the state at the time of the decree, and knew nothing thereof until after the expiration of the time for appeal; it appearing that the libelant had delayed the hearing for eight years, during which the claimant died insolvent, and the testimony originally taken was lost; that the decree was rendered on testimony of the libelant alone; and that the lost depositions, being subsequently found, showed a state of facts which, if presented to the court, would have constrained it to find against the libelant's claim.

2. SAME—TRIAL OF ORIGINAL SUIT—EXPIRATION OF TERM.

The rule that a cause may not be reheard after the term in which it was originally decided, except upon a showing of fraud, applies only to a direct proceeding in the same cause, and does not affect a proceeding to review the original suit.

In Equity. Libel by Charles E. Jackson, surety for J. H. Olney, owner and claimant of the steamer *Susie*, against William Munks, libelant of said steamer, to review a decree of the district court in favor of said Munks as libelant of the steamer. Decree modified. The libel of review was originally filed in the district court, but, the district judge being disqualified, it was certified to the circuit court.

Green & Turner, for libelant.

Hughes, Hastings & Stedman, for respondent.

GILBERT, Circuit Judge. Charles E. Jackson filed his libel against William Munks to review the decree of the United States district court of this district rendered on the 28th day of September, 1890, in the case of William Munks, libelant, against the steamer *Susie*, etc., alleging that the decision of the court, which in that case was rendered in favor of William Munks and against Charles E. Jackson, as surety upon the bond given by the claimant of said steamer for her release, was erroneously entered, and fraudulently

obtained by the suppression of a certain deposition, taken by the libellant therein, which deposition, if read in the evidence on the trial of said cause, would have been conclusive against the right of the libellant to recover therein. The libel of review was not filed until after the end of the term of the district court at which the decree in the original suit was entered, nor until three months after the opening of the December term of 1890 of said district court. The libel of review sets forth the facts contained in the record. It alleges that upon filing the libel of William Munks against the steamer, and upon the issuance of a monition thereupon, the said C. E. Jackson, as surety for J. H. Olney, the owner of the steamer, and the claimant in the original suit, signed, on June 5, 1882, a bond for the release of the steamer, and for the satisfaction of the decree of the court in said cause. The libellant alleges that after signing said bond he paid no further attention to said matter, supposing that no decree could be rendered against him without a further suit, and that he was not represented by a proctor in said original suit, and knew nothing of the decree therein until after the end of the term at which it was rendered, and his time for appealing therefrom had expired; that issue was joined upon the libel in said original proceeding, and that in 1888 said Olney died, but that fact was not known to the libellant until November, 1890; that on the 23d day of September, 1890, the said cause came on for trial, and it was decreed that the said libellant, William Munks, do have and recover of and from this libellant the sum of \$671.71, and costs and disbursements, and that execution issue therefor; that at the time of said trial and of the rendering of said decree this libellant was not represented by counsel, and, for some time prior thereto, the libellant was without the state of Washington, and knew nothing of said proceedings, and did not discover until the 1st of March, 1891, that there was a good and sufficient defense to said original libel; that since the decree, execution has been issued against the libellant, but said decree remains unsatisfied.

The conceded facts in regard to the original suit are that the steamer made fast to a boom of piles in Fidalgo bay, in Washington; that the piles were about eight inches in diameter, some less, and were boomed lengthwise and across with similar piles; that the steamer at the time had a raft of logs also in tow, and the boom of piles was made fast to the logs; that the steamer made fast to the piles with a hawser which was considerably worn, the hawser being tied to the boom poles of the raft; that in performing the towage service the steamer was obliged to pass through Swinomish slough, where it met a strong current from the tide. In consequence of the opposing current, the steamer cast anchor, and made both booms fast to the shore. While in this position the hawser between the raft of logs and the piles parted, letting the latter go adrift. The boom of piles ran ashore in the slough, and the ebbing tide left the boom poles partly upon the bank and partly in the water, thus allowing the piles to escape. Probably from one-third to one-half of the piles were lost, being floated out by the ebbing tide.

It appears from the testimony that on the issues formed in the original suit the libelant therein began taking testimony on the 20th day of August, 1883, and continued taking testimony at intervals until September 17, 1887, when the testimony of William Wardell was taken; and all the testimony so taken was supposed to have been lost in the great fire in Seattle, and no further proceedings were had in said cause until the 24th day of September, 1890, when testimony was again taken of the libelant, William Munks, in his own behalf, but no testimony was taken of any other witness for the libelant, save the deposition of one witness, and no evidence whatever was taken for the claimant or for the said C. F. Jackson. Upon taking the testimony, upon the issues presented on the libel of review, the original testimony taken on behalf of the libelant, Munks, and lost, as above mentioned, was presented. The testimony of said Wardell, so taken and lost and subsequently found, was in substance that he was present, and noticed the manner in which the piles taken in tow were boomed, and that he did not think they were well boomed; that they used piles for boom sticks, and used ordinary boom chains, and that they left a good deal of chain at the coupling, and that some of the piles were very small. He further testified that he was assisting the steamer, and had occasion to go out on the boom two or three times; that when the boom of piles was taken in tow the water was smooth; that one of the piles had already worked out of the boom; and he described the loss of the piles as follows:

"We got up part of the way through the slough that night, and tied up to the bank. I had my boat along, and I pulled around, or partly around, the boom, to see how it was; and the piles were sticking out in all directions from the boom. They had run out so that they nearly filled the slough, the boom was so big. They ran out behind, and at the sides, too. Of course, that caused a good deal of current. The raft was bigger, and caught more water. The steamer was tied up to the bank, and shortly after that—an hour, probably, after we had got everything, as we thought, secured—the line parted between my logs and the piles. We felt it break, but we did not get there in time. When the tide went out I think there was a lot of piles went out."

On careful consideration of the testimony, it seems clear to me that if the evidence of William Wardell had been presented to the district court upon the trial of the original libel, it would have convinced the court that there was no negligence on the part of the steamer, and no liability for the loss of the piles in the Swinomish slough. The burden was upon William Munks to prove the negligence of the steamer. The district court found that there was negligence consisting in the use of a hawser of insufficient strength. The testimony of William Wardell, who was the libelant's own witness, and whose evidence is uncontradicted, shows that the raft was taken in tow in the night, and that at the time the piles were lost there was an unusual strain upon the hawser, arising from the fact that, the piles in the boom being insufficient to hold the rafted piles in position, the latter worked out and projected in all directions, some of them to the extent of half their length, thereby offering a greatly increased resistance to the current, and producing a greatly

increased strain upon the hawser. It was not disputed that the raft of piles was taken in tow in the night, and that the owner and master of the steamer was unacquainted with the defective manner in which they were boomed. The record shows further that the libellant is not prevented from bringing this record in review from any neglect or laches upon his part; and, since the decree was rendered against him alone upon his bond, and Olney, his principal, was insolvent at the time of his death, he has no remedy other than the present suit.

There are but few precedents to be found in the decisions of the admiralty court upon the subject of the jurisdiction of the district court to entertain a libel of review in admiralty. In the case of *The New England*, 3 Sum. 495, Mr. Justice Story, after considering the English cases, expressed a doubt whether a rehearing could be granted after a final decree was made, but intimated that a libel in the nature of a bill of review in equity would lie after a final decree, under similar circumstances as in equity, and he proceeded to say:

"But upon the most careful reflection which I have been able to bestow upon it, the result to which I have brought my mind is that if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies because the matter is less in value than is required by law to justify an appeal, or the proper time for an appeal is past, and the decree remains unexecuted; or where there is clear error in matter at law; or, if not, where the decree has been obtained by fraud; or where new facts changing the entire merits have been discovered since the decree was passed, and there has been not only the highest good faith, but also the highest diligence, and an entire absence of just imputation of negligence; and, finally, where the principles of justice and equity require such interference to prevent a manifest wrong."

In *Car Co. v. Hopkins*, decided in the United States circuit court in Illinois, and reported in 4 Biss. 51, it was held that the court of admiralty would entertain a libel for review filed after the term has passed at which the decree complained of was rendered, and after the decree had been executed, when actual fraud was charged, and the libellant was without fault, and would be otherwise without remedy. In *Janvrin v. Smith*, 1 Spr. 13, it was held that the remedy of an admiralty court to review its decree was not to be limited to the term at which the decree was passed.

It is not shown that there was any rule of the district court for Washington, at the time of filing this libel, which would preclude the libellant from filing the same. The rule that a cause may not be reheard after the term in which it has been originally decided, except upon a showing of fraud, applies only to a direct proceeding in the same cause. It does not affect a proceeding such as is instituted by the filing of this libel, for the libel of review is an original suit. This case comes within the rule of jurisdiction defined in the cases cited above, and it is a case that presents strong ground for affording the relief sued for. The deposition of Wardell, if presented at the trial of the original libel, would have been fatal to the right of the libellant therein to recover. The fact that Jackson, the libellant herein, was unacquainted with the proceedings in the original

suit, is explained and excused when we consider the long and unnecessary delay of Munks in prosecuting his libel. The surety on the bond signed his undertaking in 1882 in the sum of \$725, and went about his business. The amount involved in the libel was but \$356.32. The witnesses were all within reach, and their testimony was brief, and could have been taken in a short time thereafter. Instead of so proceeding, the libelant, Munks, delayed more than a year before beginning his testimony. He then adjourned from time to time for four years, taking in all some sixty pages of testimony, and finally brought on the case for trial more than eight years after filing his libel. In the mean time the claimant had become insolvent, and had died, and the surety upon the bond had every reason to suppose that his liability had been long since extinguished by a final decree.

The evidence upon the trial of the original cause shows that there was a second loss of certain of the piles after the escape of the lost piles from the boom, which was caused by striking a snag, and that thereby six piles were lost, the same being of the value of \$16.32. The loss of these piles was found by the district court to have been caused by the negligence of the steamer. It is not now shown in this proceeding that that finding was erroneous. That part of the decree, therefore, must be allowed to stand.

It will be the decree of this court that the decree rendered in the district court in favor of William Munks and against C. E. Jackson, the libelant herein, be modified so far as concerns all of the piles lost in Swinomish slough, save and except those lost by striking the snag referred to in said former decree; and that the said William Munks recover nothing as against this libelant for or on account of said piles, but that said former decree stand in favor of said William Munks and against said C. E. Jackson for the loss of the said piles so lost by striking said snag so referred to, and for the costs and disbursements of that suit, and that the libelant in this suit recover of and from the said William Munks his costs and disbursements herein.

NEW YORK & N. E. R. CO. v. CHURCH et al.

(Circuit Court of Appeals, First Circuit. September 13, 1893.)

No. 58.

1. DEMURRAGE—STIPULATION FOR PRECEDENCE IN DISCHARGE—BREACH.

A breach of a stipulation in a bill of lading giving the vessel precedence in discharging, under pain of double demurrage during time lost by failure to do so, entitles the vessel to such demurrage, although she is not detained, altogether, beyond the lay days allowed in the preceding part of the bill.

2. SAME—RATE OF DEMURRAGE—STIPULATION CONTROLS.

Demurrage will be allowed at the rate stipulated in the bill of lading or charter party, unless, at least, the loss to the ship is shown to be less.

Appeal from the District Court of the United States for the District of Massachusetts.

In Admiralty. Libel by Joseph H. Church and others against the New York & New England Railroad Company to recover demurrage claimed to be due under a bill of lading. There was a decree for libelant in the district court. Respondent appeals. Affirmed.

The bill of lading was taken by the Pennsylvania Railroad Company, and covered a cargo of coal shipped on board the schooner Glenwood from Philadelphia to the respondent railroad company, at Boston. Across its face were stamped the words, "Subject to conditions National Association Bill of Lading." At the hearing, libelants put in evidence what they claimed to be a National Association bill of lading. This contained a provision that the vessel should have precedence over "all vessels" arriving or giving notice after her arrival. Respondent, however, introduced a National Association bill of lading which merely gave the vessel precedence over all "steam" vessels subsequently arriving or giving notice.

James Milton Hall, (Charles A. Prince, on the brief,) for plaintiff in error.

Edward S. Dodge, for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The first question is whether the schooner Glenwood, in discharging her cargo, was entitled to precedence over all vessels subsequently arriving, or whether, by the terms of the contract or bill of lading of the National Association, regulating the order in which vessels should be relieved of their cargo, precedence was only given over steam vessels subsequently arriving and giving notice.

It is apparent from the record that the district court found as a fact that the Pennsylvania Railroad was the agent of the New York & New England; that, in taking the bill of lading subject to the conditions of the National Association bill of lading, it acted within the scope of its authority, and either knew or ought to have known the provisions thereof as to precedence, and the order in which vessels should be discharged; and that all vessels were within the operation of the provision as to precedence. We see no reason for disturbing this finding, and this disposes, not only of the first question, but of the first four grounds of error set forth in the record.

According to this finding below, 24 hours were allowed after arrival and notice to the consignee for receiving the cargo, at the rate of 1 day, Sundays and legal holidays excepted, for every 150 tons thereof, after which the cargo, consignee or assignee, should pay demurrage at the rate of 6 cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per bill of lading, for each and every day's detention, and pro rata for parts and portions of a day, beyond the days above specified, until the cargo should be fully discharged; and after arrival and notice to the consignee, and the expiration of 24 hours, the vessel should have precedence in discharging over all vessels arriving or giving notice after her arrival; and for any violation of this provision she should be compensated in demurrage as if,

while delayed by such violation, her discharge had proceeded at the rate of 300 tons per day.

The master of the Glenwood reported her arrival at the port of Boston, and readiness to discharge her cargo, at 7 A. M., June 8, 1891, to the wharfinger of the New York & New England Railroad Co.; and on the same day, at 7:30 A. M., schooners Lyman M. Law and Sullivan Sawin were reported, and were given precedence at the wharf, notwithstanding the earlier arrival and report of the Glenwood. The consignee contended that the precedence in order of arrival was only given over steam vessels, and, as the Lyman M. Law and Sullivan Sawin were not steam vessels, that they were not within the contract; but as it has been determined, as a matter of fact, that the word "steam" was not a part of the contract, it follows that all vessels were entitled to discharge in the order of arrival, and the consignee's contention in this respect is therefore answered by the contract itself.

It is further contended by the consignee, in substance, that if it should be determined that the Glenwood was entitled to precedence over the Lyman M. Law and Sullivan Sawin, and that giving priority to the latter was a violation of the provisions of the contract, it should not be held to be the stipulated demurrage, for the reason that the Glenwood was not detained beyond the time in which the consignee might hold her at the wharf, and that her discharge was completed within the lay days allowed in the first part of the contract.

Assuming the fact to be as the consignee contends, we cannot sustain the position taken. The leading feature of the contract is the idea that vessels should have precedence according to the order of their arrival and report. It is quite probable that the parties intended to give liberal lay days for the discharge, and more than is ordinarily required, and it is a reasonable inference that it was understood that if time was gained the vessels should receive the benefit. It cannot be supposed, however, that parties contracting for the discharge of vessels in the order of their arrival and report could have contemplated that it should be left to the arbitrary caprice of the consignee to reverse the order of discharge, and give precedence to vessels of later arrival and report, and respond in nominal damages only. Under such construction, the consignee would take the benefit of the liberal provision as to lay days, which was intended as a safeguard in his favor against accident and unforeseen contingencies, rather than a shield for wrongdoing, in the teeth of the express provision of the contract as to precedence in order of arrival and report.

As a general rule, courts of admiralty have allowed the demurrage stipulated in contracts of charter party and bills of lading. 1 Pars. Shipp. & Adm. 313. This would certainly be the rule unless the loss to the shipowner is shown to be less. Carv. Carr. by Sea, 609. It is not made to appear that the loss to the Glenwood by the wrongful detention was less than the stipulated demurrage, and that sum must therefore be accepted as the basis of just compensation, under the circumstances of this case. The consignee, in the case under consideration, set aside the Glenwood,

which was entitled to discharge her cargo in order of arrival, and gave precedence to a vessel subsequently arriving and making report. We see no reason for varying the general rule in this particular case. The record presents no question as to the correctness of the computation of demurrage.

Decree of the district court affirmed, with interest from November 4, 1892, to date of the decree of the district court.

MILBURN et al. v. NORD-DEUTSCHER LLOYD.

(District Court, S. D. New York. October 25, 1893.)

CHARTER — DAMAGE TO CARGO — CHARTER HIRE — INDEMNITY FROM FOREIGN OWNERS TO THE CHARTERERS.

Where the charterers of a foreign ship, being responsible to the owners for the charter hire, and having received freight upon goods delivered to the consignees, are liable to the latter for damage claims arising through negligence of the ship, and the owners are foreign, and have no assets in this country, the charterers will not be required by a court of admiralty to pay over to the owners the whole amount of the charter hire, except upon security indemnifying them against such reasonable and probable demands as may have arisen against the charterers through the fault of the owners in the transportation of the cargo.

In Admiralty. Libel for freight under charter.

Convers & Kirlin, for libelants.

Shipman, Larocque & Choate, for respondent.

BROWN, District Judge. The above libel was brought to recover the balance of charter money for the libelants' steamship "Tiverton," which had been chartered to the respondent for a voyage from Bremerhaven to New York, for the lump sum of £1,400, under a charter of affreightment. The vessel performed the voyage and arrived in New York on the 11th of June, 1892, and a few days thereafter delivered all her cargo. Some claims for damages for bad stowage having been made upon the respondent, to whose agents—Oelrichs & Co.—the freight moneys had been paid, the charterers claimed a bond of indemnity from the libelants against the damage claims, before paying them the whole charter money. Indemnity was refused and the above libel filed.

The defendant, in its answer, offered to pay the freight moneys, on receiving such indemnity, and asked a decree therefor from the court.

It is admitted that the "Tiverton" was a British vessel; that her owners are British residents, having no assets here; and that the steamer is not upon any regular line to this country. Since the answer was filed, the amount of the damage claims has been very largely reduced; and upon the evidence I do not find that there is more than a single claim for which there appears to be any reasonable ground to claim damages, or any probability of litigation.

The libelants urge that the respondent is not in any event personally liable for any damage claim whatsoever; because the respondent did not sign the bill of lading or become personally bound

by it; and that therefore it is not responsible for any bad stowage of the cargo.

Upon the general scope and meaning of the charter, however, and the mode in which the business under it has been actually managed by both parties, plainly the voyage was for the benefit of the respondent, and at its risk. The respondent was absolutely responsible for the payment of the whole charter hire; and the moneys to be derived from the freights, not having been settled for at Bremerhaven, became, when collected by Oelrichs & Co., the respondent's agents in New York, the moneys of the respondent. Had Oelrichs & Co. failed to account for this money, the loss would have fallen upon the respondent; their collection of the freights would not have been any offset against the charter hire due to the libelants.

Upon charters like the present, moreover, the captain, in signing the bills of lading, has been held to sign as agent of the charterers; and the latter, therefore, become liable thereon to the consignees. *Marquand v. Banner*, 6 El. & Bl. 232; *Schuster v. McKellar*, 7 El. & Bl. 704. In suing the respondent for the whole charter money, libelants have treated the freights collected by Oelrichs & Co. as the respondent's money, and the transportation as made on account of the respondent as principal. As the consignees of the damaged goods have, moreover, paid the freights in full, to the respondent, as charterer and carrier, they have a legal right of action against the respondent for the damage to their goods in transit; and for this the respondent has a right to indemnity from the ship, or her owners, so far as the same arose from bad stowage. *The Centurion*, 57 Fed. Rep. 412, 416. As the libelants are foreign, and without assets here, the defendant should not be required to pay over all the charter money, except on such security as may afford recourse, within this jurisdiction, for indemnity against reasonable and probable demands for which the ship and her owners are primarily responsible, and which it is within the power and the ordinary jurisdiction of this court to require. The principle is the same as in suits between part owners, as to the employment of the ship; or for freight upon the part delivery of cargoes. *Ben. Adm.* § 274; *Brittan v. Barnaby*, 21 How. 527, 534; *The Tangier*, 32 Fed. Rep. 230; *The Dixie*, 46 Fed. Rep. 403.

The libelants are entitled to a decree, without costs, upon giving such indemnity, the amount of which will be fixed by the court, if not agreed on by the parties.

THE GULF STREAM.

INLAND & SEABOARD COASTING CO. v. THE GULF STREAM.

(District Court, S. D. New York. October 25, 1893.)

COLLISION—MUTUAL FAULT—AGENT'S PURCHASE OF DAMAGE CLAIMS AT A DISCOUNT—ALLOWED FOR AMOUNT PAID ONLY.

Where one of the parties before the court in a cause of collision, or his agent, purchases at a discount damage claims for injuries to cargo, and both parties are afterwards held to be in fault, the purchased claims will not be allowed in the subsequent assessment of damages for more than the amount paid, with interest. Neither party in

fault can make a profit out of the other by the purchase of such claims at a discount. Such a purchase by the ship's agents is, in effect, a purchase by the owner as their principal.

In Admiralty. Exceptions to commissioner's report.

Owen, Gray & Sturges, for libellant.

Robinson, Biddle & Ward, for claimants.

BROWN, District Judge. The above libel was filed to recover damages to the *E. C. Knight* and her cargo through collision with the *Gulf Stream*, whereby the *Knight* and her cargo became a total loss. Both vessels were found in fault. 43 Fed. Rep. 895. Upon a reference to compute the damages, the value of the *Knight* was fixed at \$10,000.

A further claim of damages to the amount of \$3,270, was allowed, besides interest, for the value of 765 barrels of flour on board the *Knight* belonging to Whittemore & Sons, who were paid that amount by the Atlantic Mutual Insurance Company, as insurers of the flour, on October 26, 1887, and who assigned all their claim for the damages to the insurance company. On March 20, 1890, this claim was purchased from the insurance company by B. F. Clyde, and assigned to him for \$1,000. One-half of another claim of \$500 for the value of certain furniture shipped on board the *Knight* by one Trimble, was assigned by him to William B. Clyde & Co. for \$150.

William B. Clyde & Co. were the general agents of the owners of the *Gulf Stream*; and B. F. Clyde was a member of that firm. All the above assignments were made after the libel was filed; the two latter, long after the cause was at issue and after the owners of the two vessels were before the court.

The claim in the libel being for the loss of the cargo, as well as of the ship, it was agreed, by stipulation between the parties, that B. F. Clyde and William B. Clyde & Co. should be treated as intervening for their interest. By this I understand that their claims are to be dealt with in the same manner as if they had sought payment of the assigned claims from both vessels found at fault. The respondent's proctors contend that Clyde, and Clyde & Co., are entitled to recover the full amount of the assigned claims with interest; the libellant contends that they are entitled to recover only what they paid, with interest.

1. As the *Knight* was a total loss, no recovery can be had by Clyde, or Clyde & Co., directly against her; but as the *Gulf Stream* is directly answerable for the whole loss of cargo, the one-half of whatever sum the *Gulf Stream* has paid, or may be liable to pay on account of cargo, should be offset against the amount decreed to the owners of the *Knight* against the *Gulf Stream* for the loss of the *Knight*. B. F. Clyde, and Clyde & Co., have not, in this suit at least, any direct claim against the *Knight* or her owners; it is only the *Gulf Stream* that, by way of recoupment, can offset against the amount payable to the libellant the one-half of what the *Gulf Stream* must pay for cargo upon the assigned claims. But Clyde & Co., and B. F. Clyde as a member of that firm, being the general agents of the *Gulf Stream* and her owners, stand in a fiduciary re-

lation to them, and can make no profit by the purchase of claims against them. *Rothwell v. Dewees*, 2 Black, 613; *Church v. Insurance Co.*, 1 Mason, 344; *Story*, Ag. § 210. Hence, they cannot enforce against the Gulf Stream any more than what they have paid for the assigned claims, with interest; and, as the owners of the Gulf Stream are not legally liable beyond the latter amount, they cannot recoup or offset against the libelant more than half the latter sum.

In the view of a court of admiralty, which acts on equitable principles, Clyde, and Clyde & Co., as agents, hold the assigned claims virtually as trustees of the respondents. The adjustment of the account between the two vessels, as respects the whole loss arising from the collision through their mutual fault, should be treated, therefore, precisely the same as if the claims in question had been settled by the respondents, and the assignments made directly to them. Such an assignment, I cannot doubt, could not be enforced against the other vessel beyond one-half of the amount actually paid, with interest.

The foundation of the moiety rule in admiralty in cases of mutual fault, says Mr. Justice Bradley in *The Alabama*, 92 U. S. 697, "is for the better distribution of justice between mutual wrongdoers." While each is liable in solido to the innocent damage claimant, the right of each vessel to compel the other to bear half the burden is a substantial legal right, which, as the supreme court has repeatedly decided, must be carefully regarded and enforced whenever both vessels or their owners are before the court. *The City of Paris*, 14 Blatchf. 531, 538. See *The Hudson*, 15 Fed. Rep. 162, 164-166, and cases there cited. The practice inaugurated in the latter case, by which both vessels or their owners may always be brought into the cause when within the jurisdiction, was sanctioned by the supreme court in the enactment of the fifty-ninth rule, one of the objects of which was to make an equal distribution of the burden, so far as possible, as between the two vessels in cases of mutual fault. To permit one of the parties, equally answerable, to set up purchased claims for a larger amount than was paid for them, would not only be contrary to the principle and the equity of the moiety rule that each vessel shall bear half the burden, but would sometimes, as in this case, enable one of them to make an actual profit out of the other. If one-half of the original claims here presented are allowed as an offset against the libellant's demand on the Gulf Stream, the respondents would not only contribute nothing on account of these two items of cargo-loss, but would make out of them a profit of upwards of \$1,000. This is contrary to equity, and contrary to the principle and design of the moiety rule. *Story*, Eq. Jur. § 493.

In cases of a community of interest in a common title, such as that of two devisees, or tenants in common, the purchase of an outstanding incumbrance by one of the tenants in common, or even by the husband of a coheirress, has been held to be for the benefit of all the other interests, upon contribution to the consideration actually paid. *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Lee v. Fox*,

6. Dana, 176; and these decisions were approved in *Rothwell v. Dewees*, 2 Black, 613, 619. The principle is equally applicable here; for here, as there, it is a common burden that has been, in effect, purchased by one of the parties in interest; and the legal right of each party to demand that the burden arising from the whole loss shall be shared equally and in common, so far as this is within the control of the court, must, therefore, preclude the respondents, or Clyde & Co. as their agents and trustees, from recouping against the libellant more than one-half of the amounts actually paid for the assigned claims, with interest.

2. The value of the Knight at the time of the loss was the subject of a remarkable conflict in the testimony. Considering, however, the age of the vessel, her antique model, the little call for such vessels ever since this collision, and the small earning capacity of her consort, as well as the conflict in the direct testimony as to her value, I think that \$8,000 will be a sufficient allowance for the Knight at the time of the loss. The other exceptions are overruled

THE JACKSON.

THE REPUBLIC.

FEATHERSTON v. THE JACKSON AND THE REPUBLIC.

(District Court, S. D. New York. October 12, 1893.)

COLLISION—FERRYBOAT—OBSTRUCTING SLIPS—CITY ORDINANCES—RUNNING INTO DANGER.

Under the ordinances of the city of New York forbidding obstruction to the free course of ferryboats in and out of their slips, a tugboat is in fault for unnecessarily allowing her tow to drift across and into a ferry slip while engaged in business at the wharf and slip above; but where the ferryboat, in approaching her slip under such circumstances, instead of waiting a very short time to enable the boat to be hauled out, went on into the slip when there was not apparently reasonable space for her to enter without damaging libellant's boat, and collision ensued, *held*, that both were in fault, and the damages were divided.

In Admiralty. Libel for collision. Decree for libellant.

Hyland & Zabriskie, for libellant and The Republic.

Stewart & Macklin, for The Jackson.

BROWN, District Judge. The collision in the above case occurred as the Republic was entering her slip on the Brooklyn side. The libellant's canal boat hung by a short line of five or ten feet from the stern of the Randolph, the outer of four boats on the starboard side of the tug Jackson, which lay at the end of the pier that formed the upper side of the ferry slip. The Jackson and her tow were heading up against the ebb tide, until another boat could be taken on by the tug from the slip above. The northwest wind blew the libellant's boat around into the ferry slip; and at the time of the entrance of the Republic, as the weight of testimony shows, the libellant's boat had swung round nearly alongside the ferry rack. In that situation it was impossible for a ferryboat to reach the bridge landing in the upper slip without hitting the libellant's boat, and three of her planks were thus broken in. The above libel was

filed against the Jackson, and the Republic was afterwards made defendant on the Jackson's petition.

The pilot of the ferryboat says that after bringing his ferryboat to a stop a little way out in the stream, he started up again, when the libelant's boat was tailing nearly straight down river, across the slip, so that he thought he could get in astern of her, and that the latter swung in more, through the backing of the Jackson after he had started up, and after the ferryboat had got into such a position that he could not help going forward without the risk of greater damage to her by stopping. The weight of evidence, however, shows that at the time when the ferryboat started up to go into the slip, the libelant's boat was not in the position stated by her pilot, and that entrance could not be reasonably expected without collision; and that the libelant's boat was a dangerous obstruction.

Under such circumstances, both the tug and the ferryboat are to blame. The tug is to blame for voluntarily allowing the libelant's boat to obstruct the entrance of the ferry slip. Though the tug had proper business at the Washington street pier, in order to take on another boat, it was not necessary that she should let the libelant's boat swing from the end of the other boats alongside; and under the state statute, and the city ordinances, enacted thereunder, she was bound not to cause any such obstruction as was in her power to avoid by other methods of towing.

The ordinances forbidding such obstructions are of very long standing. See Consolidation Act 1882, c. 410, §§ 85, 86, subd. 35. Judge Betts, in the case of *The Relief*, Olcott, 109, which was decided in this court nearly 50 years ago, says that "the city government, which possesses full power over the subject, by its ordinances, interdicts all obstructions to the free course of ferryboats." See Rev. Ord. 1866, p. 293; *The John S. Darcy*, 29 Fed. Rep. 644, 647; *The South Brooklyn*, 50 Fed. Rep. 588; *The Express*, 1 C. C. A. 431, 49 Fed. Rep. 764.

I should feel bound to hold the Republic free from fault, if at the time when she started there was apparently a reasonable space for her to enter the slip without damaging libelant's boat. But the weight of evidence precludes that view; it shows, also, that the ferryboat had waited outside only a very short time, if at all; and that not more than a couple of minutes longer were required for the Jackson to get out of the way. The Jackson's work of picking up the other boat in the slip could have been easily seen by the pilot of the Republic,—if, in fact, it was not seen. Under such circumstances, if it be true that the Republic could not, without real danger of accident, make the lower slip instead of the upper one, she ought to have waited outside a few moments longer, and to have sought relief by the enforcement of the penalties against the Jackson, rather than by inflicting damage upon the libelant's boat, which was in no way responsible for the obstruction. I cannot distinguish the case in principle from that of *The Baltic*, 2 Ben. 452, in which Mr. Justice Blatchford held both vessels in fault. *The Roslyn*, 22 Fed. Rep. 687; *The Fanwood*, 28 Fed. Rep. 373, affirmed on appeal.

The libelant is entitled to a decree against both defendants.

SHATTUCK v. NORTH BRITISH & MERCANTILE INS. CO. OF LONDON AND EDINBURGH et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 294.

1. REMOVAL—NOMINAL PARTIES.

It is not necessary that merely nominal or formal defendants should join in the petition, where they have not appeared, and where there is no issue between them and the plaintiff upon which a verdict could have been rendered.

2. SAME—FOREIGN CORPORATION.

A petition, which shows that the defendant is a corporation chartered by the laws of a foreign country, need not allege negatively that it is not a citizen or resident of the state in which suit is brought, although it may have an office and do business in such state.

3. SAME—SUIT BY ASSIGNER—CITIZENSHIP OF ASSIGNOR.

If the citizenship of plaintiff's assignor is material, it need not be specifically alleged in the petition, when it sufficiently appears from other parts of the record.

4. VERDICT—CLERICAL ERRORS—APPEAL.

When merely formal defendants never appear, and the case proceeds against the only real defendant, the fact that the verdict is for "defendants," without specifying which of them, if a defect at all, is a mere clerical error, constituting no ground for reversal on writ of error.

In Error to the Circuit Court of the United States for the District of Kansas. Affirmed.

S. W. Shattuck, Jr., for plaintiff in error.

Thomas Bates, (Fred W. Bentley, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This was an action at law commenced in the district court of Hodgeman county, Kan., on the 3d day of December, 1891, by S. W. Shattuck, Jr., the plaintiff in error, against the North British & Mercantile Insurance Company of London and Edinburgh, the First National Bank of Jetmore, Kan., and Frederick George. The complaint alleged, in substance, that the defendant insurance company verbally promised and agreed with Frederick George to renew a policy of fire insurance for the sum of \$2,700 on the latter's stock of merchandise in his storehouse in Jetmore, Kan., from the 14th day of June, 1891, at noon, to the 14th day of June, 1892, at noon; that on the 27th day of June, 1891, the property was destroyed by fire, and that thereafter the assured, Frederick George, assigned in writing to the plaintiff, as collateral security for a promissory note for the sum of \$2,232.40, which he owed the plaintiff, his cause of action against the insurance company for its failure and neglect to renew the policy. As to the defendants the First National Bank and Frederick George, the allegation of the complaint was that they and each "have or claim to have, adversely to said plaintiff, some interest in or lien upon the moneys due said plaintiff" from the defendant. There was

a prayer for judgment against the insurance company for \$7,052.34, the value of the goods destroyed by fire; and, as to the defendants the First National Bank and George, the prayer was that each of them be adjudged to have no interest in or lien upon the moneys due the plaintiff from the defendant. All of the defendants were duly summoned to answer. The defendants the bank and George never appeared to the action, and the plaintiff took no default or order against them. The defendant insurance company appeared in the state court, and removed the suit into the federal court, upon the grounds that the plaintiff was a citizen of the state of Kansas, and the defendant insurance company a foreign corporation, chartered by the laws of Great Britain, and a citizen of that kingdom, and that the suit involved a controversy wholly between the plaintiff and the petitioner, which could be finally determined between them. The plaintiff moved to remand the cause for the following, among other, reasons: (1) That all of the defendants did not join in the application for removal; (2) that it did not appear that the controversy was wholly between citizens of different states; (3) that it did not appear that the insurance company was not a citizen of some state of the United States. The overruling of this motion is the error chiefly relied upon.

The bank and George, upon the averments of the complaint, were not necessary parties. The insurance company had no interest in any controversy between those defendants and the plaintiff about the division of the fund that might be recovered from it in the suit. That was a controversy to be determined by a suit between the parties claiming the fund. With such a controversy the insurance company had no concern whatever. At most, the bank and George were merely nominal or formal parties, and the citizenship of such parties, or their presence on the record, is never allowed to defeat the right of removal. It is only parties who are necessary to the determination of the real controversy whose citizenship or presence on the record will defeat the right of removal. *Dill. Rem. Causes*, (5th Ed.) 18, and cases cited. The plaintiff himself asserts in his assignment of errors and in his brief that there was no issue between him and the bank and George upon which a verdict could have been rendered. For the purposes of removal, therefore, this must be regarded as a suit between the plaintiff and the insurance company.

It sufficiently appears from the petition for removal and the record that the plaintiff is a citizen of the state of Kansas, and that the defendant is a corporation chartered under the laws of Great Britain, and it is immaterial that another and probably insufficient ground of removal is set up in the petition. A corporation created by the laws of a foreign country does not become a citizen or resident of a state of this Union by merely opening an office in the state, and transacting business there; and a petition for removal which shows that the defendant is a corporation chartered by the laws of another state, or a foreign country, does not have to allege negatively that it is not a citizen or resident of the state in which suit is brought against it, because, in legal contemplation, its

residence and citizenship can only be in the state or country by the laws of which it was created, although it may have an office and do business in other states whose laws permit it. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935; *Ward v. Manufacturing Co.*, 5 C. C. A. 538, 56 Fed. Rep. 437.

On the argument it was urged that the cause was not removable under the act of 1887, (24 Stat. 552, c. 373,) unless it was one of which the federal court could take jurisdiction originally under the provisions of the first section of the act if no assignment of the claim had been made; and that, as the petition for removal fails to show that the citizenship of George, the assignor of the claim, is such that he could have brought the action originally in the federal court, the cause was erroneously removed; and the opinion of Judge Shiras in *McNulty v. Insurance Co.*, 46 Fed. Rep. 305, is cited in support of this contention. We do not find it necessary to express any opinion as to the soundness of this construction of the statute. While it is true the petition for removal does not allege that George, the assignor of the cause of action, is a citizen of Kansas, we think that under the rule laid down in *Express Co. v. Kountze Bros.*, 8 Wall. 342, that fact sufficiently appears from other parts of the record. See *Ward v. Manufacturing Co.*, *supra*, and cases cited.

It is objected that the verdict of the jury was for the defendant, without designating which defendant. As elsewhere shown, there was but one real defendant in the action. The nominal defendants never appeared, and the plaintiff, in his brief, very properly says: "There was no issue between the plaintiff and two of the defendants upon which a verdict could have been rendered." The record shows that the only issue tried, and the only one the jury were sworn to try, was that between the plaintiff and the insurance company, and that no other party appeared. Judgment was rendered in favor of the defendants. This trifling clerical error, if, indeed, it is such, is capable of correction by an inspection of the record, and constitutes no ground for the reversal of the case. *Bank v. Farwell*, 56 Fed. Rep. 570.

The judgment of the court below is affirmed.

RUST v. BRITTLE SILVER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 302.

FEDERAL COURTS—CITIZENSHIP.

In a suit to set aside a deed of trust made for the benefit of creditors, it appeared that the plaintiff and the trustee were citizens of the same state, but that the beneficiaries under the deed, other than the plaintiff, were citizens of another state. *Held*, that the trustee was an indispensable party to the suit, and that the federal court, therefore, had no jurisdiction.

Appeal from the Circuit Court of the United States for the District of Colorado. Decree modified.

M. B. Carpenter and W. N. McBird, for appellant.
Albert S. Frost, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This is a suit in equity begun by George Rust, the appellant, against the Brittle Silver Company, Albert S. Frost, trustee, William H. Bofinger, Charles K. Hall, and George N. Fenno, appellees, in the circuit court of the United States for the district of Colorado. The Brittle Silver Company, a Louisiana corporation, on the 10th day of April, 1890, conveyed all its property, consisting of lode mining claims in Summit county, Colo., to Albert S. Frost, in trust, to secure the payment of debts due and owing by the company, as follows, namely: To the defendant William H. Bofinger, the sum of \$4,832.64; to the defendant Charles K. Hall, the sum of \$3,009.84; to the defendant George N. Fenno, the sum of \$2,935.38; and to George Rust, the appellant, the sum of \$5,212.04.

A statute of Colorado provides that "no corporation doing business in this state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge or otherwise encumber its real property situated in this state, to the injury or exclusion of any citizen, citizens or corporation of this state who are creditors of such foreign corporation; and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished." Mills' Ann. St. § 499.

The bill alleges that the plaintiff and the defendant Frost, the trustee in the deed of trust, are citizens of the state of Colorado, and that the other defendants are citizens of the state of Louisiana, and claims that as the plaintiff is the only creditor of the defendant corporation whose debt is secured by the deed of trust, who is a citizen of Colorado, he is entitled, under the statute above quoted, to have his debt, upon which he has obtained a judgment at law, made a lien upon the premises conveyed by the deed of trust prior and superior to that of the other creditors whose debts are secured by that instrument; and the prayer of the bill is that the deed of trust may be declared to be of no effect as against the judgment of the appellant, and that the "defendant Albert S. Forest, trustee, be decreed to release said premises from said deed of trust; that when said premises shall be sold by virtue of an execution issued in favor of your orator in the law action, or if sold under said deed of trust, your orator's claim shall be decreed to be first paid in full out of the proceeds of such sale, before any of the claims of the defendants William H. Bofinger, Charles K. Hall, or George N. Fenno shall be paid."

It will be observed that the plaintiff and the defendant Frost, the trustee, to whom the corporation had conveyed its property, are

both citizens of the state of Colorado. The bill avers that Frost, the trustee, "is only a nominal party," and the jurisdiction of the court is attempted to be supported upon that theory. But the position is not tenable. The deed of trust invested Frost with the legal title to the premises, and imposed on him the duty of selling the property, and applying the proceeds to the payment of certain debts of the grantor. The bill seeks to set aside and annul this conveyance, and make a disposition of the property different from that provided for in the deed of trust. To a bill seeking such relief, Frost, the trustee, is not a nominal, but an indispensable, party. As the plaintiff and Frost, the trustee, are citizens of the same state, the court below had no jurisdiction of the case, and rightly dismissed the bill. *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. Rep. 355; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. Rep. 237.

There was a demurrer to the bill, which was sustained, and thereupon the bill was dismissed generally. As the demurrer challenged the right of the plaintiff to relief on the merits, the decree dismissing the bill should be modified to show that the bill was dismissed for want of jurisdiction, and the cause is remanded to the circuit court with directions to qualify its decree accordingly.

EQUITABLE MORTG. CO. v. CRAFT.

(Circuit Court, N. D. Georgia. November 23, 1893.)

No. 451.

USURY—COMMISSIONS TO INTERMEDIARY—EVIDENCE OF AGENCY.

The fact that a trust and banking company engaged in the business of securing loans for its customers in one instance advances money to a borrower before submitting his application and real-estate securities to the mortgage company in whose favor they are drawn, coupled with the fact that the bonds to reconvey are signed by the president of the trust company, as attorney in fact for the mortgage company, are not sufficient to justify the court in inferring, in the face of direct testimony to the contrary, that the trust company was an agent of the mortgage company, so that the payment of a commission to the former would be a payment to the latter, rendering the rate of interest usurious. *Merck v. American, etc., Co.*, 7 S. E. 265, 79 Ga. 213, followed.

In Equity. Bill by the Equitable Mortgage Company against Clayton Craft. Heard on exceptions to the master's report. Exceptions sustained, and decree for complainant.

Statement by NEWMAN, District Judge:

On July 26, 1889, Clayton Craft, the defendant in this case, made a written application to the Atlanta Trust & Banking Company for a loan of \$2,400 for five years at 6 per cent. per annum, the application being made to them for the purpose of inducing said trust company to undertake to procure the money from some source for Craft. Accompanying said application was a written agreement, signed by Craft, and addressed to the Atlanta Trust & Banking Company, in which Craft made said banking and trust company his agent to procure the five-year loan of \$2,400 at 6 per cent. per annum, and agreed to pay said trust and banking company \$480 as commissions for procuring the loan, the same being 20 per cent. of the amount of the loan.

On October 23, 1889, Craft executed a mortgage deed to certain lands to secure a note for \$2,580, payable to the Equitable Mortgage Company. The reason the face of the loan was \$2,580 was because the Equitable Mortgage Company would not loan their money for less than 8 per cent., and, Craft agreeing to pay 8 per cent., and the loan, which called for \$2,580 at 6 per cent., would be about equal to \$2,400 at 8 per cent., for five years, this being the period said loan was to run. The evidence is undisputed that the Equitable Mortgage Company received no more than 8 per cent. interest, which is the legal rate of interest in Georgia. Nor did the evidence show that the Equitable Mortgage Company shared in any commissions charged by the Atlanta Trust & Banking Company. The Atlanta Trust & Banking Company was chartered to do a general banking business, and to negotiate loans; and their method of doing business was to get up applications which contained a description of the property intended as security, have an inspection of the same made from their office, and with this have an abstract of title, which application, abstract, and examiner's report were submitted to the loan company or individuals who desired such a loan. The blank bonds, coupon notes, applications for loans, and all necessary papers were furnished by the Atlanta Trust & Banking Company. The Atlanta Trust & Banking Company negotiated these loans not only with the Equitable Mortgage Company, but with several other companies and individuals, both in America and Europe.

In this particular instance, Craft's papers were written up for the Equitable Mortgage Company before the papers had been submitted to them, and the money was furnished temporarily to Craft by the Atlanta Trust & Banking Company with his knowledge, in order to expedite the loan. The papers were then sent on to the Equitable Mortgage Company, and it accepted the papers, and returned to the Atlanta Trust & Banking Company the amount of money advanced by it to Craft. The Equitable Mortgage Company had the privilege of rejecting these papers if they were not satisfied, and in many instances did reject papers so prepared and sent on by the Atlanta Trust & Banking Company. W. A. Hemphill, under a power of attorney from the Equitable Mortgage Company, (whom the evidence showed to be the president of the Atlanta Trust & Banking Company,) executed in the name of the Equitable Mortgage Company a bond to reconvey the property on the payment of the debt.

This case was referred to special master to hear and determine and report back to this court. The special master, in his report, found for the defendant, and the case is now before the court on the exceptions of complainant to said report of the master.

Payne & Tye, for complainant.

Geo. Dudley Thomas and Erwin & Cobb, for defendant.

NEWMAN, District Judge, (after stating the facts.) Having become satisfied that the contract in this case is not usurious, it is unnecessary to consider the other exceptions to the report of the master, and other questions discussed in this case. The fact that the money was advanced to the defendant by the Atlanta Trust & Banking Company before the papers were received by the Equitable Mortgage Company, and the fact that the bonds to reconvey were signed by W. A. Hemphill, as attorney in fact for the Equitable Mortgage Company, is not sufficient, in my opinion, to justify the court in determining that the Atlanta Trust & Banking Company was the agent of the Equitable Mortgage Company. The fact that Hemphill was the president of the Atlanta Trust & Banking Company, it seems to me, ought not to affect the question, said trust and banking company being engaged in negotiating loans through complainant and others; and, it being desirable, in order to facilitate

the transaction of the business, that there should be some one to execute such papers, it is entirely natural that he should be selected, and the court would not from that imply an agency in the trust and banking company, in the face of express testimony to the contrary. The fact of the advance of the money to Craft, the defendant, by the Atlanta Trust & Banking Company, before the loan was finally accepted by the Equitable Mortgage Company, is shown to have been to expedite the transaction of the business of negotiating loans, and the Equitable Mortgage Company had the right to accept or reject it thereafter. If the trust and banking company saw proper to thus advance the money to the defendant on paper executed by him to the Equitable Mortgage Company, taking their chances on its acceptance by the latter, it is not a matter that the defendant should be allowed to set up as a ground for claiming the contract to be usurious. It is not claimed that the Equitable Mortgage Company received more than legal interest. The only contention is that the facts in evidence make the Atlanta Trust & Banking Company its agent, and therefore the commissions received by said trust and banking company were, in law, received by the Equitable Mortgage Company. The court is not prepared to so hold.

In the case of *Merck v. American, etc., Co.*, 79 Ga. 213, 7 S. E. 265, the supreme court of Georgia, in a case very much like this, construed the statutes of Georgia on the subject of usury, and the reasoning there covers the facts in this case. It is claimed by counsel for the defendant that in the two matters which have been referred to above—the president of the Atlanta Trust & Banking Company acting as attorney in fact for complainant, and the advance of the money before the acceptance of the loan by complainant—distinguishes this case from the *Merck Case*. I do not think so. The Atlanta Trust & Banking Company seems to have been doing an independent business in Atlanta in banking and in negotiating loans, and would, of course, adopt such methods of transacting its business as to facilitate the same; and that was all these two matters amounted to. It is insufficient, as has been stated, to raise the implication of agency in the face of direct testimony to the contrary. In the case of *Trust Co. v. Fowler*, 141 U. S. 384, 12 Sup. Ct. 1, the agency was express. The person negotiating the loan had been expressly made the agent of the lender in the state where the loan was made. Consequently the facts in that case differ materially from the facts in this case, and there was nothing in that case inconsistent with the views above expressed by the court that the transaction at bar is not usurious.

The conclusion is that the contract is not usurious, and that the special master erred in so finding. Complainant's exception on that ground will be sustained, and a decree rendered in favor of the complainant for the full amount of its debt, with interest thereon.

MINOR et al. v. WILSON.

(Circuit Court, S. D. Georgia, E. D. November 27, 1893.)

FRAUDULENT CONVEYANCES—CREDITORS' BILL—HOMESTEAD.

A decree declaring a deed made by an insolvent debtor and his wife void as against a judgment creditor, does not revert title in the grantor, so as to enable him or his family to establish a homestead therein to the prejudice of the creditor's claim.

In Equity. Suit by James E. Minor, Annie E. Minor, and others against Benjamin J. Wilson to enjoin the latter from enforcing a decree rendered in a prior suit between the parties. Bill dismissed.

Marion Erwin, for complainants.

Lester & Ravenel and J. H. Hines, for defendant.

PARDEE, Circuit Judge. March 7, 1877, Benjamin J. Wilson recovered a judgment at law in the superior court of Washington county, Ga., against James M. Minor for the sum of \$2,900 principal and \$1,234 interest, being the amount of a note dated February 7, 1871. Writ of fieri facias issued on said judgment, and was returned nulla bona. Pending the suit in which said judgment was obtained, James M. Minor made a voluntary conveyance of certain landed property then standing in his own name to himself as trustee for his wife, Annie E. Minor, and subsequently, February 6, 1877, James M. Minor and his wife conveyed the same property to John L. Hardee by an absolute deed of bargain and sale purporting to be for the valuable consideration of \$4,000. On return of fi. fa., Benjamin J. Wilson filed a bill in the superior court of Washington county against John L. Hardee, James M. Minor, and Annie E. Minor, his wife, seeking to subject to the above-mentioned fi. fa. and judgment the certain tract of land aforesaid, and to have declared void the trust deed to said lands, made by Minor to himself, as trustee for his wife and children, and the joint deed made by James M. Minor and wife to John L. Hardee, claiming that the trust deed was void as to creditors on account of Minor's insolvency, and that the joint deed was void because made to delay, hinder, and defraud creditors, and, at most, as against him, (Wilson,) the joint deed was a conveyance to secure a debt due by Minor to Hardee. The bill originally brought in the state court was duly removed by Wilson, the complainant, to this court for hearing. The defendant Hardee, in his answer to the bill, admitted that there had been a running account between him and Minor for supplies and moneys advanced, and averred that at the close of the year 1876 Minor was indebted to him upon a note for \$4,700, besides in an open account; and further alleged in terms as follows:

"That in the year 1876, upon calling upon Minor for settlement of these balances, he said he could not pay, and proposed to sell me the land in controversy by absolute deed in satisfaction of my debt, then amounting to about \$5,800, (five thousand eight hundred dollars,) or such sum, besides interest. Finding I could not get the money, I took the deed, and delivered up the notes and accounts. The trade made with us was bona fide, and upon

full consideration, as before stated, for advances previously made to said James M. Minor. In order to make my title to the land and premises good, his wife, Mrs. Annie E. Minor, also signed the deed. I do not now remember whether I knew of any trust deed from Minor to himself, as trustee for his wife and children, but am pretty certain that that fact was not known to me till the fact was set out in the complainant's bill. Having no knowledge of the affairs of Mrs. Minor, I did not inquire a great deal until informed by him that he could not pay me unless I took the lands in settlement of my demand. I accepted his proposition, and they made me the deed, and I delivered up the claims."

Further answering interrogatories, Hardee stated that the deed from Minor was unconditional, and not made to secure a debt, but in satisfaction of a debt; and that he did not agree to reconvey to the Minors, or either of them, or any one else for them; and throughout, in his answers to interrogatories, Hardee insisted that the deed was made bona fide in payment of a debt.

James M. Minor and his wife jointly answered the bill, and, among other things in said answer, averred that the conveyance from Minor to Hardee was in good faith, with no intention of hindering or defrauding any one, but was made in pursuance of contract, and in settlement and satisfaction of indebtedness of Minor to Hardee; that no bond to reconvey was taken from said Hardee, and that said conveyance was not intended as a mortgage or security for said debt, but that the said sale was absolute.

On the hearing in the circuit court a decree was entered declaring the trust deed from James M. Minor to Annie E. Minor, made and executed the 18th day of March, 1876, to be void, and of no effect; that the conveyance of Minor and Annie E. Minor, purporting to convey to Hardee the lands in controversy, bearing date the 6th day of February, 1877, be construed to be not a conveyance of said land, but a security for the payment of the debt due and owing to Hardee from said Minor at that time, to be determined by reference to a master; and also finding and declaring that the judgment of Wilson was a lien upon said lot of land upon the satisfaction and payment of the amount due to Hardee, and that the question of amount due from Minor to Hardee should be referred to a master to state the same; that upon final determination of said amount the property should be sold by the marshal to satisfy said amount in Hardee's favor, and any balance arising from the sale, after paying the amount due to said Hardee, together with the costs, should be paid to said Wilson, complainant, for account of his said judgment. On December 12, 1887, the master's report, finding \$1,784.76 due Hardee, was confirmed by a decree of the court, the former decree closed and confirmed, and the marshal directed to advertise and sell the property to satisfy the same. From this decree Hardee took an appeal to the supreme court of the United States against Wilson, but did not join Minor or Minor's wife in said appeals. The supreme court dismissed the appeal. See *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39.

On the 4th day of June, 1884, just after the first decree adverse to Minor and Hardee was rendered, Mrs. Minor, on behalf of herself and her minor children, and on the ground that her husband, James

M. Minor, refused to make the application, applied for a homestead to be set apart for her out of the lands and property of her said husband, James M. Minor, and thereupon such proceedings were had before the ordinary of Washington county, Ga., as set apart the valuable portion of the lands in controversy as a homestead for Mrs. Minor and her children. This claim of a homestead was not suggested nor referred to in any of the proceedings in the main case. After the final decree was rendered, on the 28th of August, 1889, Minor and his wife, for her and her children, filed a bill against Wilson and the marshal to enjoin the enforcement of the decree theretofore rendered in favor of Wilson upon the ground that the lands in controversy had been set apart as a homestead, and therefore were not subject to sale under the decree. To this bill defendant Wilson answered, and denied that a valid homestead had been set apart, claiming that this is shown by the bill itself, in which a full copy of the proceedings is set out; and, further, that a valid homestead could not be set apart to Minor himself nor to his family out of the lands in controversy, because the conveyances of Minor to his wife, and afterwards from Minor and his wife to Hardee, show that at the time the homestead was set apart the title of the property was not in Minor, the husband.

The case made by this bill and answer has been submitted for decision. The counsel for Wilson contend that the proceedings before the ordinary of Washington county, Ga., purporting to set apart a homestead in favor of Mrs. Minor and her children, are invalid, and not binding as against Wilson; because, it is said, Wilson was not named in the list of creditors therein, the naming of the firm B. J. Wilson & Co. not being binding on Benjamin J. Wilson individually. To this contention it is answered that Benjamin J. Wilson made himself a party by taking an appeal from the decision of the ordinary to the superior court of Washington county, Ga., which appeal he afterwards abandoned. Counsel for Wilson also contend that the proceedings actually had before the ordinary were not otherwise in accordance with law; among other things, that no schedule of Minor's property was filed therein, and therefore no valid homestead resulted in favor of Mrs. Minor and her children as against anybody. These questions I do not think need to be decided. The decrees in the case of Wilson v. Hardee and Minor rendered in this court in the main case should be construed in the light of the pleadings. Substantially, Wilson in his bill only asked that the deed from Minor to himself, in trust for his wife, and the joint deed of Minor and wife to Hardee, should be declared invalid as against him for the amount of his judgment. As between the parties to those conveyances, he (Wilson) had no interest to invalidate them. The parties defendant, Minor and wife and Hardee, insisted in their answers that the conveyances were in good faith, for a valuable consideration, and in full force. By these judicial admissions neither Minor nor his wife had any right in, or title to, the lands in controversy, and naturally they ought to be estopped from setting up title. The Code of Georgia (section 1952) declares that:

"The following acts by debtors should be fraudulent in law against creditors and as to them null and void: * * * Every fraudulent deed or conveyance not for a valuable consideration made by a debtor insolvent at the time of such conveyance."

Under the law of Georgia it seems that the title to property conveyed by voluntary deed by a person insolvent at the time remains where the deed puts it, except that such a deed cannot be set up against existing creditors; and, as James M. Minor put the title out of himself by his deed, in trust for his wife, it would seem that for all the proceedings had in the circuit court of the United States the title remains out of him. Section 1969, Code Ga. 1882, provides that:

"Whenever any person in this state conveys any real property by deed to secure any debt to any person loaning or advancing such vendor any money or to secure any other debt and shall take a bond for titles back to said vendor upon the payment of such debt, or debts, or shall, in like manner, convey any personal property by bill of sale, and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt, or debts, such conveyance of real and personal property shall pass the title of said property to the vendee; provided that the consent of the wife has been first obtained, till the debt, or debts, which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this state to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt, or debts, intended to be secured, agreeable to the terms of the contract, and not a mortgage."

And it seems, so far as passing title is concerned, that whether a bond to reconvey title is taken or not is immaterial. In *Braswell v. Suber*, 61 Ga. 398, it was held by the supreme court of Georgia that no bond was necessary; that a deed with or without bond to secure a debt passed title; and the same court held (*Phinizy v. Clark*, 62 Ga. 623-626) that such security is not a mere lien, but title, subject to be divested by payment of the secured debt. In *Kirby v. Reese*, 69 Ga. 452, it was held that where such a deed is made there is nothing in the debtor wherein a homestead can operate, save the equity of redemption. If he never redeems, there is nothing to which the homestead can attach. The conveyance to secure a debt, made under the act of 1871, (Code Ga. § 1969,) passes title, and defeats all rights to a homestead in land conveyed by such deed. See, also, *Isaacs v. Tinley*, 58 Ga. 457; *Christopher v. Williams*, 59 Ga. 779. My conclusion, therefore, is that neither at the time the proceedings setting apart a homestead for Minor's wife and family were had, nor at any time since, was Minor entitled to a homestead in the lands in controversy; and, if Minor was not so entitled, a fortiori, Mrs. Minor and her children were not. See *Bowen v. Bowen*, 55 Ga. 182; *Stewart v. Stisher*, 83 Ga. 297-300, 9 S. E. 1041.

A decree will be entered dismissing the bill for injunction, with costs.

SANFORD et al. v. GREGG, Auditor General.

(Circuit Court, E. D. Pennsylvania. June 6, 1893.)

No. 4.

1. TAXATION—FOREIGN JOINT-STOCK COMPANIES—CORPORATIONS.

The Adams Express Company, a joint-stock association, organized in New York, and having its property vested in trustees, in whose name all legal proceedings are conducted, the interests of the members being represented by shares, which are transferable on certain conditions, and the company not being dissolved by the death or insolvency of a shareholder, is not a corporation; and therefore its capital stock was not taxable under the Pennsylvania statutes of 1868, 1874, 1877, and 1879, as being the stock of a company "incorporated by another state" and doing business in Pennsylvania.

2. FEDERAL COURTS—JURISDICTION—SUITS AGAINST STATES—WHAT ARE.

A suit to enjoin a state officer from assessing or enforcing a tax for which there is no authority or warrant under the state laws is not in substance a suit against the state, within the prohibition of the eleventh amendment to the constitution of the United States.

3. SAME—ILLEGAL TAXATION—INJUNCTION BY FEDERAL COURTS.

While the federal courts are extremely cautious about interfering with the collection of current state revenues, yet they will not decline to enjoin a settlement of illegal back taxes, which threatens to create a cloud on real estate.

4. EQUITY JURISDICTION—QUIETING TITLE—TAXATION.

A settlement of alleged illegal back taxes, which, when the proper steps are taken, will constitute a lien on real estate, constitutes such a threat to create a cloud on title as will authorize the interference of equity; and an allegation by the taxing officers that they do not intend to take the steps necessary to create the lien does not oust the jurisdiction.

In Equity. Suit by Henry Sanford, Clarence A. Seward, and L. C. Weir, trustees of the Adams Express Company, to enjoin D. McM. Gregg, auditor general of the commonwealth of Pennsylvania, from making a settlement of taxes against the capital stock of the express company from May 1, 1868, to the first Monday of November, 1888. By stipulation of counsel the case was heard upon the bill, supplemental bill, and answer, upon a motion for injunction, with the same effect as if the same were at issue upon the pleadings and proofs for a determination of the merits and for final decree. Injunction granted.

The language of the various acts of assembly of Pennsylvania, under which this tax is claimed upon the capital stock of the Adams Express Company is as follows: Section 4, Act May 1, 1868: "That the capital stock of all companies whatever, incorporated by or under any law of this commonwealth, or incorporated by any other state, and legally doing business in this commonwealth, shall be subject to pay a tax into the treasury at the rate of * * * upon the valuation of the capital stock of the same." Fifth section of Act April 24, 1874: "That every company whatever now or hereafter incorporated under any law of this commonwealth, or now or hereafter incorporated under the laws of any other state and doing business in this commonwealth * * * shall be subject to pay a tax * * * annually at the rate of * * * upon its common or preferred stock. * * *" Third section of Act March 20, 1877: "Every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by or under the laws of any other state or country and doing business in this commonwealth," shall pay a tax on capi-

tal stock. The language of the fourth section of the act of June 7, 1879, (P. L. 114,) is identical, as far as pertinent, with that of 1877.

The Adams Express Company is a joint-stock association, formed in New York in 1854, under articles of association which contain the following provisions in substance:

(a) The subscribers declare "that we, for ourselves and our associates and successors, have associated together as a joint-stock association for carrying on the business of express forwarding."

(b) "Every person or corporation or company who shall contribute to the joint stock, or who shall be admitted and acquire interests in the business of this company, shall participate in its profits and share in its losses."

(c) The property of the company was divided into 12,000 shares of stock, with the right to increase or diminish their number. The shares are to be represented by proper certificates which shall be from time to time issued by the association. The association was authorized "to receive from any persons, corporations, or associations subscriptions for shares, the contribution or payment for which shall be called in" by assessments to be levied or suits to be brought under the tenth provision of the certificate.

(d) The persons signing that certificate declare they were owners of shares, 10,769 shares. The balance was to be disposed of as the managers direct.

(e) The name of the association was the Adams Express Company. The business of the association could be carried on at the option and direction of the board of managers in that name or in the names of such associations or local express firms as are now or may be established and known to the public, and which may be purchased up by this association; and such persons, corporations, and associations as shall be admitted to and contribute or be members of the association by acquiring the interests of others should also be members of this association.

(f) Any person, corporation, or association entitled to any shares could transfer his or their interest, in whole or in part, under certain conditions, on the books of the association.

(g) The death of any shareholder, or the assignment by an insolvent debtor of his interest in the property of the association, should not dissolve the same; but the representatives or the assignee of such shareholder may transfer their shares in the manner and under the conditions aforesaid.

(h) "The property and effects of the association, or committed to their charge and custody, * * * shall be in the exclusive possession and custody of the trustees, consisting of the president and two of the managers, in whom the same shall legally vest, subject always to the accountability therefor justly growing out of these presents, in the name of which trustees or the president all legal proceedings of the association shall be conducted as permitted by law."

(i) Upon the change of any of those trustees, their substitutes, or, upon the death of any of them, their survivor or survivors, shall succeed to and exercise the above powers.

(j) The board of managers, consisting of nine persons, was appointed with power to select from their own number a treasurer and secretary, and to elect a president and vice president. The managers could direct the hiring, purchase, or sale for the association of any personal property which they may think necessary or proper for the conduct or in aid of the business of the association, even to the extent of being common carriers on the portions of their routes, and could insure or reinsure anything committed to the charge of the association.

(k) Annual meetings are fixed for the second Wednesday of February, and provisions made for calling special meetings.

(l) Assessments may be made upon any shareholder upon his shares for paying up his subscription, or ratably meeting the losses or claims of the association beyond its available resources at the time.

(m) Dividends of the profits may be declared by the managers to such extent as they from time to time may provide.

(n) The authentication by the secretary and the president or vice president and treasurer or secretary of all acts, obligations, powers, and documents of the association.

John Hampton Barnes, Geo. Tucker Bispham, and Wayne MacVeagh, for complainants.

(1) It is submitted that the provisions of the articles of association fall short of the characteristics of a corporation.

"A corporation is a body consisting of one or more persons established by law for certain specific purposes, with the capacity of succession, either perpetual or for a limited period, and other special privileges not possessed by individuals." (Definition from American & English Encyclopaedia of Law.)

Such an organization can only be created by the action of the law and authority of the government, and not by the agreement of the parties. *Stowe v. Flagg*, 72 Ill. 397; *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *People v. Assessors of Watertown*, 1 Hill, (N. Y.) 616; *State v. Bradford*, 32 Vt. 50. It follows that a corporation can have no legal existence out of the state creating it. The exercise of any power in another state depends upon the will of that state. *Bank v. Earle*, 13 Pet. 519; *Railroad Co. v. Wheeler*, 1 Black, 286. The statutes of Pennsylvania under which the right is claimed to settle these taxes refer to companies incorporated under the law of another state and doing business in this commonwealth. Their purpose was to recognize corporations created by law of another state and doing business in this state, and the authority to do such business must be expressly granted, as shown in the decisions above cited.

The Adams Express Company was not established by law or under the authority of any government. It is a voluntary association of individuals. All of the powers granted by the said articles of association may be lawfully created by agreement between the parties. There is no assumption of any power expressly reserved to corporations. The provision making the shares assignable without causing dissolution is not contrary to the policy of the law, and is expressly authorized by the joint-stock company act of the state of Pennsylvania. See Act Pa. June 2, 1874. The members of such organization have the right, under that act, to elect purchasers of stock members of the association. A similar power has been recognized and held to be within the power of individuals in the case of *Gleason v. McKay*, 134 Mass. 419, and it is competent for partners to agree that death shall not dissolve the copartnership. 1 Pars. Cont. § 200; *Tyrrell v. Washburn*, 6 Allen, 475, 476; *Pearce v. Chamberlain*, 2 Ves. Sr. 33; *Kingman v. Spurr*, 7 Pick. 235. The designation of the trustees as the parties to whom property was to be conveyed for the benefit of the copartnership was lawful without statutory authorization, and was not the exercise of a corporate power. Corporations take and convey real estate by their corporate name, and under their corporate seal. A copartner may, in his own name, take title to firm real estate purchased with the partnership fund, and it then becomes partnership property, and is subject to its liabilities, and is divisible on liquidation, and can be sold by the authority of the firm; and until the firm's affairs are settled it is personal property. *Lindl. Partn.* 642; *Id.*, *Wentworth's Notes*, 342; *Pars. Partn.* 372; *Moderwell v. Mullison*, 21 Pa. St. 257, 259; *Van Brunt v. Applegate*, 44 N. Y. 544.

The title to the property being in the three trustees, it was proper to give them the power to sue in relation thereto; and, indeed, only those named in the transfers, to wit, the three trustees, could sue, (*Metcalfe v. Rycroft*, 6 Maule & S. 75; *Scott v. Godwin*, 1 Bos. & P. 67,) and dormant partners need not join, (*Mitchell v. Dall*, 2 Har. & G. 171.) The delegation of power to the president to sue has been reaffirmed by the State Code of New York, which authorizes (section 1919) suits in the name of the president or treasurer, where the association consists of seven or more persons, but only when the association is "unincorporated." Like power exists both at law and in equity. *Chamberlain of London's Case*, 5 Coke, 62b; *Smith v. Swormstedt*, 18 How. 302. Moreover, the right of suing or being sued in the name of a president is not a corporate power or privilege. The corporate power or privilege is to sue and be sued in the corporate name. There is no attempt in the articles to determine against whom suit must be brought. The designation is limited to suits by and on behalf of the association. The acts of assembly in Pennsylvania, referring as they do to corporations incorporated under the

laws of another state, must be the guide of the kind of organization intended to be effected, and a controlling test of the character of such organization is found in the status which it occupies in the state in which it exists.

The character of the association of the members of the Adams Express Company and of other similar organizations has been before the courts of the state of New York at various times. The organization has been held to be a partnership, and not a corporation. *Whitman v. Hubbell*, 30 Fed. Rep. 81. See, also, *Chapman v. Barney*, (1889,) 9 Sup. Ct. Rep. 426, 129 U. S. 677; *Dinsmore v. Railroad Co.*, 2 Wkly. Notes Cas. 275; *Hoey v. Coleman*, (1891,) 46 Fed. Rep. 221; *People v. Coleman*, 31 N. E. Rep. 96, 133 N. Y. 279; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

(2) The taxation of the shares held by the members in the Adams Express Company as stock of a corporation is therefore contrary to law, and injunction is the only remedy.

The right to come into equity is undoubted in this case, unless the remedy at law is adequate and efficient in protection of the complainant's rights, and the complainant is deprived of its right to come into a federal court. The parties are residents of a different state, and the complainant entitled to bring its action in the federal court. There is no legal remedy which will protect them in that court, and therefore equity is the only channel open to it through which to enforce its rights. The fact that there is a remedy of another kind under a state statute in a state court would not oust the equitable jurisdiction of the United States court. *Livingston v. Story*, 9 Pet. 632; *Barber v. Barber*, 21 How. 592; *Kirby v. Railroad Co.*, 7 Sup. Ct. Rep. 430, 120 U. S. 138. Where the circuit court has jurisdiction of the parties, it will restrain the collection of illegal taxes by the writ of injunction.

Osborn v. Bank, 9 Wheat. 738. "A state cannot tax the Bank of the United States, and any attempt on the part of its agents and officers to enforce the collection of such tax against the property of the bank may be restrained by an injunction of the circuit court." See, also, *Shelton v. Platt*, 11 Sup. Ct. Rep. 646, 139 U. S. 600; *British Foreign Marine Ins. Co. v. Board of Assessors*, 42 Fed. Rep. 90.

B. H. Bristow, of counsel, for complainants.

First. The proposed tax is without authority of law.

The statute, by its terms, imposes the tax upon "companies now or hereafter incorporated by or under any law of this commonwealth and companies incorporated by any other state and doing business in this commonwealth." The Adams Express Company is merely a joint-stock association. Upon several occasions the predecessors of the present auditor general, on their attention being drawn to the facts, have concluded that the company did not come within the language of this statute. The legislature of the state has shown its concurrence in this view, for in 1889 the statute was amended by inserting the words "joint-stock association and limited partnership," indicating that the language previously used did not embrace such associations, and the tax under this statute has been annually settled and paid without question; and it is absolutely settled by authority that a joint-stock association is not a corporation. This has been held by controlling authority in cases regarding express companies. Thus in *Chapman v. Barney*, 9 Sup. Ct. Rep. 426, 129 U. S. 677, where the United States Express Company was involved, it was said: "The allegation of the amended petition is that the company is a joint-stock company, organized under a law of the state of New York, and a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint-stock company—that is, a mere partnership." Page 682, 129 U. S., and page 428, 9 Sup. Ct. Rep. To the same effect is *Dinsmore v. Railroad Co.*, 2 Wkly. Notes Cas. 275. Again, in *Whitman v. Hubbell*, 30 Fed. Rep. 81, it is said the "Adams Express Company is a partnership, and not a corporation." Again, in *Hoey v. Coleman*, 46 Fed. Rep. 221, the precise point was decided. The statute of New York which was there in question subjected to taxation "all moneyed

or stock corporations deriving an income or profit from their capital or otherwise." The tax commissioners of New York claimed that this language covered the Adams Express Company, but the court (Wallace, J.) held that "the proposition that the Adams Express Company is not a corporation in legal definition is too self-evident for discussion." Page 222.

Still further, there is no suggestion in the present case that the Adams Express Company is a "company incorporated by or under any law of this commonwealth." No action in that regard has ever been taken by the state of Pennsylvania. The claim of the defendants must then rest wholly upon the ground that it is "a company incorporated by another state," namely, New York. But upon that subject there is conclusive authority to the contrary, for no possible difference in legal effect can be suggested between the language of the New York statute, "a corporation," and that of the Pennsylvania statute, "a company incorporated by any state." In *People v. Coleman*, the precise question was whether a joint-stock association—in that case the National Express Company—is a corporation under the laws of New York. At the special term it was held, in an exhaustive opinion, that the statutes of the state did not have the effect of rendering such an association a corporation. Reported 5 N. Y. Supp. 394. This decision was affirmed by the general term, (reported 13 N. Y. Supp. 833,) and by the court of appeals, (reported 31 N. E. Rep. 96, 133 N. Y. 279.) The court of last resort, upon a review of all the statutes, held with great positiveness that they did not have the effect of incorporating a joint-stock association such as an express company. Under elementary rules this construction of the statutes of New York by the courts of that state is conclusive here. *Norton v. Shelby Co.*, 6 Sup. Ct. Rep. 1121, 118 U. S. 425, 439; *Gormley v. Clark*, 10 Sup. Ct. Rep. 554, 134 U. S. 338, 348; *Stutsman Co. v. Wallace*, 12 Sup. Ct. Rep. 227, 142 U. S. 293, 306. And it was so regarded in *Hoey v. Coleman*, 46 Fed. Rep. 221. Precisely the same thing is held in *Gleason v. McKay*, 134 Mass. 419.

It is, therefore, settled beyond controversy by controlling authority that the Adams Express Company is not within the terms of the statute now involved; that the proposed tax is wholly unwarranted by law. The sole question open for discussion is whether or not this court of equity has jurisdiction to restrain the enforcement of this unlawful demand.

Second. The court has jurisdiction to entertain this suit.

The question of the jurisdiction of equity under such circumstances depends upon the nature of the remedy at law. To exclude jurisdiction in equity the remedy at law must be "as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity." *Oelrichs v. Spain*, 15 Wall. 228; *Kilbourn v. Sunderland*, 9 Sup. Ct. Rep. 594, 130 U. S. 505. The courts of Pennsylvania are clothed by statute with the power to "prevent or restrain the commission or continuance of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals." *Bitting's Appeal*, 105 Pa. St. 520. Under this it had been held that "equitable jurisdiction does not depend on the want of a common-law remedy, for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties; hence the exercise of chancery powers must often depend on the sound discretion of the court. *Bierbower's Appeal*, 107 Pa. St. 14. So a bill may be sustained solely on the ground that it is the most convenient remedy. *Kirkpatrick v. McDonald*, 11 Pa. St. 387." *Appeal of Brush Electric Co.*, 7 Atl. Rep. 794, 114 Pa. St. 585. As has been said in a similar case: "The state cannot be sued, and if the courts do not interfere, and the tax be collected and paid over by the cashier, there is no remedy either to the bank or to the stockholder." *Agnew, J., Markoe v. Hartman*, 6 Amer. Law Reg. (N. S.) 487.

When it is necessary to prevent or cancel a cloud upon the title to real estate by the use of extrinsic evidence, or to prevent a multiplicity of suits, equity has jurisdiction. *Hannewinkle v. Georgetown*, 15 Wall. 547; *Union Pac. R. Co. v. Cheyenne*, 3 Sup. Ct. Rep. 601, 113 U. S. 516; *Shelton v. Platt*, 11 Sup. Ct. Rep. 646, 139 U. S. 591; *Allen v. Car Co.*, 11 Sup. Ct. Rep. 682, 139 U. S. 658; *Express Co. v. Seibert*, 12 Sup. Ct. Rep. 250, 142 U. S. 339. Within these principles there have been many recent instances of injunc-

tions in cases of taxation. *Pelton v. Bank*, 101 U. S. 143; *New Orleans v. Houston*, 7 Sup. Ct. Rep. 198, 119 U. S. 265; *Ratterman v. Telegraph Co.*, 8 Sup. Ct. Rep. 1127, 127 U. S. 411; *Railroad Co. v. Gaines*, 3 Fed. Rep. 266; *First Nat. Bank of Richmond v. City of Richmond*, 39 Fed. Rep. 309; *British Foreign Marine Ins. Co. v. Board of Assessors*, 42 Fed. Rep. 90; *American Fertilizing Co. v. Board of Agriculture of North Carolina*, 43 Fed. Rep. 609; *Land Co. v. Gowen*, 48 Fed. Rep. 771. It is manifest that both of these grounds of jurisdiction exist here within the controlling authorities.

The court has jurisdiction upon the ground that the threatened tax will constitute a cloud upon the title to the real estate which can be removed only by extrinsic evidence.

If the tax be imposed in form upon the *Adams Express Company* it will constitute a presumptively valid "lien upon the personal and real property of the company against whom the tax is assessed," and therefore a lien upon the real estate, which, as disclosed by the bill, the company owns and holds in its possession. Manifestly extrinsic evidence alone can show that this tax imposed in form upon the association as a corporation and under the statute authorizing taxes upon corporations is invalid, because the company is not in fact a corporation. In order to establish that fact, extrinsic proof would be requisite regarding the character of the company's organization. It is well settled that equity, under such circumstances, will entertain jurisdiction to prevent (*DeWitt v. Van Schoyk*, 17 N. E. Rep. 425, 110 N. Y. 7) or cancel a cloud upon the title to real estate, (*Cooley, Tax'n*, 543.) There are many applications of this rule. In *Gage v. Kaufman*, 10 Sup. Ct. Rep. 406, 133 U. S. 471, the suit was to cancel a tax deed as a cloud upon the title upon grounds necessitating extrinsic proof. There was a demurrer for want of equity. The court held that in a bill in equity was the proper form of obtaining relief upon the grounds alleged. In *Lyon v. Alley*, 9 Sup. Ct. Rep. 480, 130 U. S. 177, relief against a tax sale was granted in equity upon the ground that the facts showing its invalidity could only be established by extrinsic proof. In *Dull's Appeal*, 6 Atl. Rep. 540, 113 Pa. St. 510, where there was an outstanding tax deed which was shown by parol evidence to be invalid, it was held that equity had jurisdiction to entertain a suit for its cancellation. In *Stewart v. Chrysler*, 3 N. E. Rep. 471, 100 N. Y. 378, the suit was to cancel a tax deed as a cloud upon the title. The ground alleged was that the lands were assessed as nonresident property, whereas in fact they were occupied by a resident of the town, and therefore, under the statutes, should be assessed to the occupant. The court held that, inasmuch as extrinsic proof was necessary, equity had jurisdiction. The same thing was held in *People ex rel. Barnard v. Wemple*, 22 N. E. Rep. 761, 117 N. Y. 77.

To the same effect are *Union Pac. R. Co. v. Cheyenne*, 5 Sup. Ct. Rep. 601, 113 U. S. 516; *Land Co. v. Gowen*, 48 Fed. Rep. 771; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Rumsey v. City of Buffalo*, 97 N. Y. 114; *Seminary v. Cramer*, 98 N. Y. 121.

Lyman D. Gilbert, John H. Weiss, James A. Stranahan, Dep. Atty. Gen., and W. U. Hensel, Atty. Gen., for defendant.

I. The *Adams Express Company* is liable to taxation under the laws of Pennsylvania for taxes accruing between the years 1868 and 188 , and the settlement of March 8, 1893, against said company by Auditor General Gregg and State Treasurer Morrison for capital stock from May 1, 1838, to the first Monday of November, 1889, as found on page 7 of the plaintiff's supplemental bill, and on page 14 of defendant's answer, was a lawful settlement under the laws of Pennsylvania, and must be so adjudged by this court if it shall take jurisdiction of the subject.

An inquiry into the character of that company requires an examination of the statutes of New York which preceded its creation, and of the grant of powers made by them to it. On 7th April, 1849, the legislature of that state passed the following act of assembly:

"An act in relation to suits by and against joint-stock companies and associations.

"1. Any joint-stock company or association, consisting of seven or more shareholders or associates, may sue and be sued, in the name of the president
v.58F.no.4—40

or treasurer, for the time being, of such joint-stock company or association; and all suits and proceedings so prosecuted by or against any such joint-stock company or association and all process or papers in such suits and proceedings on the president or treasurer for the time being of such joint-stock company or association shall have the same force and effect as regards the joint rights, property and effects of said joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders or associates in the manner now provided by law.

"2. No suit so commenced shall abate by reason of the death, removal or resignation of such president or treasurer of such joint-stock company or association, or the death or legal incapacity of any shareholder or associate during the pendency of such suit; but the same may be continued by or against the successor of the officer in whose name such suits shall have been commenced.

"3. The president or treasurer of any such joint-stock company or association shall not be liable in his own person or property, by reason of any suit prosecuted as above provided, by or against him, as nominal plaintiff or defendant therein; provided that such president or treasurer shall not be exempted from any liability to which he may be otherwise legally subject as a stockholder or shareholder in such joint-stock company or association.

"4. Nothing herein contained shall be construed to deprive the plaintiff of the right after judgment shall have been obtained against any such joint-stock company or association, as above provided, from suing all or any of the shareholders or associates therein individually as now provided by law, or of the right to proceed, in the first instance, against the persons constituting any such joint-stock company or association, in the manner now provided by law; but if it shall appear to any court in which any suit shall be prosecuted otherwise than as provided in the first section of this act, that the same is so prosecuted for the purpose of vexatiously or oppressively enhancing costs, such court shall not allow any more costs to be taxed and recovered in such suit than would be taxable and recoverable in case such suit was prosecuted in the manner provided in the first section of this act.

"5. Nothing herein contained shall be construed to confer on the joint-stock companies or associations mentioned in the first section of this act any of the rights or privileges of corporations except as herein specially provided."

Chapter 258, Laws N. Y. 72d Sess. 1849.

On 9th July, 1851, the legislature of that state passed the following additional act of assembly:

"An act to extend 'the act in relation to suits by and against joint-stock companies and associations' to companies having a joint or common interest in property.

"1. The act entitled 'An act in relation to suits by and against joint-stock companies and associations,' passed April 7, 1849, is hereby extended to any company or association composed of not less than seven persons who are owners of or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest; and the suits and proceedings authorized by the said act may be brought and maintained in the manner therein provided as well for any cause of action heretofore existing as for any that may hereafter occur.

"2. This act shall take effect immediately."

Chapter 455, Laws N. Y. 74th Sess. 1851.

On the 15th April, 1854, the legislature of that state passed the following act of assembly:

"An act to amend and in addition to the several acts relative to joint-stock companies.

"Whenever in pursuance of its articles of association the property of any joint-stock association is represented by shares of stock, it may be lawful for said association to provide by their articles of association that the death of any stockholder or the assignment of his stock shall not work a dissolution of

the association, but it shall continue as before, nor shall such company be dissolved except by judgment of a court for fraud in its management or other good cause to such court shown, or in pursuance of its articles of association.

"2. Such association may also by its articles of association provide that the shareholders may devolve upon any three or more of the partners the sole management of their business.

"3. This act shall in no court be construed to give said associations any rights, or privileges as corporations."

Chapter 245, Laws N. Y. 77th Sess. 1854.

The effect of this legislation, so far as it is material to the present inquiry, was to sanction the organization of joint-stock associations and companies, and to confer the following artificial powers upon them: To permit any joint-stock company or association which did not consist of less than seven shareholders or associates to sue and be sued in the name of the president or treasurer, the service of all processes or papers in such suits to be made on the president or treasurer of such company or association, with the same effect as if the suits were prosecuted in the name of all the shareholders or associates; to prevent the abatement of any suit by reason of the death, removal, or resignation of such officer of such company or association, or by the death or legal incapacity of any shareholder or associate during the pendency of a suit; to permit any joint-stock association whose property, in pursuance of its articles of association, is represented by shares of stock, to provide in its articles of association that the death of any stockholder, or the assignment of his stock, shall not work a dissolution of the association; to provide that such company shall not be dissolved except by judgment of a court for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association, and to allow the shareholders to declare in their articles of association that the sole management of their business may devolve upon three or more of their partners.

After the passage of this legislation, 18 gentlemen, on the 1st of July, 1854, entered into articles of association creating the Adams Express Company, and designating the city of New York as its principal place of business.

These articles of association sufficiently show that the Adams Express Company was formed under the legislation already mentioned, and that the artificial powers it enjoys are expressly sanctioned by that legislation, and derived from it. The character of these associations, in respect to state taxation, was made the subject of judicial inquiry in New York, and in the case of *People ex rel. Platt v. Wemple*, 22 N. E. Rep. 1046, 117 N. Y. 136, the court there declared that the words "incorporated or organized under any law of this state," as used in the tax act of 1881, "are not to be taken in a technical or restricted sense, and confined to associations brought into being according to the formality of the statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes, and, so far as possible for it, assume an independent personality, and claim privileges not possessed by individuals or copartnerships." The court in that case held that the United States Express Company, a corporation of the same character as the Adams Express Company, must be deemed to be incorporated for purposes of taxation, and as such was taxable under the revenue laws of that state.

In *People v. Coleman*, 31 N. E. Rep. 96, 133 N. Y. 279, this decision was reversed upon these grounds: The distinction between joint-stock companies or associations and corporations was said to be preserved in the taxing statutes by the use of the words "incorporated" and "organized," and by the fact that the formation of a corporation involves the merging of the common-law liability of the members for debts, and requires the substitution of a new or the retention of the old liability by an affirmative enactment; but in the case of joint-stock associations the common-law liability remains unchanged and unimpaired, needing no statutory intervention to preserve or restore it.

The judicial mind of New York has, therefore, within the short space of three years entertained and expressed conflicting opinions with regard to the liability of the Adams Express Company and similar express companies to taxation under the revenue laws of that state. But whatever difference of judicial opinion may exist in that state, the same questions have elsewhere arisen and been determined in perfect harmony with the view entertained

by this commonwealth of its right to tax the capital stock of the Adams Express Company for the period of time already mentioned.

The case of *Oliver v. Insurance Co.*, 100 Mass. 531, presented the following facts: A revenue statute of that commonwealth declared that "each fire, marine and fire and marine insurance company incorporated or associated under the laws of any government or state other than one of the United States shall annually pay to the treasurer of the commonwealth a tax of four per cent. upon all premiums charged or received on contracts made in this commonwealth for the insurance of property, or received or collected by its agents in this commonwealth." A bill in equity was filed by the treasurer of that commonwealth to restrain that company from prosecuting its business in Massachusetts until this tax had been by it paid. The company was an English joint-stock company, organized in 1836 under a deed of settlement, and after that time transacting business under that and two supplemental deeds of settlement, with powers and privileges conferred upon the company by three acts of parliament. Each of those acts expressly stipulated that it should not have the effect to incorporate the company, and the personal liability of the members for the obligations of the association was in each carefully preserved. The argument made on behalf of that company by its very learned counsel completely anticipates the argument presented by the learned counsel for the Adams Express Company, and the latter is a duplication of it. The court, in deciding the question, declared that there could be no doubt that the company was an insurance company associated under the laws of a government other than one of the United States, and that, therefore, it came literally within the terms used in the tax statute. But the decision did not rest upon that point. It was based upon the ascertainment that the company was a corporation within the meaning of the taxing legislation.

This decision has not only never been reversed, but its authority has never been questioned, in the commonwealth of Massachusetts. The cases of *Taft v. Ward*, 106 Mass. 518, and *Railroad v. Pearson*, 128 Mass. 445, do not in any manner consider or decide the question of tax liability of associations of this character under the revenue legislation of that or any other state. They deal entirely with questions affecting the liability of the members of such associations for the joint indebtedness, and the remedies to be used for the collection of claims against such associations. Examination, therefore, will sustain, we confidently assert, that under the legislation of Massachusetts associations of the character of the Adams Express Company are taxable under language similar to that used in the statutes of Pennsylvania, which are offered for the consideration of this court.

If ampler authority to sustain this branch of the contention of the commonwealth of Pennsylvania were needed, it can readily be found in the case of *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. In that case the supreme court of the United States reviews, upon appeal taken by the company from the supreme judicial court of Massachusetts, the decision there pronounced against it, and reported in 100 Mass. 531. The argument of the counsel for the company is given at length, and will be found to be not only substantially, but almost literally, that offered to the view of this court upon this branch of this case by the counsel for the Adams Express Company. Mr. Justice Miller, in considering the character of that company, declares:

"(1) It has a distinctive and artificial name by which it can make contracts.

"(2) It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

"(3) It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

"(4) Its existence as an entity, apart from the shareholders, is recognized by the act of parliament which enables it to sue its shareholders and be sued by them."

In all respects the powers which the supreme court of the United States thus found lodged with and enjoyed by that company are precisely those which the Adams Express Company enjoys under the sanction of the laws of the state of New York. The question presented by that case for decision to that court is thus judicially stated: "The question before us is whether an association, such as the one we are considering, in attempting to carry on its

business in a manner which requires corporate powers under legislative sanction, can claim, under a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals. We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate functions in that state on the condition of payment of the specified tax, is in no violation of the federal constitution or of any treaty protected by said constitution."

That decision not only stands unreversed, but unquestioned by any of the subsequent decisions of that high court. The doctrine announced in *Chapman v. Barney*, 9 Sup. Ct. Rep. 426, 129 U. S. 677, does not, and was not, in any manner, intended to, conflict with the decision announcing the liability of such associations to an equality of taxation with corporations transacting the same character of business under the laws of any state. Those decisions of the supreme courts of the United States and of Massachusetts are in harmony with the decisions of the other courts which are collected in note 2, p. 28, § 23, 1 *Spell. Priv. Corp.*; 11 *Amer. & Eng. Enc. Law*, 1031, 1045, 1054.

The fact to which the counsel for the company have made reference, that joint-stock associations are specifically mentioned in the twenty-first section of the revenue act of June 1, 1889, (P. L. 429,) and are not particularized in any of the earlier statutes imposing tax upon capital stock, does not justify the inference that the Adams Express Company was not taxable upon its capital stock until the passage of the revenue act of 1889. The twenty-third section of the revenue act of 1889 declares that pipe lines shall be taxed upon their gross receipts. The fourth section of the revenue act of April 24, 1874, (P. L. 70,) does not specifically include them among the companies that shall pay this kind of tax. This would be such an omission of companies of that character as would, under the argument now advanced by the Adams Express Company, require the court to hold that pipe-line companies were not taxable under the act of 1874, and could not be made taxable until they had been specifically mentioned in some later taxing statute. This argument the pipe lines invoked in their behalf, but it was rejected, and they were declared to be sufficiently described in the general words of the fourth section of the revenue act of 1874, and were taxable upon their gross receipts. *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307.

The taxing language in these statutes is therefore substantially the same as that contained in the legislation of Massachusetts, which was considered and decided by the courts of that state and of the United States in harmony with the present view of the commonwealth of Pennsylvania. That these questions would be decided in the same manner by the courts of this commonwealth is indicated by the decision in *Coal Co. v. Rogers*, 108 Pa. St. 147. In that case a limited partnership is called "a quasi corporation," and made subject to the provisions of Act May 8, 1876, p. 142, which authorizes an action for trespass to be brought against "any person or corporation." Such a construction would be in harmony with that which declares that the word "person" in a taxing statute included a corporation. *Society v. Yard*, 9 Pa. St. 359; *Endl. Interp. St.* § 87. Such a construction would be in keeping with and required by the constitution of Pennsylvania. Article 16 of that instrument declares by its title that it deals with "private corporations," and yet its thirteenth section contains the following provision:

"Sec. 13. The term 'corporations' as used in this article, shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations and not possessed by individuals or partnerships."

The tenth section of that article provides that upon certain terms and conditions "the general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or that may hereafter be granted."

Joint-stock companies can be formed under Act June 2, 1874, (P. L. 271,) and acquire the powers set forth in their written statement. That such companies can be deprived of their privileges by the general assembly cannot successfully be denied, and the grant to the general assembly of this power

of revocation must be found in the constitutional language already quoted. That section, therefore, treats the articles of association of such companies as a charter, and in respect to regulation for the public welfare places such an association upon an equality with corporations created by or doing business within the state.

We therefore respectfully submit that the commonwealth of Pennsylvania, under its constitution, its legislation, and the decisions of its own courts and those of other states and of the United States, is justified in holding that the Adams Express Company is, for purposes of taxation, a quasi corporation, and to be treated like all other corporations created by the authority of Pennsylvania or doing business within its limits, and as such taxable upon that proportion of its capital stock representing property owned by it within the limits of the commonwealth of Pennsylvania.

II. Has this court jurisdiction of the subject-matter of the controversy brought before it?

(a) Are the plaintiffs entitled to equitable relief?

(b) Is the suit in this case in fact and in law a suit against the state of Pennsylvania, and therefore to be dismissed as in violation of the eleventh amendment to the federal constitution?

(a) It is true that plaintiff's bill avers, and the argument of the plaintiff maintains, that the court should take jurisdiction because the threatened tax will constitute a cloud upon the title to real estate.

The answer to this proposition is that, notwithstanding the law of Pennsylvania of March 30, 1811, section 12, (5 Smith's Laws, 231,) declares that the "amount or balance of every account settled agreeably to this act due to the commonwealth shall be deemed and adjudged to be a lien," etc., it has been decided in a very recent case (*Wm. Wilson & Son Silversmith Co.'s Estate*, 24 Atl. Rep. 636, 150 Pa. St. 289) that it is the duty of the auditor general in all cases to file a certified copy in the county in which the lien is to take effect, and no such lien is created in the event of noncompliance with the act of 1827. Under that act the duty of filing a copy in the county of the debtor is applicable to the settlement of taxes under the act of 1811. The reasons of public policy, which is averse to secret liens, are declared by the supreme court to be applicable to state taxes under the act of 1811.

As the auditor general has neither threatened nor intended to file any such lien, we submit that the apprehensions of the plaintiff are wholly unfounded, and the averments of the answer that no lien has been created by the settlement must be taken to be true. Whatever lien exists or is apprehended exists in the nature of things under the law and from the liability of the company, however that may be finally adjudicated, and it does not arise from nor is it strengthened by the settlement of the auditor general. The plaintiffs, therefore, are entitled to no equitable relief upon the ground that any cloud upon the title of their property, or any obstruction to them in the free use of the same, is threatened. Any such averment in their bill is expressly denied by the answer.

It is contended here, and it must be established, to maintain this proceeding, that the tax here sought to be levied is wholly unwarranted by law, and that the complaining company is not an object of the Pennsylvania taxing statute. If this contention be true, then no real cloud upon the title of the property need be apprehended. *Cooley, Tax'n*, p. 779.

(b) This proceeding is a proceeding against the state of Pennsylvania, and therefore, under the prohibition of the eleventh amendment to the federal constitution, it cannot be sustained.

That amendment, adopted from considerations of public necessity, which have never been seriously questioned, declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The present suit is—First, the suit of Messrs. Sanford et al. v. The State of Pennsylvania, in which case it must be dismissed from this jurisdiction; or, second, it is a suit of the Adams Express Company v. The State of Pennsylvania, in which event it must also be dismissed from this jurisdiction; or it is, third, a suit of the Adams Express Company, a corporation, against D. McM. Gregg, in

which event there can be no further contention that the plaintiff is not subject to the tax laws of Pennsylvania; or, fourth, it is a suit of Sanford et al., citizens of another state, against Gregg, a citizen of this state. If the relation of the parties is that stated in the fourth proposition, there is no occasion for equitable relief, for the settlement of the auditor general can have no binding force or validity. His threat is *brutum fulmen*. His settlement can have no finality, requires no appeal, can ensue in no judgment, can create no lien, and exacts no security. If it is not a mere controversy between individuals, which can be settled at law, then it is in effect and in law a suit against the state of Pennsylvania, and a proceeding to restrain that commonwealth, to shackle its arm.

The bill, as appears by the record, is against D. McM. Gregg, "auditor general of the state of Pennsylvania," and not against him as an individual. He is in no way interested in this case other than in his official capacity as auditor general of the state, and whatever he intended doing or did do was as such official, acting in an official capacity for the state. Under this head there is an abundance of authorities. This question is thoroughly discussed in the case *In re Ayers*, 8 Sup. Ct. Rep. 164, 123 U. S. 443, in which are cited: *Georgia v. Brailsford*, 2 Dall. 402; *Ex parte Madrazzo*, 7 Pet. 627; *Kentucky v. Dennison*, 24 How. 66, 98; *Cunningham v. Railroad Co.*, 3 Sup. Ct. Rep. 292, 609, 109 U. S. 446; *Hagood v. Southern*, 6 Sup. Ct. Rep. 608, 117 U. S. 52; *Louisiana v. Jumel*, and *Elliott v. Wiltz*, 2 Sup. Ct. Rep. 128, 107 U. S. 711; *Board v. McComb*, 92 U. S. 531; *Kirtland v. Hotchkiss*, 100 U. S. 491; *New Hampshire v. State of Louisiana*, and *New York v. State of Louisiana*, (decided in 1883,) 2 Sup. Ct. Rep. 176, 108 U. S. 76. See, also, *De Saussure v. Gaillard*, 8 Sup. Ct. Rep. 1053, 127 U. S. 216.

In a recent argument before the supreme court of the United States, (In re Tyler, 13 Sup. Ct. Rep. 785, 149 U. S. 164,) Mr. J. Randolph Tucker, an eminent constitutional lawyer and commentator, states the subject thus:

"Where an officer of the law does an act under valid and constitutional authority of the government of his state, in obedience to her order, and in pursuance of his sworn duty as her officer, the act is not his own; it is the act of the state by its own will and mind and hand, the hand and will and mind of its own officer. It has no other means of acting. If this, its only, means may be held responsible, then the state's immunity from liability is a fiction and a mockery. If those by whom alone the state can act may be punished or prevented, it is folly to say the state is not punished and prevented. To enjoin the officer through whom only she can act is to enjoin her; to sue these is to sue her. To forbid these to act, to put them in duress of imprisonment, to force them, is to act judicially on her. If these are deterred by such proceedings from acting, she is deterred from action; is a state maimed and helpless; a state only in name; a sovereign without will or capacity to act at all.

"This doctrine of identity of the state with its officers, as 'the head with its members,' is recognized as to her responsibility under fourteenth amendment, in the Virginia Cases, 100 U. S. 313, 370. If so, why not applicable to her immunity under the eleventh amendment?

"The United States cannot be sued, and hence its officers cannot be sued for their representative action. *Mississippi v. Johnson*, 4 Wall. 475; *Georgia v. Stanton*, 6 Wall. 50; *Noble v. Railroad Co.*, 13 Sup. Ct. Rep. 271, 147 U. S. 165; *New Orleans v. Paine*, 13 Sup. Ct. Rep. 303, 147 U. S. 261."

"Where the officer of the state has no right to possession of or title to property, nor right or interest in action, which is separable from the state's right, title, and interest, then the officer in respect of such right, title, and interest is protected by the eleventh amendment from suit against him, because it is really against her.

"Especially is the foregoing true, when the officer is charged with discretion in his action, and is not merely ministerial; for his mind and will in discretionary action is her mind and will, and cannot by suit be constrained or forbidden. Court cannot substitute judicial or executive action of state officer. *Board v. McComb*, 92 U. S. 531; *Cheatham v. U. S.*, Id. 55; *State Railroad Tax Cases*, Id. 575; *Heine v. Levee Com'rs*, 19 Wall. 660. In this case the action of the board of liquidation was judicial, and conclusive on

taxpayer, unless by resort to the tribunal created by the state for correction of the error." *Stanley v. Supervisors*, 7 Sup. Ct. Rep. 1234, 121 U. S. 535.

"An officer chargd with a sovereign function of a state cannot be punished by fine and imprisonment, or prevented by injunction from discharging it; nor can such officer holding by state authority any property be enjoined from so holding it, nor can it be taken from him by any court, because it is in fact a proceeding against the state; and decree so affects her that she should be a party, which she cannot be because of eleventh amendment. In all such cases officers have the state's immunity in order to secure her own."

And although in this South Carolina case the supreme court has recently denied the application for a writ of habeas corpus, it has done so expressly upon the ground that the seizure by the officers of the state of South Carolina for taxes of the property of a railroad in the hands of a receiver by force was unjustifiable, and could not be defended; that the claims of the state for taxes are not superior to the general rule which makes property placed in the hands of a receiver subject to the orders of the court. "They are to be determined in the regular way, and in the proper manner." That is precisely what is proposed to be done by the state of Pennsylvania in this case.

It is not the province of the federal courts to interfere with the policy of the revenue laws of the states. *High, Inj.* (3d Ed.) §§ 485, 486, p. 366; *Id.*, § 491; *Bank v. Billings*, 4 Pet. 514; *St. Louis v. Ferry Co.*, 11 Wall. 425; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Memphis Gas-Light Co. v. Taxing Dist. of Shelby Co.*, 3 Sup. Ct. Rep. 205, 109 U. S. 398; *Haley v. Breeze*, 12 Sup. Ct. Rep. 836, 144 U. S. 130; *Dows v. City of Chicago*, 11 Wall. 108; *Walston v. Nevin*, 9 Sup. Ct. Rep. 192, 128 U. S. 578; *Shelton v. Platt*, 11 Sup. Ct. Rep. 646, 139 U. S. 591; *Allen v. Car Co.*, 11 Sup. Ct. Rep. 682, 139 U. S. 658; *Express Co. v. Seibert*, 12 Sup. Ct. Rep. 250, 142 U. S. 348; *State Railroad Tax Cases*, 92 U. S. 614, 615; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 26 Fed. Rep. 11; *Marye v. Parsons*, 5 Sup. Ct. Rep. 932, 962, 114 U. S. 332-335; *Henderson Bridge Co. v. Henderson City*, 12 Sup. Ct. Rep. 114, 141 U. S. 688; *Pennoyer v. McConaughy*, (1891,) 11 Sup. Ct. Rep. 699, 140 U. S. 17.

DALLAS, Circuit Judge. My consideration of this case has been greatly facilitated by the thorough and able arguments which have been presented by counsel; but it is not necessary to enter upon a discussion of the several questions to which they have been directed. A brief statement of the conclusions which have been reached will suffice to indicate, with reference to the stipulation filed, the grounds of the decision now to be made.

1. The Adams Express Company is not a corporation. Consequently—First, it is not subject to the tax in question; and, second, the defendant, in making the settlement against that company, did not act by authority of the state of Pennsylvania, and therefore this suit is not, in effect, against that state, but is one to which the judicial power of the United States extends.

2. It is undoubtedly true that the federal courts should be extremely cautious in interfering with the collection of the revenues of the several states; but this bill is not aimed at the collection of current revenue, but of back taxes covering a period of 20 years; and this settlement, if not itself a presently existing cloud upon title to real estate, is certainly a potential threat to create one, which is not effectually withdrawn by the allegation that this defendant does not propose to pursue it. In *Jackson v. Cator*, 5 Ves. 688, the Lord Chancellor (Loughborough) said: "I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait until they are cut down." This de-

fendant asserts a right to create a lien, and has done all that is necessary to enable him, or his successor in office, to do so under color of the right asserted. This is sufficient ground for apprehending that the power (which unquestionably exists) to cloud the plaintiffs' title will be exercised; and the "naked and unsupported" promise of the defendant that he will refrain from exercising that power does not defeat the right of the plaintiffs to have its exercise prohibited. *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. Rep. 324. The first step towards the creation of a lien having been taken, the jurisdiction in equity then attached, and cannot now be divested by the averment of the defendant that he does not intend to proceed further in that direction; and if it be assumed that equity would interpose primarily only to prevent the perfection of the apprehended lien, yet, having acquired jurisdiction for that purpose, the court should not hesitate to strike at the root of the wrong by annulling the unlawful preliminary procedure by which the completed injury has been rendered possible. Therefore, and irrespective of the other grounds which have been urged with much force, I am of opinion that this suit is within the equitable jurisdiction of this court.

The complainants are entitled to relief in accordance with the stipulation filed, for which a decree may be prepared and, if requisite, be submitted for settlement.

FARMERS' & MERCHANTS' BANK OF CLAY CENTER v. FARWELL
et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1893.)

No. 312.

1. ASSIGNMENT—RIGHT OF ASSIGNEE.

One who, being indebted to a bank, and also to a firm, had assigned to the latter his interest in certain fire insurance policies, prosecuted actions thereon in his own name, testifying that he was solely interested therein. Previously, he had refused to assign the policies to the bank, but informed its officers that when he collected the money he would deposit it, and the bank could pay itself; and the bank, having no knowledge of the assignment, and relying on these statements, granted him further credit, and made him other loans. Subsequently, after a settlement of certain of the actions, the attorney for the assignor, without his knowledge, or that of the assignees, deposited the proceeds in the bank. *Held* that, by the assignment, the entire beneficial interest in the policies vested in the assignees, and entitled them, as against the bank, to the proceeds of the settlement.

2. SAME—FAILURE TO GIVE NOTICE OF ASSIGNMENT—ESTOPPEL.

The assignees were not estopped to claim the money because of their failure to give notice of the assignment, nor for allowing the prosecution of the actions in the assignor's name, as they had no knowledge of the assignor's indebtedness to the bank, or that the latter intended to extend his credit.

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Suit by John V. Farwell, Charles B. Farwell, John K. Harmon, John T. Chumasero, and John V. Farwell, Jr., doing busi-

ness under the firm name of John V. Farwell & Co., against the Farmers' & Merchants' Bank of Clay Center, Kan., to recover proceeds of insurance policies, as assignees thereof. Decree for complainants. Respondent appeals. Affirmed.

Statement by SANBORN, Circuit Judge:

H. L. Frishman, a merchant in Clay Center, in the state of Kansas, sustained a loss by fire March 3, 1888. He held nine policies of insurance against this loss, issued by nine insurance companies. In the summer of 1888 he commenced actions against these companies upon these policies, and they remained pending until 1891. At the time of the fire he owed the appellant, the Farmers' & Merchants' Bank of Clay Center, Kan., \$3,000, but before November 23, 1888, he had reduced this indebtedness to \$2,200. At the time of the fire he owed the appellees, John V. Farwell & Co., \$4,000, and on November 23, 1888, he owed them \$11,000. On that day he made a written assignment of his interest in the insurance policies, and in the moneys to be derived from them, to the appellees, to secure his indebtedness to them. This assignment was not filed in any court, but was delivered to one of the attorneys of Farwell & Co. Subsequent to this assignment, Frishman testified, in the trial of the actions against the insurance companies, which were prosecuted in his name, that he was the owner of the policies, and that no one else was interested in them, and this fact was known to the officers of the bank. Frishman informed some of these officers after the assignment that he could pay his debt to the bank when he collected the money on these insurance policies, that this money would be deposited with their bank, and that they could then pay the bank out of it. In reliance upon these statements, they permitted Frishman to renew his notes to the bank repeatedly; allowed him on one occasion to take up an indorsed note with his own note, without indorsement, and loaned him some more money; so that he owed the bank \$3,500 on March 19, 1891, all of which was past due. The bank officers knew that Frishman was indebted to Farwell & Co., but did not know that he had assigned the policies to them. They had demanded an assignment of the policies to the bank, but he had refused to make it. Farwell & Co. did not know that Frishman was indebted to the bank, nor that he had testified that he alone was interested in the policies, nor that he had made the representations recited to the bank. The attorneys who prosecuted the actions against the insurance companies were employed by Frishman, and were not advised of the assignment to the appellees. One of these attorneys, on March 19, 1891, settled certain of these actions, and collected \$3,480.19, which, without the authority or knowledge of Frishman, he deposited to the credit of Frishman in this bank. On the same day the bank charged the indebtedness of Frishman to it against this credit. Frishman and Farwell & Co. immediately notified the bank that the money so deposited was the property of the latter, under the assignment, and Farwell & Co. brought this suit in the court below, and obtained a decree for its recovery. This decree is challenged by this appeal.

F. B. Dawes, (Dawes & Durrin, on the brief,) for appellant.

Charles Blood Smith, (W. H. Rossington and Clifford Histed, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

A bank has a lien on the moneys or funds of a depositor to secure his overdue indebtedness to it, and may at once apply these funds to the payment of such a debt. The foundation of this lien is the mutual relation of the parties. The depositor owes the bank for money he may have borrowed, and his debt is due. The bank owes the depositor for moneys he has deposited, and that debt is due. If

the depositor brings an action for the amount of his deposit, the bank can, of course, set off the past-due debt he owes it, and the balance only can be recovered. The lien of the bank upon moneys deposited with it—the right of the bank to charge the overdue debt of its depositor against his deposit—is based upon this right of set-off, and is coextensive with it. It is essential to its existence that each of the parties should be a debtor to the other, and that each of the debts should be due. Not only this, but, as against third parties, the indebtedness of the bank that becomes subject to this right of lien must have arisen from the deposit of moneys or funds that belonged to the depositor himself. He cannot, by depositing moneys of others intrusted to his care, pay his own debt to the bank, or enable the bank to do so. In the absence of fraud or gross negligence on the part of third parties, the bank has no higher right or better title to their moneys intrusted to its depositor than the depositor has himself. It is met here by the rule that equity will follow moneys held in a fiduciary capacity as far as they can be identified, and restore them to the beneficial owner of them. If they are deposited in the bank by a trustee, agent, factor, or bailee, even if they are mingled with his own money, they do not become his property, and the bank stands in the shoes of its depositors. It must pay the money to the true owner. *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 383; *Knatchbull v. Hallett*, (In re Hallett's Estate,) 13 Ch. Div. 696, 710, 719; *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 67, 68; *Bank v. King*, 57 Pa. St. 202, 209; *Van Alen v. Bank*, 52 N. Y. 1; *Manningford v. Toleman*, 1 Colly. 670; *Murray v. Pinkett*, 12 Clark & F. 764, 785; *Jordan v. Bank*, 74 N. Y. 467, 472; *Falkland v. Bank*, 84 N. Y. 145, 149, 150. In *Pennell v. Deffell*, supra, Lord Justice Knight Bruce said:

"When a trustee pays trust money into a bank, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money so paid would have done, had it specifically been placed in a particular depository, and so remained."

In *Murray v. Pinkett*, supra, the trustee of certain bank shares, which stood in his own name on the books of the bank, borrowed £4,000 of the latter upon his agreement to pledge the shares as security for the loan. In summing up the case the lord chancellor said:

"Then here are two equities; that is to say, here is a trustee of the property, which he held for the benefit of the cestuis que trustent, endeavoring to create an equity upon that property to secure his own debt. Which of these two equities is to prevail? Undoubtedly, the former."

In *Bank v. King*, supra, a collector of rents deposited moneys of his principal in a bank in his own name. It was attached by a creditor of a depositor, and the principal immediately gave notice of his ownership. It was held that the attaching creditor stood in the shoes of the depositor, and could recover only what the depositor could.

The case before us is stronger than any we have cited, because these moneys were never deposited with the bank by the trustee, or with his consent. They were deposited by a mistake of his attorney, and without his knowledge or authority. The entire beneficial interest in the insurance policies, and in the moneys collected from them, as against Frishman, vested in Farwell & Co. by his assignment to them in 1888. They were intrusted to him to collect for their benefit. If, after he had collected their proceeds, he had deposited this money with the bank, with the intent to thus apply it to the payment of his own debt to the latter, he would have been guilty of a gross breach of trust, if not of a more serious offense. By mistake, and without his knowledge, these moneys of Farwell & Co. were deposited with this bank. It is the province of a court of equity to enforce trusts and to correct mistakes. The decree below corrected the mistake of the attorney who deposited this money, and enforced the trust under which it was collected. It directed that the money should be paid to the beneficial owners. To reverse it would be to enforce a mistake, and to compel the breach of a trust.

But it is said that Farwell & Co. are estopped to claim this money because they concealed the assignment, and permitted Frishman to appear as the owner of the policies, and he, by his testimony that he alone was interested in them, in the trial of the actions against the insurance companies, and by his representations to the bank, induced it to extend the time of payment of his debt, to surrender the security of an indorser, and to increase its loan. This position is untenable: First. It is the province of a court of equity to correct mistakes. Equity considers that as done which ought to have been done. The money in dispute must be treated as though the attorney of Frishman had never made the mistake of depositing it in the bank, but had paid it to Frishman, as it was his duty to do. Farwell & Co. would then have had the promise of Frishman to pay this money to them, supported by the legal title evidenced by their assignment and the possession in their trustee, while the bank would have had the bare promise of Frishman to violate his trust and pay the money to it. Where equities are equal the legal title prevails, and the bank could never have maintained any claim to this fund. Second. An essential element of such an equitable estoppel as will defeat a legal title is a willful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be either some moral turpitude or some breach of duty. We find no evidence of anything of this kind in this record. There is some evidence that Farwell & Co. and Frishman agreed that they would not give notice of the assignment while the suits were pending because they thought they could be more successfully prosecuted by Frishman than by Farwell & Co. To prosecute them in the assignor's name was a right expressly given to them by the statutes of Kansas, which provide that in case of any such transfer of interest the action may be continued in the name of the original parties, or the court may allow the person to whom the transfer is made to be substituted in the action. 2 Gen. St. Kan. 1889, par. 4117. At common law a

chose in action not founded on a negotiable instrument is not assignable, so as to give the assignee a right to sue in his own name. The action must be brought in the name of the original owner. There was nothing in this agreement, or in the prosecution of these actions in Frishman's name, evidencing any intent on the part of Farwell & Co. to deceive the bank, or to give a delusive credit to Frishman. They did not know that he was indebted to the bank, or that the bank intended to give him credit.

The case of *Burnett v. Gustafson*, 54 Iowa, 86, 6 N. W. 132, is cited by counsel for appellant in support of his contention. In that case the owner of certain cattle in Iowa gave a chattel mortgage upon them, and it was duly recorded in the proper office. The mortgagee permitted him to remove the cattle from Iowa to Chicago, and to sell them there in his own name. He received the proceeds. He deposited them in a bank in Chicago to the credit of his own bank in Iowa. The bank in Iowa passed these proceeds to his individual credit, where they remained for several weeks, until one of his notes to the bank, for \$1,000, fell due. He then drew a check on the bank for the amount of his note, payable to the latter out of this deposit, and the bank paid it, and surrendered the note. Subsequently, the mortgagee of the cattle claimed to recover the amount of this check from the bank. It is evident that there is a clear distinction between this case and the one at bar. In the former the mortgage, by its terms, covered the cattle only, and gave no authority to the mortgagor to sell them, or to receive or dispose of the proceeds for the benefit of the mortgagee. In the latter the assignment expressly covers the policies, and the moneys to be collected on them, and Frishman was expressly authorized to receive the money, and pay it over to the assignees. In the former case the moneys were deposited by the mortgagor himself, and they were applied by his own act to the payment of his debt to the bank. In the latter they were deposited by mistake by another, and they were seized by the bank without the consent of Frishman. It might well be held in the Iowa case that the bank was authorized to presume that the mortgage lien had been discharged, or that, if it had not, the mortgagee would follow the cattle, and not their proceeds. But there is no warrant for any such holding on the facts of this case. Undoubtedly, if the insurance companies paid Frishman in reliance on his apparent title, Farwell & Co. would be estopped to demand a second payment to themselves. This is because they knew that the natural and probable consequence of their silence would be such a payment to Frishman, and hence it became their duty to give notice to the companies of their assignment, if they intended to demand payment to themselves. Again, if, while he held possession of the policies, and was prosecuting the actions upon them in his own name, Frishman had assigned his claim against the companies to the bank or to a third person for value, and without notice of the prior assignment, and the subsequent assignee had first given notice to the insurance companies of his assignment, Farwell & Co. would have been estopped to claim the proceeds of the policies

as against such an assignee. To this effect are *Dearle v. Hall*, 3 Russ. 1; *Spain v. Hamilton*, 1 Wall. 604; and *Judson v. Corcoran*, 17 How. 614. And they rest upon the rule that where one of two innocent parties, holding titles of equal apparent validity, must suffer through the fault of a third, that one must bear the loss who has put it in the power of the third to commit the fraud. In *Williams v. Thorp*, 2 Sim. 570, and in *Ex Parte Colvill*, 1 Mont. Bankr. Cas. 110, it was held that the assignee of an insurance policy, who had given no notice to the company of his assignment, could not recover a fund which had been collected by the assignee in bankruptcy of the original assignor under a subsequent assignment. But these cases are far from holding that, if the original assignor had collected the money on the insurance policies, the courts would compel him to violate his trust, and turn it over to his general creditors. If *Farwell & Co.* had been informed that the bank was about to give credit on the faith of *Frishman's* apparent title, and had then represented it to be good, or if the assignment they received had been subject to such registry statutes as commonly govern deeds and chattel mortgages, and they had kept it from the registry with the intent to give the assignor a delusive credit, an estoppel might have arisen, because in each of these cases they would have failed to perform a plain duty. To this effect are *Hilliard v. Cagle*, 46 Miss. 309; *Hafner v. Irwin*, 1 Ired. 490; *Hildeburn v. Brown*, 17 B. Mon. 779; and *Anderson v. Armstead*, 69 Ill. 452.

These cases to which we have referred in the discussion of this question of estoppel are cited by counsel for the appellant in support of their contention. In each of them there was some evidence of moral turpitude, or of such negligence of the rights of others as was tantamount to a breach of duty, but in the case at bar there is nothing of this character. *Farwell & Co.* trusted *Frishman*, as they had a right to do, to prosecute these suits and collect this money for them. They trusted him to do it in his own name, and the sequel has proved that their faith was well founded. He did not assign the policies to another, but he refused to do so. He did not appropriate the money he collected to his own use, or to the use of other creditors; but when the bank undertook to do so, by taking advantage of a mistake committed by another, he immediately notified its officers that the money belonged to *Farwell & Co.* *Farwell & Co.* never knew that *Frishman* owed the bank, or that it was extending credit to him on the faith of his ownership of these policies, while the officers of the bank did know of *Frishman's* indebtedness to *Farwell & Co.* To create an estoppel, there must be knowledge, actual or constructive, by the party making the representation or the concealment, that the other party intends, or is likely, to act upon it. *Andrews v. Lyons*, 11 Allen, 349. No statute has been called to our attention which authorized or required the registration of this assignment in order to give it validity against creditors of the assignor, and we know of no rule of law which required these assignees to give unknown creditors of their assignor notice of their assignment in order to

protect themselves against the claims of the latter; nor do we know of any method by which they could have effectually given such a notice. Mr. Justice Field, in delivering the opinion of the supreme court in *Henshaw v. Bissell*, 18 Wall. 255, 271, declared "that there must be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to a constructive fraud," to warrant the application of the doctrine of equitable estoppel. As there was no knowledge on the part of Farwell & Co., and no reasonable ground to anticipate that the bank intended to act, or was acting, on the faith of Frishman's apparent title to the policies, there could have been no intent on their part to induce it to so act. It was no breach of duty on their part to fail to notify the bank of the assignment, because they did not know, and could not anticipate, that it would act upon Frishman's apparent title, and negligence that does not amount to a breach of duty does not constitute constructive fraud, and is not sufficient to raise an estoppel. *Henshaw v. Bissell*, supra; *Brant v. Iron Co.*, 93 U. S. 326, 336; *Copeland v. Copeland*, 28 Me. 525, 540; *Hill v. Epley*, 31 Pa. St. 331, 334; *Com. v. Moltz*, 10 Pa. St. 527, 531; *Zuchtmann v. Roberts*, 109 Mass. 53; *Boggs v. Mining Co.*, 14 Cal. 279, 368; *Davis v. Davis*, 26 Cal. 23. The decree below is affirmed, with costs.

FARMERS' LOAN & TRUST CO. v. OREGON & W. T. R. CO., (CONGDON,
Intervener.)

(Circuit Court, D. Oregon. November 3, 1893.)

No. 1,896.

1. SALE—RAILROAD BONDS—COUPONS.

A contract for the sale of railroad bonds held to include overdue coupons, where it appeared that the contract contemplated a purchase of the railroad free from all indebtedness, and that the purchase of the bonds was merely a means to that end.

2. SAME—BONA FIDE PURCHASER.

One who took an assignment of such coupons, with knowledge of the contract, held not to be a bona fide purchaser.

In Equity. Bill by the Farmers' Loan & Trust Company against the Oregon & Washington Territory Railroad Company to foreclose a mortgage. Chester A. Congdon intervenes. Petition denied.

C. E. S. Wood, for petitioner.

Lewis L. McArthur and Richard C. Dale, for C. B. Wright.

BELLINGER, District Judge. Chester A. Congdon files his petition of intervention in this suit, claiming to be the holder and owner, for value, of 5,866 coupons of the consolidated first mortgage bonds of the defendant company, of the par value of \$30 each. These coupons matured on July 1, 1890, and January 1, 1891. There was a decree of foreclosure heretofore made in this suit, of the mortgage in question, but such decree did not provide for the payment of any coupons maturing prior to January 1, 1891, or in any way refer

to such coupons. The petitioner prays that, as the owner of these coupons, he be allowed to participate in the proceeds of the sale had under the decree of foreclosure, and that the decree be modified accordingly. The answer to this petition denies that the petitioner is a bona fide holder of the coupons in question, and alleges that on the 27th day of February, 1891, G. W. Hunt was the owner of the bonds to which these coupons were attached, and then sold such bonds to C. B. Wright for a valuable consideration paid by Wright; that the petitioner knew of such sale, and, having such knowledge, accepted such coupons from Hunt without consideration, knowing that Hunt had wrongfully detached them from the bonds after the sale to Wright, and in fraud of the latter's rights; that Wright is the owner of the coupons mentioned in the petition. The ownership of these coupons is the question to be decided.

On the 27th day of February, 1891, G. W. Hunt was the president, manager, and in fact owner, of the Oregon & Washington Territory Railroad, and of all its bonds, except 1,142 of a first issue on what is known as the Pendleton Division, already sold, and then owned by C. B. Wright. On that day he entered into the following agreement with Wright:

"Philadelphia, Pa., Feb. 27, 1891.

"It is hereby agreed between C. B. Wright, of Philadelphia, Pa., and G. W. Hunt, of Walla Walla, Wash., as follows: The said Hunt agrees to deliver, and the said Wright to take, all of the issue of bonds of the Oregon & Washington Territory R. R. Co., (except 1,142 bonds of the first issue on the Pendleton Division, already sold,) at 90 per cent. of their par value, at \$20,000 per mile, or at a purchase price of \$18,000 per mile. There are said to be 111 miles of said road, but the exact mileage shall be determined by actual measurement, by two competent parties, one to be selected by each of the parties to this contract. If said road is not in a fair and reasonable good condition, according to the standard of western railroads, the said Hunt agrees to put it in such a condition, to the reasonable satisfaction of the president and chief engineer of the Northern Pacific, at his own expense. This provision applies only to roadbed, not to stations or other improvements. The said Hunt further agrees to deliver to said Wright, without additional compensation, 51 per cent. of the capital stock of said corporation.

"It is further agreed that said Hunt shall be paid for all the rolling stock of said corporation or of said Hunt, and used by said corporation, an additional sum, to be determined by T. F. Oakes, president of the N. P. R. R., and G. W. Hunt. Also, that the said Hunt shall be allowed to build and complete, ready for the rolling stock, about 42 miles of extension of said road, as follows:

"About 18 miles to the Snake river.
 " 12 " to the near Conalle.
 " 12 " to the near Milton.

--All in Washington and Oregon, whenever the same shall be built, and at such price as may be agreed on with the said T. F. Oakes.

"The terms of payment to be as follows, \$75,000 cash, which immediate payment shall be further secured by said Hunt pledging with said Wright, as collateral security, until the second payment is made, all the capital stock of said corporation remaining and belonging to said Hunt, over and above the 51 per cent. aforesaid.

"\$800,000 to be paid on Friday, April 17th, 1891.

"\$300,000 " " " " July 1st, 1891.

"\$400,000 " " " " September 1st, 1891.

--And the balance on December 1st, 1891. Deferred payments to draw interest at 6 per cent.

"It is further agreed that said road shall be delivered clear and free of floating (or unsecured) indebtedness, and that the said Hunt, as president of said corporation, shall lend his best efforts and his time to the reorganization of said corporation, as the said Wright or his successors shall direct.

"In the presence of

"C. E. S. Wood.

"C. B. Wright, Jr.

C. B. Wright. [Seal.]

G. W. Hunt. [Seal.]

C. B. Wright."

While this agreement does not, in exact terms, state that the sale includes all the coupons of all the bonds not already owned by Wright, such is its effect. The provisions that Hunt is to deliver, and Wright take, "all of the issue of bonds," except 1,142 already owned by Wright; that the road shall be delivered clear and free of floating or unsecured indebtedness; that the bonds are to be taken at 90 per cent. of their par value, at \$20,000 per mile, "or at a purchase price" of the road "of \$18,000 per mile," and the further provision for the purchase of all the rolling stock of the road and of Hunt, and of 42 additional miles of road to be built by Hunt, at prices to be determined by T. F. Oakes, president of the Northern Pacific Railroad Company,—show that this was intended to be a purchase of the road free from all indebtedness, and that the purchase of the bonds of the road was merely a means to that end.

The remaining question, then, is, did Congdon, the petitioner, purchase these coupons, as claimed by him, under circumstances that entitle him to the protection of a bona fide purchaser?

At the time the agreement between Hunt and Wright was made, the bonds in question were deposited as collateral security for Hunt's debts with the Park National Bank and J. Kennedy, Tod & Co., both of New York. Of the overdue coupons now in controversy, 2,388 were at the former bank, and 3,478 at the bank of J. Kennedy, Tod & Co. The collaterals held by the Park National Bank were, in greater part, to secure Ladd & Tilton. All of them were so held in the first instance, but subsequently, at different times, at Hunt's request, portions of them were agreed to be held to secure certain other creditors, whose debts were pressing. These bonds and coupons are still in the Park National Bank. The 3,478 coupons at the bank of J. Kennedy, Tod & Co. were delivered to C. E. S. Wood, upon his order, but on account, presumably, of Mr. Congdon, whose attorney Mr. Wood now is. These latter coupons were offered in evidence on this hearing in behalf of Mr. Congdon. The coupons in question were overdue at the time of the agreement between Hunt and Wright. It is claimed for Congdon that they had been detached from the bonds prior to that time, and that he purchased them in good faith, without notice of Wright's claim, and in pursuance of an agreement with Hunt theretofore had, prior to the latter's agreement with Wright. In his testimony, Hunt does not state when the coupons were cut off, further than that it was done by his order at different times, by the parties who held the bonds; that he had ordered them cut off whenever they were due. The witness King, loan clerk of the Park National Bank, testifies that he does not know how or when the coupons belonging to the bonds in that bank were

cut from the bonds; that it might have been done while he was away from the bank for a day, sick, and he would know nothing of it; and that he does not know who would have knowledge of it, unless it is Baldwin, assistant cashier of the bank. Baldwin testifies that he knows nothing on the subject, and does not know who would know, unless it is King. William S. Tod, of the banking firm of J. Kennedy, Tod & Co., testifies with particularity to the receipt of bonds at different times from Hunt, and to their delivery, giving dates and amounts, but knows nothing as to the cutting off of coupons. A letter is in evidence from Ladd & Tilton to the Park National Bank, dated April 28, 1891, in which the writer says that "early in 1891 Mr. Wilcox cut off some O. & W. T. consolidated coupons, and left them with you," and they request the bank to forward these coupons by registered mail. Mr. Wilcox was the agent of Ladd & Tilton. He was a witness for the petitioner, but was not examined as to the cutting off of these coupons. On the 21st of May, 1892, Mr. W. S. Ladd, of Ladd & Tilton, answering a letter from Wright, says, "I understood from Mr. Hunt that, when the bonds were delivered to you, it would be with the coupons cut off up to that date, and so the coupons were cut off." From this it seems that the coupons attached to bonds in the Park National Bank were not detached at the time of the sale of these bonds to Wright, February 27, 1891, but that thereafter Hunt represented to Ladd & Tilton that the bonds sold to Wright were to be delivered with the coupons cut off up to that date, and that thereupon the coupons were cut off. What is true of these coupons is, no doubt, also true of those in the custody of J. Kennedy, Tod & Co. The matter of the cutting off of these coupons is not decisive of the rights of the parties. It is important as tending to show good faith, or want of good faith, on the part of Hunt in the transaction; as tending to show that the coupons were not cut off as fast as they matured, in obedience to a direction from Hunt to that effect, as he tries to have it appear, but that they were cut off after the sale to Wright, and in order that the bonds sold might be delivered to Wright without the attached coupons.

Hunt testifies that he had been "carrying" these coupons, and that he means by this that he was paying the interest on the bonds out of his own pocket, and that Wright knew this. He further explains this statement by saying, "The bonds belonged to me, and I borrowed moneys, and put up the bonds as collateral security to the parties I owed." But this would not alter his relations to the coupons. It has no bearing upon the question of sale to Wright, which, so far as such "carrying" of the bonds is concerned, may as well have been of coupons as of bonds.

Hunt's assignment of coupons to Congdon is dated April 2, 1891, —more than a month later than the agreement between Hunt and Wright. The consideration stated is \$120,000. This \$120,000 was a pre-existing debt due Congdon from Hunt. Notwithstanding the claim made that Congdon took these coupons on this debt in

good faith, he presented an order from Hunt to Wright for this \$120,000, which he sought to have paid out of the moneys which Wright had agreed to pay Hunt for these bonds, and he claimed, and wrote to Wright at length to convince him, that this order operated as an assignment of so much of the moneys due from Wright under the latter's contract with Hunt. In other words, Congdon now claims ownership of these coupons as a purchaser of them in good faith on his debt, after having tried to avail himself of Wright's contract of purchase to get such debt paid out of the price agreed to be paid for these coupons, and the bonds to which they were attached. Wright refused to accept the order for the reason that he was compelled to pay the amount of his obligation to the creditors of Hunt who held the bonds of the company. The assignment of coupons to Congdon is dated April 2, 1891. On the 16th of the same month, Wright wrote to Congdon, saying that he had not had an opportunity, until that date, to look over the document handed him (Wright) by Congdon, in New York, "some days ago." The document referred to was a copy of Hunt's order to Wright to pay Hunt's debt to Congdon out of the payments due Hunt under the February contract. Wright explains his position in his letter,—that he must "corral" the bonds of the Oregon & Washington Territory, as these "govern the road," and he does not know, and cannot know, what amount will be due Hunt, until these bonds are corraled,—until he knows what amount "has to be advanced to cover the amount of bonds on the road." This letter to Congdon also says, "I understand you have seen a copy of the contract,"—the contract between Wright and Hunt. Congdon answered this letter on May 2d, stating that, at the time he took the order from Hunt, he had seen a copy of the contract referred to. He insisted in this letter that Hunt's order entitled him to receive \$120,000 from Wright out of the price Wright was to pay Hunt under their agreement. He did not, in this letter, make any reference to coupons, although the letter to which this was an answer had explained Wright's refusal to accept Hunt's order by stating that he (Wright) was under the necessity of "corralling" the indebtedness which "governed the road." If Congdon had, or supposed he had, these coupons, at that time, as security for the debt for which the order was given, he would have mentioned the fact. These coupons comprised a part of the debt for which the road was held, and would therefore be what Wright was trying to "corral." With these coupons, Congdon would be among the favored class of Hunt's creditors. When Wright said to Congdon, "I cannot pay your order, because I must pay those whose debts are liens upon the road," it is incredible that Congdon would, if he had at the time a contract for these coupons, write at length in reply, and endeavor to convince Wright that he should pay the order, and yet omit to inform him that he held these coupons, which made his debt a lien on the road. Congdon has not testified in the case, but his correspondence in evidence leaves nothing to be said upon the question of his good faith

in the matter of the claim made in his petition. The assignment of April 2, 1891, or any previous promise of Hunt made in consideration of Congdon's antecedent debt, does not give the latter the better right, as against Wright, who gave his acceptances for large sums of money, which he subsequently paid, without notice of the claim now made, in discharge of the debts for which the bonds and coupons in question were pledged.

I conclude that, by the agreement between Hunt and Wright, the latter became the owner of the coupons in controversy; that such was the intention of the parties, and is the effect of their agreement; that the detaching of these coupons was an afterthought on the part of Hunt and the petitioner; that the latter took his assignment subsequent to the agreement between Hunt and Wright, and probably subsequent to the refusal of the latter to accept Hunt's order, although it antedates such refusal; and that he took such assignment with notice of Wright's purchase. The prayer of the petitioner is denied.

REPUBLICAN MOUNTAIN SILVER MINES, Limited, et al. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 290.

1. FOREIGN CORPORATIONS—DISSOLUTION—EQUITABLE JURISDICTION.

The circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act 1862."

2. SAME—INVALID RESOLUTION—RECEIVERS.

The fact that a resolution to wind up a foreign company was confirmed at a meeting of shareholders held on insufficient notice, is no ground for the appointment of a receiver by the circuit court. Adequate relief may be afforded, where the defendants submit themselves to the jurisdiction of the court, by a decree declaring the resolution invalid, and enjoining the defendants from carrying it into effect.

3. SAME—CONFLICT BETWEEN ACT AND ARTICLES OF ASSOCIATION.

Where the articles of association of an English company are in conflict with the act of parliament under which the company was organized, the act of parliament must prevail.

4. SAME.

A provision in articles of association of an English company that the company may amalgamate its business with, or transfer its business or property to, any similar undertaking or company, does not relate to the same kind of proceeding as that provided in section 51 of the "Companies Act 1862," for the voluntary winding up of a company, and consequently is not in conflict with that act, although they differ as to the time prescribed by each for the confirmatory meeting of shareholders required. 55 Fed. 7, reversed.

5. SAME—EQUITABLE JURISDICTION.

A circuit court, as a court of equity, should not interfere, at the suit of shareholders in the United States of an English mining company operating a mine in the United States, to restrain proceedings by English shareholders to wind up the company, merely on account of the motives

which may have inspired their conduct, so long as their action was strictly in accordance with English laws, and not in violation of the company's charter or by-laws. 55 Fed. 7, reversed.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Bill filed by J. Warren Brown and Porter P. Wheaton against the Republican Mountain Silver Mines, Limited, Edward F. Tremayne, Horace H. Atkins, A. P. Welch, John Welch, and Arthur E. Phillips, for the dissolution of the corporation defendant, the appointment of a receiver, and for other relief. Decree for complainants. 55 Fed. 7. Defendants appeal. Reversed

Statement by THAYER, District Judge:

This was a bill filed by the appellees against the Republican Mountain Silver Mines, Limited, and its directors, and also against Edward F. Tremayne, its secretary, who had been appointed liquidator to wind up the affairs of the corporation. The bill averred, in substance, that the defendant company was a corporation organized and existing under the laws of Great Britain, with its principal office in the city of London, England, but that its mining property, consisting of numerous mining lodes or claims, was all situated in the state of Colorado; that the capital stock of the company consisted of 100,000 deferred shares and 50,000 ordinary shares of the nominal value of one pound each, and that the great majority of said shares were owned by the appellees, and by other American shareholders, not named as complainants, but in whose behalf the bill purported to have been filed; that within the eight years preceding the filing of the bill the defendant company had remitted from England less than \$18,000 for the working of its mines; that prior to December, 1889, it had become indebted to a bank in the state of Colorado for money borrowed to conduct certain mining operations, and that on the 11th of December, 1889, the bank had recovered a judgment therefor in the sum of \$4,353 and costs, which judgment was subsequently assigned to A. P. Welch, who was chairman of the company's board of directors, he having advanced the money wherewith to pay said judgment; that in the year 1890 the defendant company, in pursuance of a resolution of its board of directors, had executed two deeds of trust on all of its mining property in Colorado for the purpose of securing two notes which had been drawn in favor of said A. P. Welch; and that under the terms of said deeds of trust the property covered thereby might be sold on 30 days' notice if the sum due on said notes was not paid at maturity. The bill averred that said deeds of trust in favor of said Welch were executed without authority, for the purpose of acquiring title to the property of the company, in fraud of the rights of the majority of the shareholders; but it did not appear from any other allegations of the bill, or from the testimony produced at the trial, in what respect the deeds of trust were unauthorized, or that the indebtedness thereby secured was not justly due and owing to the party in whose favor they were ordered to be executed. The bill further averred, in substance, that on the 16th day of June, 1891, an extraordinary meeting of the shareholders was held in London, England, in pursuance of a notice theretofore given, for the purpose of appointing a liquidator under English laws to wind up the affairs of the corporation, but that the notice of such meeting was not sent to or received by the appellees and other American shareholders in time to attend the same. That at such meeting a resolution was passed that the company be wound up. That Edward F. Tremayne, who is named as defendant, be appointed liquidator of the company; and that he be vested with authority to sell the property and business thereof to any other corporation, and to receive in payment therefor shares in such other corporation, for the purpose of making a distribution of the same among the shareholders of the defendant company. That after the passage of such resolution a subsequent extraordinary general meeting of the shareholders was appointed to be held on July 1, 1891, at London, England, for the purpose of confirming, according to English laws, the reso-

lution that had been adopted at the prior meeting of June 16, 1891. That only 16 days' notice was given of such confirmatory meeting of July 1, 1891, which was insufficient to enable the appellees, or any of the American stockholders, to be present, whereas a by-law of the defendant company expressly required that no such confirmatory meeting should be held to approve a resolution for the winding up of the company, within less than 30 days after the first meeting at which such resolution should be proposed and adopted. That at such second meeting, held on July 1, 1891, as well as at the prior meeting, none of the American shareholders were in fact present or were represented, but that the resolution of June 16, 1891, was nevertheless re-enacted and confirmed. The bill further charged that the adoption of said resolution under the circumstances aforesaid was in violation of the by-laws of the company, and was also a violation of English laws, but that, whether or not such action was within the letter of any English statute it was nevertheless fraudulent, because the several meetings had been held with knowledge that the American shareholders, who held a large majority of the stock, could not attend or be represented. The bill also charged that the liquidator appointed by the company to wind up its affairs was financially irresponsible, and that one of the appellees (J. Warren Brown) claimed to be a creditor as well as a stockholder of the defendant company, and that his claim was then in litigation. The testimony showed that the litigation had resulted in a final judgment in favor of the company. In view of the premises, the complainants below prayed that the members of the board of directors who had been made parties, and said Edward F. Tremayne, might be severally enjoined from selling or disposing of any of the defendant company's property; that said Tremayne might be restrained from taking any proceedings whatever as liquidator to wind up the affairs of the company; that a receiver might be appointed to take charge of all of the company's property in Colorado, and that he be authorized to sell and dispose of the same to the end that the defendant company might be dissolved and wound up for the benefit of all of its stockholders and creditors. On final hearing the circuit court sustained the bill, and granted substantially all of the relief that was prayed for therein. From such decree granting an injunction and appointing a receiver with a view of dissolving and winding up the company the defendants below have prosecuted an appeal to this court.

Charles E. Gast, for appellants.

R. S. Morrison and Willard Teller, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

It is made apparent by an inspection of the bill of complaint that it states no case entitling the complainants to any form of equitable relief, unless the right thereto can be maintained on the strength of the allegation that the shareholders' extraordinary general meeting of July 1, 1891, was an unauthorized meeting, because it was convened and held on insufficient notice under the charter and by-laws of the company. Unless that averment is sustained, we are unable to see that the complainants had any fair pretense for invoking the aid of a court of chancery to restrain the proceedings that were about to be taken by the English liquidator, in conformity with English laws, for the purpose of disposing of the property of the company, and winding up its affairs.

The corporation owed its existence to the laws of Great Britain. It held all of its property and franchises under and subject to the laws of that kingdom relative to the "incorporation, regulation,

and winding up of trading companies and other associations," to which class of corporations it evidently belonged. Those laws entered into and formed a part of the defendant company's charter; and every shareholder not only had notice thereof and assented thereto when he became a member of the company, but he impliedly agreed that the company might be wound up in accordance with the provisions of such statutes, if it was thought proper to go into liquidation, and if a resolution to that effect was duly enacted. These principles must be regarded as sufficiently established by the decision in *Relfe v. Rundle*, 103 U. S. 222, 226. See, also, *Railway Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363.

The jurisdiction that a court of equity may lawfully exercise over the affairs of an ordinary business corporation, in the absence of any statute conferring extraordinary powers, is likewise well defined. A court of chancery may, at the instance of a stockholder, and if the company itself refuses to move, lawfully entertain a bill to depose or to restrain the officers or directors of a corporation, when it appears that in their capacity as agents or trustees of the stockholders they have committed, or are about to commit, acts that are tantamount to a breach of trust, whether such acts consist of fraudulent dealings with the corporate property or funds, or whether they consist in engaging the corporation in enterprises that are beyond the scope of its chartered powers. In more general phrase, it is sometimes said that a court of chancery may grant equitable relief against a corporation, at the suit of an individual, "whenever a sufficient case for relief is shown upon ordinary principles of equity jurisprudence." *Mor. Corp.* § 1042, and citations; *Dodge v. Woolsey*, 18 How. 331, 341; *Zabriskie v. Railroad Co.*, 23 How. 381, 385, 386; *Peabody v. Flint*, 6 Allen, 52; *March v. Railroad Co.*, 40 N. H. 548; *Robinson v. Smith*, 3 Paige, 222. But a court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar controversy arising between the members of an ordinary partnership. Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance. If in either of the cases last specified a stockholder is nevertheless dissatisfied with the business policy that is being pursued, or the methods of corporate management, he must seek redress within the corporation, in

the mode prescribed by its charter and by-laws, rather than by an appeal to the courts. *Hawes v. Oakland*, 104 U. S. 450; *Oglesby v. Attrill*, 105 U. S. 605, 610; *French v. Gifford*, 30 Iowa, 148; *Foss v. Harbottle*, 2 Hare, 461. Moreover, the doctrine is very well established that a court of equity has no power at the suit of an individual to decree the dissolution of a domestic corporation, and a winding up of its affairs, unless such extraordinary power has been conferred upon it by the terms of some statute. The better view undoubtedly is that at common law no such power to decree a surrender or forfeiture of corporate franchises was vested in courts of equity, to be exercised at the suit of an individual, although some courts have upheld the right of a court of chancery to exercise that power when invoked by the state through its attorney general. *Folger v. Insurance Co.*, 99 Mass. 267, 274; *Slee v. Bloom*, 5 Johns. Ch. 366, 377; *French v. Gifford*, 30 Iowa, 148; *Attorney General v. Railroad Co.*, 35 Wis. 425, 511; *Mor. Corp.* § 1040.

It is hardly necessary to remark that if courts of equity, at the suit of a shareholder, and in the absence of a statute, have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation. It has, indeed, been held on much consideration that the courts of a state have no visitorial powers over foreign corporations doing business within the state, unless such power is expressly conferred by local statutes; and for that reason it was ruled by the supreme court of Maryland that it would not entertain a proceeding by a citizen of Maryland, who was a shareholder in a foreign company, to compel it to annul an alleged wrongful forfeiture of his stock, and to reinstate him as a stockholder. *Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039. See, also, *Wilkins v. Thorne*, 60 Md. 253.

In view of the foregoing principles, it is evident, we think, that the decree of the circuit court was erroneous in so far as it contained provisions which contemplated a sale of all of the defendant company's property in the state of Colorado, and a general liquidation of its affairs. As we have already shown, the circuit court had no inherent power, as a court of equity, to dissolve the company, and to wind up its business operations. It had no authority to enter a decree of that nature under any existing statute of the state of Colorado to which our attention has been directed, and it can hardly be pretended that it derived or could derive any such power or jurisdiction from the act of parliament under which the corporation was organized. The trial court appears to have been of the opinion that the resolution to wind up the company which was adopted at the meeting of June 16, 1891, and was confirmed at the meeting of July 1, 1891, was void, for the reason that the latter meeting was held on insufficient notice; but, if we accept that view as sound, it is nevertheless apparent that there was no occasion for the appointment of a receiver to hold and dispose of the company's property, or for the order directing

him to inquire and to report in what manner the property in question could be most advantageously sold. As all of the defendants, including the foreign liquidator, had joined in an answer to the bill, and had thereby submitted themselves to the jurisdiction of the court, we think that adequate relief would have been afforded for the injury complained of,—if the trial court had simply declared the invalidity of the resolution to wind up the company, and had thereupon enjoined the defendants from taking any action to carry the same into effect. An injunction in the form last suggested would have been all-sufficient to prevent the threatened wrong, even if the resolution to wind up the company was in fact void; and we are unable to see that the record discloses any fact or circumstance which rendered an order for the appointment of a receiver and for the sale of the company's property either a necessary or a proper order.

It is insisted, however, that the resolution to wind up the company was neither void nor irregular, but was passed in strict conformity with English laws; and this contention on the part of the appellants compels us to make a brief reference to the company's articles of association, and to some provisions of the act of parliament under which the defendant company was organized. It is not denied that the act of parliament last referred to permitted the defendant company to go into voluntary liquidation in the manner contemplated by the resolution adopted at the shareholders' meeting of June 16, 1891, which was subsequently confirmed. The act of parliament provides that a company organized under the act may be wound up "whenever the company has passed a special resolution requiring the company to be wound up voluntarily;" it further provides, in substance, that the liquidator appointed by the shareholders to wind up the company may be authorized to transfer the business and property of the company to another company, and in payment therefor receive shares in such other company for distribution among the shareholders of the company whose affairs are being liquidated. Vide Companies Act 1862, §§ 129, 161. The act further defines a *special* resolution to wind up a company to be, in substance, one which has first been passed at a general meeting of shareholders, and has been confirmed at a subsequent general meeting, "of which notice has been duly given and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed." Vide *Id.* § 51. The resolution over which the controversy arises in the present case appears to have been passed and to have been subsequently confirmed in strict conformity with the provisions of the companies act above cited, both as respects the method of calling the meetings at which the resolution was proposed and adopted and as respects the notice given to shareholders of said meetings and the time within which they were to be held. It is contended, however, that although the second meeting was held within the period prescribed by section 51 of the companies act, to which we have alluded,—that is to say, not less than fourteen days nor more than one month from the date

of the first meeting,—yet that it was not held within the period prescribed by section 136 of the defendant company's articles of association. An obvious answer to this contention is, that if the articles of association are in conflict with the act of parliament under which the company was organized, the act of parliament must prevail. Section 136 of the articles of association provides, in substance, that the company “may amalgamate its business with, or transfer its business and property to, any similar undertaking or company, or purchase or acquire the business or property of any company * * * carrying on a business similar to that of the defendant company, upon such terms as may be agreed upon, * * * and may pay for any business so acquired either in cash or in shares,” etc., provided a resolution to that effect is passed by a three-fourths vote at an extraordinary general meeting, and is confirmed at a second meeting, held “not less than one month nor more than three months thereafter.” It is obvious that if section 51 of the companies act and section 136 of the articles of association relate to the same kind of a proceeding or transaction, they are in conflict, because they prescribe a different period within which the confirmatory meeting must be held, and the companies act in that event must prevail. We think, however, that they relate to entirely different transactions. The companies act has reference to a proceeding to wind up a corporation whereby the corporation disposes of all of its property, surrenders its franchises to the crown, and thereby ceases to exist as a legal entity. On the other hand, the articles of association have reference to a proceeding whereby a corporation merely becomes consolidated with some other company doing a similar business, or purchases the property or business of some other company, in which case it neither surrenders its franchise nor ceases to exist. Under the provision contained in the company's articles of association it was intended no doubt that it might unite its business with that of any other company or firm that was engaged in similar enterprises by a simple agreement with such other company that had first been confirmed by the defendant company's members; but in a proceeding taken under the companies act to wind up a corporation it is necessary to appoint a liquidator to dispose of its property, and to effect a valid surrender of its corporate franchises. In view of what has already been said on this branch of the case, the necessary conclusion is that the meeting of July 1, 1891, was properly convened and held under the terms of the statute under which the defendant company was organized, and the resolution passed at such meeting was neither void nor irregular by reason of any provision found in the defendant company's articles of association.

We have not overlooked the charge contained in the bill that the two meetings held in London were intentionally called by the English shareholders on short notice for the express purpose of preventing the American shareholders from taking part in such meetings. With reference to that charge, and without deciding whether it is true or false, it is sufficient to say that the company's articles of

association gave all foreign shareholders the right to name an address at any place in the United Kingdom, to which notices of all meetings were required to be sent, and the right to appoint an agent at such place to represent their interest at any meeting or meetings that might be held. Furthermore, the foreign shareholders were bound to take notice of the law under which the company was organized, and of the various provisions to which we have already referred that enabled the company to be wound up on short notice by a resolution passed at a shareholders' meeting and confirmed at a subsequent meeting. It is furthermore disclosed by the record that the English and American shareholders had been pulling at cross purposes for some years prior to June, 1891, and that the controversy between them was largely due to the fact that the English shareholders had contributed practically all of the funds to prosecute the business of the company while the American shareholders possessed the superior voting power. But, aside from these considerations, we think that a court of equity should not interfere merely on account of the motives that may have inspired the conduct of the English shareholders, so long as the action taken by them was strictly in accordance with English laws, and was not in violation of any provision of the company's charter or by-laws. *Oglesby v. Attrill*, 105 U. S. 605.

The result is that we have been constrained to disapprove of all of the provisions of the decree from which the present appeal was taken. The decree of the circuit court is accordingly reversed, and the case is remanded to that court with directions to discharge the receiver, and to vacate its former decree, and to enter an order dismissing the bill of complaint at the complainants' costs.

HANAN v. SAGE.

(Circuit Court, D. Minnesota, Fourth Division November 11, 1893.)

CORPORATIONS—DISSOLUTION—POWER TO CONVEY LANDS TO A TRUSTEE.

Under the Minnesota statute (Gen. St. 1878, c. 34, § 416) declaring that corporations whose charters expire or are annulled shall continue bodies corporate for three years for the purpose of settling their concerns, disposing of and conveying their property, and dividing their capital stock, a railroad company, whose charter is annulled by judicial decree, has power within the three years to convey its lands to a trustee in trust to wind up its business.

In Equity. Suit by George Hanan against Russell Sage to quiet title and settle an adverse claim to lands. On demurrer to the answer. Demurrer overruled.

Statement by NELSON, District Judge:

This is an action under the statute of Minnesota, brought to quiet title and settle adverse claims. The complainant alleges that he is in possession of the land, charges that the defendant claims an interest adverse to him, and prays that the defendant be required to set forth the nature of his claim, and that all adverse rights be determined. The defendant files an answer, setting forth in detail his interest, and in substance claiming that the land in controversy is a portion of the place lands under a grant to the Hastings

& Dakota Railway Company, derived from the United States government, and that, subsequent to a judgment of the supreme court of the state declaring the charter of the railway company annulled by forfeiture, under proceedings commenced by the attorney general of the state, the corporation, in accordance with a resolution of its directors and stockholders, duly transferred and assigned its lands, of which the tract in dispute is a part, to him in trust, for the purpose of settling and winding up its business. A demurrer is interposed to the answer.

Lyndon A. Smith, for complainant.

J. M. Gilman and Davis, Kellogg & Severance, for defendant.

NELSON, District Judge, (after stating the facts.) The contention to sustain the demurrer is that the corporation, after the judgment under the forfeiture proceedings, had no authority to convey any other than an absolute and complete title, and could not make any disposition of its lands and capital stock and other property in trust to be distributed among its shareholders, with a view of winding up its concerns; in fact, that the corporation could not convey its property upon any conditions, to any one in trust, for any purpose. The decree or judgment of forfeiture left in full force and effect section 416, c. 34, Gen. St. Minn. 1878, which reads as follows:

"Corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall, nevertheless, continue bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which they were established."

This is one of the laws of Wisconsin, which was in force when the territory of Minnesota was established; it was declared to be valid and operative therein, and has been the law of Minnesota ever since. The corporation, under this statute, did not cease to exist after the decree of the supreme court, but continued its organization, and retained its officers and directors, and its stockholders continued to be such, with all the authority possessed before. True, the corporation only existed for the purpose of winding up its corporate business, and closing up its concerns; but to do this it had full control over all its property, and could dispose of it for the purposes indicated in the statute, subject, however, to the rights of creditors and stockholders. The complainant, by his demurrer, admits that the defendant's grantor had a good title to the land in controversy as a portion of the "lands in place" under its land grant, and in his brief concedes that the railway company could pass a complete title up to the end of three years from the date of forfeiture. The statute is clear in its terms, and, unless the act done by the corporation before the three years expired is clearly for some purpose other than that pointed out, or is fraudulent, there is no reason why the conveyance to the defendant should be declared void. Complainant asserts that the manifest purpose of the deed was an attempt to forestall the action of the courts, and was against public policy. How so? There

is nothing upon the face of the transaction to indicate that such was its purpose. On the contrary, it declares, in substance, that the object was to carry out the statutory provisions, and wind up the business of the corporation. It makes no difference, if that was its purpose, that the property of the corporation passed to a trustee. Such assignments have been upheld by courts under a similar statute, and would seem in many instances to be a necessary course to pursue, if done in good faith. There is no evidence of bad faith disclosed in the answer of defendant. The statutes of "uses and trusts" do not forbid the creation of such a trust as this.

O'SHAUGHNESSY v. NEW YORK RECORDER CO.

(Circuit Court, E. D. New York. November 30, 1893.)

LIBEL—WHAT CONSTITUTES—CRUELTY BY POLICEMAN.

A publication charging a police officer with treating a prisoner, making a desperate attempt to escape, in a merciless manner, by striking him a crushing blow on the neck, felling him to the ground, and shortly causing his death, is actionable.

At Law. Action by James O' Shaughnessy against the New York Recorder Company for the publication of a libel. On demurrer to the complaint. Overruled.

Charles J. Patterson, for plaintiff.
Rochfort & Stayton, for defendant.

WHEELER, District Judge. The publication alleged charges the plaintiff, a police officer, with treating a prisoner, making a desperate attempt to escape, in a merciless manner, by striking him a crushing blow on the neck, sinking him helpless to the ground, and from which he soon after died. The demurrer raises the question whether the publication is actionable, being made concerning the plaintiff preventing the escape of a rebellious prisoner, in the line of his duty. An officer having custody of even a rebellious prisoner, making even a desperate attempt to escape, has no right to make a murderous or merciless assault upon him; and a publication of so doing is a charge of gross misconduct in the line of duty, which would expose the officer to discipline; and of criminality, which would expose him to prosecution; and of brutality, which would tend to degrade him. That such a publication, if false, is libelous, is elementary. 3 Bl. Comm. 125; 4 Bl. Comm. 150. Demurrer overruled.

DAVIDSON v. MEXICAN NAT. R. CO.

(Circuit Court, E. D. New York. November 14, 1893.)

1. CORPORATIONS—CONTRACTS.

The fact that a railroad company and a construction company have mainly, though not entirely, the same officers and stockholders, does not

render them legally identical, but merely requires a more careful scrutiny of their dealings with each other, where the interests of outside parties are affected.

2. SAME—RAILROAD REORGANIZATION AGREEMENT—CONSTRUCTION.

A provision in a railroad reorganization agreement that there shall be furnished "a sum, not exceeding \$217,000, to be applied to liquidate the indebtedness of the existing railway company," is a provision that the sum shall be used as far as it will go, and hence payments subsequently made out of the assets of the company do not go in reduction of the fund, so as to render it pro tanto exempt from other valid debts of the company.

3. SAME.

A railroad reorganization agreement provided a certain sum to be applied in liquidation of existing debts of the railroad company. Just prior to the execution of the agreement an indorser of the company's notes had paid the same, amounting to \$40,000. The railroad company had agreed that if the indorser was compelled to pay the notes it would deliver to him 8,000 shares of its stock, or account therefor at \$10 per share, (being \$80,000.) The indorser did not demand the stock until after the execution of the reorganization agreement, and a reasonable time for the delivery thereof subsequently expired without such delivery. *Held*, that the fund provided under that agreement was chargeable with \$40,000, and no more.

4. SAME—INTEREST—WHEN ALLOWED.

Where a railroad reorganization agreement goes into effect from the date of execution, but no provision is made for dealing with the property, for compensation for the care of it, or for interest on money or debts during the time which will necessarily elapse pending the proceedings to be taken under the agreement, no interest should be allowed for such period upon the various mutual debts and charges of the parties thereto.

At Law. Action by Joseph A. Davidson against the Mexican National Railroad Company to recover money. Tried to the court without a jury. Findings and judgment for plaintiff.

Statement by WHEELER, District Judge:

The trial of this cause having been begun at a term of this court held at the United States courthouse in the city of Brooklyn on the 17th day of March, 1893, before the Honorable Hoyt H. Wheeler, judge, and a jury, and thereupon the parties having, by stipulation in writing, agreed that this cause should be tried by the court, and the case having thereupon been so duly tried before the said judge without a jury, and the parties having submitted their proofs and allegations, the court hereby makes the following findings of fact:

(1) The plaintiff is a citizen and resident of the United States of America and of the state of New York, and upwards of the age of 21 years. The defendant is a railroad corporation, created by and existing under the laws of the state of Colorado, and owning and operating as its principal property the railroad within the republic of Mexico, which is hereinafter called the "Mexican National Railroad."

(2) The Mexican National Construction Company (hereinafter called the "Construction Company") is, and has been since on or about the 1st day of September, 1880, a corporation duly organized and existing under the laws of the state of Colorado. It was so organized for the purpose of building, owning, and operating railroads within the republic of Mexico, and, among other railroads, the said Mexican National Railroad; and ever since its said organization it has been authorized by the said laws under which it was so incorporated, and also by the laws of the republic of Mexico, to, and the said laws provided that it might, construct, equip, operate, maintain, or own railroads within the republic of Mexico, and make contracts for the construction, equipment, operation, maintenance, or ownership of

such railroads, and do any and every act necessary or proper to such construction, equipment, operation, maintenance or ownership.

(3) The Mexican National Railway Company, (hereinafter called the "Railway Company,") from a time prior to the year 1881 until a time after the 1st day of January, 1888, was a corporation duly organized and existing under the laws of the state of Colorado, by which laws, and also by the laws of the republic of Mexico, it was authorized to, and the said laws provided that it might, construct, equip, operate, maintain, or own a railroad or railroads within the republic of Mexico, and especially the Mexican National Railroad. The Mexican National Railroad was constructed by the Construction Company for and upon the employment of the Railway Company, except that on the 15th day of October, 1886, the portion of the said railroad between San Miguel and Saltillo, two points upon the said line, was not entirely finished and in operation. Long prior to the 15th day of October, 1886, the said railroad, so far as thus constructed, was delivered to the Railway Company by the Construction Company, and on that day the Railway Company was the owner and in the possession of and operating the same. The said railroad included a main line running from the city of Mexico to Nuevo Laredo, all within the republic of Mexico, (except that the said portion between San Miguel and Saltillo, as aforesaid, was not entirely finished and in operation,) and included besides certain outlying branches; and there are, and have at all times since the construction of the railroad been, appurtenant thereto, equipment, rolling stock, telegraph and telephone lines, and other usual appurtenances of railroads. The term "Mexican National Railroad," as hereinafter used, will include the said main line, except so much of the said portion between San Miguel and Saltillo as was constructed after 15th October, 1886, and will also include said outlying branches, and also the said equipment, rolling stock, telegraph and telephone lines, and other usual appurtenances, but will not include the portions of the railroad reserved to the Construction Company by the Matheson-Palmer agreement, hereinafter mentioned. The Construction Company, prior to the 15th of October, 1886, had, in the course of such construction and equipment of the Mexican National Railroad, performed work, labor, and services and furnished materials for the said railroad and for the Railway Company.

(4) Prior to the 15th day of October, 1886, the Railway Company had made, issued, and duly and for value negotiated and disposed of certain 6 per cent. gold bonds to the amount of several millions of dollars, and had secured the same by a first mortgage upon the Mexican National Railroad. The laws of Colorado and Mexico authorized such issuance and sale of bonds and the making of such mortgage. Prior, also, to the 15th of October, 1886, the Railway Company had defaulted in the payment of interest upon its bonds, and there was danger that the mortgage would be foreclosed; and the Railway Company was also involved in other pecuniary difficulties and embarrassments. The Construction Company was the owner of a large amount in the said bonds of the Railway Company, and also owned a large part of the stock of the Railway Company. The Construction Company was also the owner of rolling stock, equipment, materials, and supplies originally intended for use upon the said railroad or upon branches thereof, or upon roads connected or intended to connect therewith. The Construction Company was also the owner of a subsidy of several millions of dollars, theretofore granted by the government of the republic of Mexico, upon which payments had from time to time been made, and upon which from time to time thereafter payments were to be made.

(5) From the time of the organization of the Mexican National Railway Company and the Mexican National Construction Company until August 1, 1887, the officers of the two companies were in large part identical. During this period the two companies had the same principal offices in Mexico and New York, the same treasurer, William M. Spackman, the same auditors, the same cashier in New York, the same general manager, the same head bookkeeper in New York, and in part the same directors. During substantially all the time from the organization of the Railway Company and Construction Company until August 1, 1887, the books of account of the two companies were kept under the direction of William M. Spackman, the treasurer of each of the companies.

(6) A contract between the Construction Company and the Railway Company for the construction of the railroad was made, dated May 12, 1881, (defendant's Exhibit No. 35,) and under it the Construction Company undertook and commenced the construction of the railroad of the Railway Company. The Construction Company received for so much of such construction as was done \$21,150,000 of the first mortgage bonds, and \$22,321,630 of the capital stock, of the Railway Company.

(7) On June 15, 1883, an agreement for the equipment of the railroad to the value of about \$2,000,000 was entered into between the Railway Company and the Construction Company, which is plaintiff's Exhibit F, and on the next day an agreement was entered into between the Construction Company and the Guarantee Trust & Safe-Deposit Company of Philadelphia for the pledge of the equipment and its use to this trust company to secure not exceeding 2,000 equipment trust certificates of \$1,000 each, with coupons for interest, to be delivered to the Construction Company to an amount not exceeding the cost of the equipment, and 1,713 of these certificates, amounting to \$1,713,000, with coupons, were delivered to the Construction Company pursuant to this agreement. The Construction Company did not complete the railroad under the contract dated May 12, 1881, and a further contract was entered into between the Construction Company and the Railway Company for that purpose, dated May 1, 1884, (defendant's Exhibit No. 18,) by the terms of which the Railway Company was, among other things, to deliver to the Construction Company \$13,437,000 of its second mortgage debenture bonds; and the Construction Company was, among other things, to surrender and yield up, or cause to be surrendered and yielded up, for cancellation so many of the equipment trust certificates as it then possessed and could surrender, and as should thereafter come into its possession or control so that it could surrender the same, as set forth. The \$13,437,000 of debenture bonds were delivered by the Railway Company to the Construction Company, according to the terms of the contract. The Construction Company had \$232,200 of equipment trust certificates and coupons, mentioned in the contract, but did not surrender or yield up but \$25,200 thereof to the Railway Company itself.

Under date of July 31, 1884, an account was opened on the ledger of the Railway Company in reference to the equipment trust certificates and coupons as follows:

Dr. Equipment Trust Certificates and Coupons Receivable:

1884. July 31. To Mexican National Construction Co., contractor \$232,200

The Construction Company delivered to the Railway Company in August, 1884, and December, 1884, \$25,200 paid coupons due June 1, 1884, upon the certificates, which sum of \$25,200 was credited by the following entries made in this account:

Cr.

1884. Aug. 31. By equipment trust securities.....	\$ 980
1884. Dec. 31. By equipment trust securities.....	24,220
Balance.....	207,000
	<hr/>
	\$232,000

Dr.

1885. Jan. 1. To balance..... \$207,000

This reduced the balance of such account on and after January 1, 1885, to the sum of \$207,000, at which sum it stood on the books of the Railway Company from January 1, 1885, until May 31, 1887. The balance sheet of the Construction Company for June 30, 1886, (defendant's Exhibit 29,) after an enumeration of bonds, stocks, and other securities owned by the Construction Company, including the equipment trust certificates and coupons, to the amount of \$713,000, contained the following entry: "Less equipment trust certificates and coupons assigned to Mexican National Railway Company, \$207,000."

(8) After the making of this contract between the Construction Company and the Railway Company, dated May 1, 1884, the Construction Company proceeded further with the work of construction of the railroad, up to the 15th of October, 1886, and delivered it as it was completed to the Railway Company, but had not completed a portion of the line about 350 miles in length between San Miguel and Saltillo; and, as compensation for such construction, the Construction Company had received the first mortgage bonds, the second mortgage debenture bonds, and nearly all the issued capital stock of the Railway Company.

(9) The Railway Company became embarrassed, could not meet the interest due on its bonds, and in the summer of 1886 was insolvent.

(10) On or about the 26th December, 1885, the Railway Company, desiring to borrow \$40,000, and being unable to secure the money upon its own credit or upon the security of the property of its own, requested the Construction Company to indorse notes of the Railway Company for that sum of money, and to lend to the Railway Company certain equipment trust certificates and certificates of shares of stock of the Railway Company, as hereinafter mentioned, belonging to the Construction Company, to be used by the Railway Company as security to the lender of the money. Thereupon the Railway Company made its eight promissory notes, each bearing date 26th December, 1885, each for \$5,000, each payable to the Construction Company or order, one year after date, with interest at 8 per cent. per annum, but with provision for earlier payment at the option of the Railway Company. These notes the Construction Company, upon the request and for the benefit and accommodation of the Railway Company, but without other consideration, duly indorsed. Upon and in consideration of these notes and the securities pledged, and the eight contracts or calls given therewith, as hereinafter mentioned, one Charles S. Hinchman, of Philadelphia, loaned to the Railway Company the sum of \$40,000. As security for such loan and the payment of the said notes, the Construction Company, upon the request of the Railway Company, delivered to the said Charles S. Hinchman the following securities, which were the property of the Construction Company, namely, certificates for \$30,000 shares (each of the par value of \$100) of the capital stock of the Railway Company, and \$160,000 in par value of equipment trust certificates of the Railway Company. Upon the request of the Railway Company, the Construction Company at the same time delivered to the said Charles S. Hinchman, who required the same as a condition of making the loan, eight contracts, each of which was in the following form, to wit:

"The bearer may call on the Mexican National Construction Company, 32 Nassau street, New York, for one thousand shares of the Mexican National Railway Company at five dollars (\$5.00) per share at any time within one year from this date, said railway stock being pledged as part collateral for a note of the Mexican National Railway Company of even date herewith for \$5,000, payment of which may be anticipated on the first of any month by notice on the first of the preceding month. This call is to be satisfied out of said pledged stock, either by arrangement between the holder hereof and the holder of said note, or by the said month's notice through the company.

"Dated New York, December 26, 1885. Expires December 26, 1886.

"The Mexican National Construction Co.

"By Walter Hinchman, President."

The said notes were indorsed and delivered, as aforesaid, by the Construction Company, and the said equipment trust certificates and certificates of stock with the said eight contracts or calls were likewise delivered, as aforesaid, in pursuance of an agreement made between the Construction Company and the Railway Company immediately prior to the making of the said notes, in and by which the Railway Company, in consideration of such indorsement and such loan of the said securities, agreed to return to the Construction Company the said 30,000 shares of stock and the said \$160,000 in par value of equipment trust certificates, whether such calls or options given by the Construction Company in respect of 8,000 shares of the said stock should be exercised or not; and, if such options should be exercised,

or the lender of the money should call and take such shares of stock at the rate of \$5 per share, as mentioned in said contracts or calls, then that the Railway Company should either return such 8,000 shares of stock, or account therefor at the rate of \$10 per share, and that the Railway Company should keep the Construction Company harmless and indemnified against any liability arising from such indorsement by the Construction Company of the said notes. Prior to the maturity of the said notes, the said Charles S. Hinchman exercised the option given him by the said 8 contracts or calls, and purchased thereunder 8,000 shares of stock at \$5 per share, whereby he was fully paid by the Construction Company the principal amount due upon the said 8 notes.

The inequality in favor of the said lender of the money had to be yielded to because of the necessities, embarrassments, and impaired credit of both companies. No fraud or fraudulent oppression is found in respect to the transaction. The said Charles S. Hinchman called for and took up the said 8,000 shares of stock, being thereby so paid the amount due upon the said notes at the times and in installments, as follows:

29th Sept., 1886.	2,000 shares being thus paid.....	\$10,000 of notes.
4th Oct. " "	1,000 " " " " "	5,000 " "
5th " " "	1,000 " " " " "	5,000 " "
6th " " "	1,000 " " " " "	5,000 " "
7th " " "	2,000 " " " " "	10,000 " "
13th " " "	1,000 " " " " "	5,000 " "
	<u>8,000</u>	<u>\$40,000</u>

Thereafter, and on the 22d day of October, 1886, the Construction Company demanded that the Railway Company return such 8,000 shares of stock, or its equivalent in cash at \$10 per share, in accordance with the agreement hereinabove stated. The Railway Company did not pay any part of the amount due upon the said notes. Nor did it within a reasonable time, or at any time, return to the Construction Company any part of the said 8,000 shares of stock; nor did it at any time account therefor at the rate of \$10 per share or at all. Such reasonable time for such return to the Construction Company had expired prior to the 1st day of August, 1887.

In the said indebtedness of \$111,454.08 there is not included any sum for or on account of the said 8,000 shares or the said notes for \$40,000, or any part of them.

(11) In view of the situation, negotiations were entered into in the summer of 1886 for a reorganization of the Railway Company and its liabilities, in which Messrs. Matheson & Co., of No. 3 Lombard street, London, England, represented certain holders of the first mortgage bonds of the Railway Company, and H. W. Smithers, of London, England, was their agent, and W. J. Palmer, president of the Railway Company, represented the Railway Company, the Construction Company, and certain other holders of these first mortgage bonds. On the books of the Railway Company was an account called "Individuals and Companies," containing charges and credits with those with whom the Railway Company did not have separate accounts, which was a well-known method among railroad men of keeping such accounts. On August 31, 1886 those engaged in the negotiations desired to know the amount of the floating debt of the Railway Company, and, upon inquiry made by Smithers and of Palmer as to the amount of it, a statement in relation thereto was asked of and in good faith made in writing by Mr. Spackman, the treasurer of the Railway Company and of the Construction Company, and by him handed with a letter to Palmer, who delivered the statement and letter to Smithers. The said letter and the said written statement of the floating debt of the said Railway Company are as follows:

"New York, August 31, 1886.

"General W. J. Palmer, President—Dear Sir: As requested, I inclose herewith statement of the floating debt of the Mexican National Railway Co., as shown by its books so far as written up, to wit, June 30, 1886.

"Very truly yours,

Wm. M. Spackman, Treasurer."

**"Floating Debt Mexican National Railway Co., Omitting Maturing Coupons
on its First Mortgage Bonds, Rental of Equipment
and Rental of Leased Lines.**

As of June 30, 1886.

Vouchers			\$ 37,168 18
Pay rolls.....			66,808 05
Foreign roads.....			108 57
Bills payable.....			43,745 19
Individuals and Co's.....			110,731 98
Unclaimed wages.....			2,169 14
Tex. Mex. Coups. outstanding.....	\$ 4,410 00		
Tex. Mex. Coups. maturing July 1, '86.....	30,440 00		34,850 00
			<u>\$295,581 11</u>
Less:			
Agents and conductors.....	\$25,967 98		
Stamp account.....	313 07		
U. S. mail.....	2,403 70		\$28,684 75
			<u></u>
Less cash:			
N. Y. office.....	\$ 6,072 92		
B. W. Thacher, cashier.....	27,453 30		
H. P. Webb, cashier.....	21,403 96		
			<u>\$54,930 18</u>
Less due:			
B. W. Thacher, department account...	\$3,396 40		
London agent.....	945 45	4,341 85	50,588 33
			<u>\$79,273 08"</u>

The amount of \$110,731.98 mentioned as due to "Individuals and Companies" by the said Railway Company on the said statement made by the said Spackman was made up as follows:

Due to Brownsville & Gulf Company.....	\$ 1,086 31		
Due Tex. Mex. Northern Railway.....	52 50		
Due insurance.....	643 93		
Due Construction Company.....	145,407 38		
			<u>\$147,190 12</u>
Due by individuals and companies.....	\$36,277 13		
Due marine insurance.....	47		
Due Brownsville Ferry Company.....	180 54		36,458 14
			<u>\$110,731 98</u>

At this time this item: "Equipment trust certificates and coupons receivable, \$207,000,"—stood on the balance sheet of the Railway Company of June 30, 1886, in the books of that company.

On or about the 15th day of October, 1886, the agreement called the "Matheson-Palmer Agreement" (plaintiff's Exhibit A) was executed; and upon the faith of the correctness of this statement as to the floating debt of the Railway Company those engaged in the negotiations inserted in it the clause contained in the fifth paragraph thereof, which reads as follows: "And a sum not exceeding \$217,000, to be applied to liquidate the indebtedness of the existing Railway Company." Neither on August 31, 1886, nor at the time of the making of the said Matheson-Palmer agreement, did Smithers inquire into the details of the statement of the floating debt of the Railway Company further, or know that the amount of \$110,731.98, mentioned on statement as due from the Railway Company to individuals and companies as of June 30, 1886, was made up by including a debt due from the Railway Company to the Construction Company of \$145,407.38; or know that there was upon the books of the Railway Company an entry as of a balance due to the

Railway Company by the Construction Company of \$207,000 equipment trust certificates and coupons.

(12) On October 1, 1886, the Construction Company stood credited on the books of the Railway Company, and the Railway Company stood charged on the books of the Construction Company, with \$104,244.10, which was correct, and, with interest, amounted to \$111,454.28, which was then due from the Railway Company to the Construction Company.

(13) While the reorganization proceedings were going on under the Matheson-Palmer agreement, and until 1st August, 1887, the possession of the railroad remained as before, and it was operated and improved in the name of the Railway Company, and dealings with the Construction Company were continued as before the making of that agreement, awaiting a determination of whether the reorganization proceedings provided for in that agreement would be carried out, and the disposition of the property under the agreement if they should be. They were carried out, and the defendant entered into the possession of the railroad, and began the operation of it on that day. During this 10-months period from October 1, 1886, the date agreed to for this purpose, until August 1, 1887, there were various transactions about the operation and improvement of the railroad with the Construction Company pursuant to the contracts between the Railway Company and the Construction Company, in which the Construction Company advanced and paid moneys or value to or for the use or benefit of the railroad, and upon request furnished materials for it, and moneys were had and received for and to the use of the Construction Company; and divers payments of money were made to the Construction Company. Upon these transactions during this period the Construction Company is charged with these amounts, mentioned in defendant's Exhibits Nos. 21 and 22:

Cash	\$106,214 42
Materials from shops and stores.....	143,246 74
Sundries, together.....	14,432 70
Cash on voucher.....	190,624 42
Cash	5,677 95
Use of drill.....	1,309 75
	<hr/>
	\$461,505 98

And the Construction Company is credited with these amounts:

Vouchers and cash, as shown in defendant's Exhibits Nos. 21 and 22.....	\$219,246 60
Collected on mortgages.....	8,612 69
Reorganization expenses.....	2,530 74
Sundries and cross entries.....	987 45
Payments to Mendez.....	12,165 61
El Salto lien.....	8,199 02
Value of cars, and setting up the same.....	133,983 33
New work and services.....	22,755 66
Zacatecas & Colima earnings.....	10,526 70
Bonds for Mendez.....	4,100 00
	<hr/>
	\$423,107 80

Balance in these transactions during this period against Construction Company..... \$ 38,398 18

Of these items \$11,811.45 of the payment of \$12,165.61 to Mendez, \$444.72 of the El Salto lien, and the \$4,100 for bonds for Mendez,—in all, \$16,356.17,—accrued wholly before October 1, 1886; \$5,815.73 of the remainder of the El Salto lien is the proportion of six months' interest due November 15, 1886, for the $4\frac{1}{2}$ months prior to October 1, 1886; and \$1,938.57 the residue, is the proportion of the $1\frac{1}{2}$ months between October 1 and November 15, 1886. But the whole of all these items was paid or furnished in good faith during the 10-months period. If the Construction Company should not be credited here for the payments of what accrued wholly before October 1, 1886, the balance against it would be \$54,754.35; if not for either this or the proportion

of interest for the 4½ months before that date, the balance against it would be \$60,570.08.

(14) On or about the 5th day of February, 1887, the defendant was incorporated under the laws of Colorado, and in the months of February, March, April, and May, 1887, foreclosure proceedings were taken in the courts of the republic of Mexico to foreclose the first mortgage upon the property of the Railway Company, and with the assent and assistance of the Construction Company therein it was foreclosed; and on or about the 24th day of May, 1887, a conveyance of the railroad, with the exception mentioned in the Matheson-Palmer agreement, in which the Construction Company joined, was executed and delivered to the defendant.

(15) The Matheson-Palmer agreement provided (article 8) that the Construction Company should assign to the new Railway Company, which the defendant became, all rolling stock and equipment then upon the lines, except that upon the Zacatecas and Colima divisions, by assigning all equipment certificates, which were the equipment trust certificates before mentioned, so that it should be vested with the sole title to this rolling stock and equipment. Pursuant to this provision the Construction Company delivered the whole issue outstanding of equipment trust certificates and coupons to the Guarantee Safe-Deposit Trust Company, including the \$207,000 thereof to be canceled, and they were thereby yielded up and canceled, of which all those interested had notice, and that account was balanced on the books of the Railway Company by entry: "1887, May 31. By Matheson-Palmer agreement, \$207,000."

(16) On or about the 1st of June, 1887, the defendant executed and delivered to Hugh M. Matheson and Charles Magniac, as trustees, a certain first mortgage or trust deed for the security of the first mortgage bonds of the defendant, and since the execution of this mortgage the defendant has issued \$12,500,000 in par value of principal of first mortgage bonds, and of the proceeds thereof \$217,000 was before January 1, 1888, received by the defendant, to be applied to liquidate the indebtedness of the former existing railway company according to the provisions for that purpose in the fifth article of the Matheson-Palmer agreement.

(17) The defendant has substantially complied with all its part of the provisions of the Matheson-Palmer agreement, except the liquidation of the indebtedness of the Railway Company to the Construction Company.

Between October 1, 1886, and August 1, 1887, there was paid from the current assets of floating debts of the Railway Company contracted prior to that time, and entered on the books of the Railway Company:

Tex. Mex. coupons.....	\$ 32,690 00
Vouchers	49,844 42
Pay roll.....	68,199 96
Bills payable.....	850 00
Foreign roads.....	129 07
Unclaimed wages.....	1,806 49
Individuals and companies.....	5,758 63
	<hr/>
	\$159,278 57

And of such debts not entered on the books of the Railway Company:

On vouchers N. Y. and Mexico.....	\$28,073 53
Less correction admitted.....	662 12
	<hr/>
	\$27,411 41
For materials used prior to October 1, 1886, but paid for after that date.....	5,755 75
One-half of Tex. Mex. coupon of Jan. 1, 1887.....	2,760 00
One-half of Corpus Christi coupon of Jan. 1, 1887.....	12,460 00
Interest paid on notes.....	2,418 40
On equipment trust certificates.....	285 83
	<hr/>
	\$51,091 39

The Construction Company has paid of debts of the Railway Company accrued before October 1, 1886, the several notes before mentioned, as stated, \$40,000; to Mendez, for services as counsel, as stated, \$11,811.45; and for bonds for Mendez, as stated, \$4,100. There has been collected since October 1, 1886, of current assets arising from the operation of the railroad before that date, as follows:

Agents and conductors.....	\$ 17,895 13
Stamp account.....	253 73
United States mails.....	2,245 42
Cash	58,894 79
Brownsville Ferry Company.....	165 88
Individuals and companies.....	39,936 28
	<hr/>
	\$119,391 23

And there remained, at the time of the commencement of this action, of such assets uncollected and uncollectible the sum of \$34,244.40.

(18) The defendant itself has paid of the floating indebtedness of the Railway Company existing October 1, 1886, since August 1, 1887, \$26,459.96. This is all that the defendant has paid directly from the fund of \$217,000.

(19) From a time prior to July 1, 1890, to a time subsequent to December 1, 1891, the defendant was the owner of certain bonds of the republic of Mexico to the amount of \$75,000, which bonds were deposited in the Banco Nacional of Mexico as security to the Mexican government for the completion of certain lines in the republic. During the same period the interest became due on the bonds as follows, viz.:

July 1, 1890.....	\$900
Dec. 1, 1890.....	900
July 1, 1891.....	900
Dec. 1, 1891.....	900

U. S. Cy..... \$3,600

—Which amounts the Construction Company collected and received, and has not paid to the defendant.

(20) After the receipt by the defendant of the sum of \$217,000, hereinbefore mentioned, the defendant, on or about the 14th day of April, 1890, entered into agreement of arbitration with the Construction Company, a copy of which is annexed to the complaint, and entitled "Arbitration Agreement." After the making of the said arbitration agreement the Construction Company and the defendant proceeded from time to time with the hearing and taking of testimony before the arbitrators therein named, as in the said agreement provided, until the same was revoked by the defendant on the 16th day of July, 1891, to which the time for completing the arbitration had been by agreement extended; and the Construction Company in all respects on its part fully performed the arbitration agreement until the same time, and paid half of the expenses thereof, amounting to \$1,731, on expectation that it would be carried out. The arbitration was revoked by the defendant because of a decision by the arbitrators to receive evidence of claims in favor of the Construction Company against the Railway Company, which the Construction Company insisted should be set off against claims made by the defendant in behalf of the Railway Company against the Construction Company; and because the defendant preferred to revoke, rather than to go on. No decision was made as to any disposition to be made of these claims if proved, and the evidence is found to have been admitted for the better understanding of the matters submitted, and not for the purpose of going outside of them or of the submission. No misconduct or ground for charging misconduct or departure from the submission is found.

(21) After the happening of all the matters aforesaid, and before the commencement of this action, the Construction Company duly assigned, transferred, and set over unto the plaintiff the causes of action of the Construction Company against the defendant, hereinbefore set forth, and all the claims of the Construction Company against the defendant arising out of

the said provisions of the Matheson-Palmer agreement with reference to the fund or sum of \$217,000, mentioned therein, as aforesaid, and all moneys due or to become due upon the claims, or either of them, and every right of action of every description whatsoever of the Construction Company against the Railway Company by reason of such claims, or any of them, and also the entire interest and right of every description whatsoever of the Construction Company in and to the fund or sum of \$217,000, and also all claims of the Construction Company against the defendant upon, and for breach of, the arbitration agreement.

And these facts are now placed upon record herein.

Edward M. Shepard, for plaintiff.

Treadwell Cleveland, for defendant.

WHEELER, District Judge, (after stating the facts.) This finding of facts has been made pursuant to section 649 of the Revised Statutes of the United States. Upon these facts the defendant is liable for the debts of the Railway Company to the Construction Company, on whose rights the plaintiff stands, by force only of the express provision stated in the Matheson-Palmer agreement. The defendant insists that payments of such debts existing October 1, 1886, made from the current assets of the Railway Company or by the Construction Company, are to be reckoned in diminishing the limit of the provision for such debts. If the provision had been that such debts should be paid to an amount not exceeding \$217,000, this claim might have been well founded; but it was of "a sum not exceeding \$217,000, to be applied to liquidate the indebtedness of the existing Railway Company." This is not a mere provision that not exceeding that amount of debts shall be paid, but a provision of that sum to be applied so far as it will go to the liquidation of such debts. The Railway Company was, in the contemplation of the parties to the agreement, to disappear. The defendant was to become its successor, and its net debts were to be provided for. This fund seems to be such a provision. It was to be added to the assets, not substituted for them; and it is to be resorted to so long as it may last for the payment of such debts not otherwise paid. The defendant has by the finding applied only \$26,459.96 of this fund in liquidation of such debts. The balance, of more than \$190,000, with interest since it was received, is left to be resorted to.

That the Railway Company correctly stood a debtor to the Construction Company upon the books of both on October 1, 1886, for \$104,244.10, is found as a fact. The interest computed to that day, \$7,210.18, has not, apart from the principal, been questioned; which makes then due \$111,454.28. The identity of stockholders and officers, the relation of the two companies to each other and to the subject-matter, and the means by which the provision came into the agreement, are relied upon to exclude the Construction Company from it.

The identity of stockholders and officers found did not make the corporations legally identical. They had separate stockholders and officers also, and separate property and dealings. It merely suggested and required more careful scrutiny of their transactions

with each other, in which still others became interested, which has been given. They could owe each other. The Railway Company did owe the Construction Company, and what was so owed was an indebtedness. The agreement nowhere expressly, or, as understood, impliedly, distinguishes between the construction company and other creditors in respect to floating or other indebtedness. That this debt was placed, in the statement furnished, among those to individuals and companies, when it might perhaps more appropriately in railroad bookkeeping have been separated, is not found to have deceived any one. The amount, not the form, of the indebtedness was what was important to the business then in hand.

The Matheson-Palmer agreement was not signed till October 15th, although, as to accounts which were dated as of the 1st of each month, the reckoning is by agreement made as of October 1, 1886. Before October 15th the Construction Company had, as accommodation indorser, paid the Hinchman notes, amounting to \$40,000, for the Railway Company. The agreement as to dates does not affect this transaction, whereby the Railway Company was indebted to the Construction Company for so much paid for it, at the time of the execution of the Matheson-Palmer agreement. This indebtedness would come within the provision of \$217,000 to liquidate the indebtedness of the Railway Company made in that agreement, and makes the indebtedness of the Railway Company to the Construction Company provided for \$151,454.28.

The Railway Company had agreed to deliver to the Construction Company 8,000 shares of stock of the Railway Company to replace that with which the notes were paid, or pay \$10 per share therefor. The stock was not demanded till October 22d, after the Matheson-Palmer agreement was signed, and has never been delivered or paid for. The plaintiff claims that the debt of the Railway Company to the Construction Company growing out of this transaction became \$80,000 of indebtedness provided for in the \$217,000. The defendant insists that no part of it, and especially that but \$40,000, is so provided for. The Railway Company could have extinguished the liability at any time before the holder exercised his option, by paying the notes. This was the situation during a part of the time of the negotiation of the Matheson-Palmer agreement, and the liability did not become \$80,000 till after the execution of that agreement. As an indebtedness it was only \$40,000 at the time of that execution, within the terms of the provision for the liquidation of indebtedness. The further liability could be satisfied by the delivery of the stock, which, as the company was insolvent, would have no actual value. Under these circumstances this excess of liability beyond the \$40,000 of original indebtedness does not seem to be such an actual indebtedness as to come within the terms of the provision for the liquidation of indebtedness, but rather to be a penalty for nonpayment of the notes. The Matheson-Palmer agreement, when made, became operative upon all the property which it would affect, and those in possession would hold it for those who should ultimately become entitled to it, with

no right to incumber it beyond what would be necessary for its preservation and use; and this liability of the Railway Company, accruing after the making of the agreement for not meeting its indebtedness, would not seem capable of being made a charge upon the balance accruing from the assets of the Railway Company against the Construction Company, so as to prevent its going in reduction of the indebtedness to the Construction Company provided for in the agreement.

Whether the payments made by the Construction Company to Mendez for services, for bonds for Mendez, and on the El Salto lien, during the 10-months period, which have been credited to that company in the transactions of that period, should not at all, or only in part, be so credited, is not material as the figures stand. All of such payments that should be disallowed there because they accrued before that period would become a part of the indebtedness existing before. If they should be taken from there, and added to the debts, they would be increased just as much as the balance against the Construction Company during that period to be deducted would be increased. Reckoned either way, the balance left due the Construction Company would be \$113,056.10.

The defendant, however, claims that the transaction in respect to the equipment trust certificates created a debt or liability of the Construction Company to the Railway Company, existing both on October 1 and October 15, 1886, and large enough to meet and extinguish the debts and liabilities of the Railway Company to the Construction Company at either of those times, and more. But the Construction Company had not purchased these certificates, nor agreed to pay anything for them; and the transaction did not create any debt either way. The certificates were not to be yielded up to the Railway Company to be used, but to be canceled; and the Railway Company had no right to use them otherwise. If the failure to yield them up created any liability, it would have been for only nominal damages, for the Railway Company had suffered nothing from the failure; and the certificates have since been delivered and canceled under the Matheson-Palmer agreement, to which the Railway Company was a party, which was the same in effect as if they had been delivered to and canceled by the Railway Company itself.

The Matheson-Palmer agreement, when made and executed, began to operate immediately upon the rights of all the parties to it as between each other, and upon the title to property within its reach; but the various proceedings to be taken under it would require considerable time. Still no provision was made for dealing with the property, for compensation about the care of it, or for interest on money, or debts among the parties, which would be in abeyance. The whole related to one object, and in effect would date from the beginning, like a term of court, or a session of parliament, at common law. Therefore no interest would seem to be chargeable meanwhile as between the parties. The period by the receipt of the money for the liquidation of the debts of the Railway Company ended before January 1, 1888,—how long before

does not appear. After that the defendant had the money with which to pay these debts, and should be charged with interest on what remained unpaid after deducting what the assets of the Railway Company paid, \$113,056.10, which, to November 14, 1893, is \$39,814.57, amounting to \$152,870.67.

Upon the finding no question seems to be left but that the defendant became liable to the Construction Company for what the latter laid out and lost by the making and revoking of the arbitration agreement, which was \$1,731; and with interest from revocation, \$241.77, amounts to \$1,972.77.

The \$3,600 received by the Construction Company, belonging to the defendant, is understood to have arisen from the same transactions, and to be proper to be deducted. As this amount was much less than the interest then accrued in favor of the Construction Company, no interest is allowed upon it.

These sums of \$152,870.67 and \$1,972.77, amounting to \$154,843.44, less \$3,600, leave due \$151,243.44.

Let judgment be entered for the plaintiff for \$151,243.44.

PAULY v. STATE LOAN & TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 137.

NATIONAL BANKS — INSOLVENCY — STATUTORY LIABILITY OF STOCKHOLDERS—
PLEDGE OF SHARES.

A corporation which holds certain shares of stock in a national bank as collateral security for a loan, and is carried on the registry of the bank as the holder of such stock "as pledgee," is not subject, on the bank's insolvency, to the statutory liability of a stockholder.

In Error to the Circuit Court of the United States for the Southern District of California.

At Law. Action by Frederick N. Pauly, as receiver of the California National Bank of San Diego, against the State Loan & Trust Company, a corporation, to recover an assessment upon 200 shares of the stock of said bank held by defendant. Findings and judgment of the circuit court for defendant. 56 Fed. 430. Plaintiff brings error. Affirmed.

M. T. Allen, for plaintiff in error.

W. P. Gardiner, for defendant in error.

Before McKENNA, Circuit Judge, and HANFORD, District Judge.

HANFORD, District Judge. The opinion of the judge who decided this case in the circuit court contains the following accurate and concise statement of the case, and of the question at issue:

"The plaintiff, as receiver of an insolvent national bank, brings this suit against the defendant bank to recover the amount of an assessment on two hundred shares of the stock of an insolvent bank originally taken by the defendant as collateral security for \$12,500, with interest thereon, loaned by defendant to J. W. Collins and S. G. Havermale upon that security,

and upon the promissory note of Havermale, indorsed by Collins. At the time of the loan, Collins was president, and Havermale one of the directors, of the California National Bank of San Diego, and each was registered owner and holder of one hundred shares of its stock. The bank was then carrying on its ordinary business, and, so far as known to the defendant and the public, was perfectly solvent. Upon the making of the loan, and for the purpose of securing its repayment with interest, Collins and Havermale each indorsed in blank his certificate for one hundred shares of the stock in question to defendant, and thereupon, and upon the application of the defendant to the bank whose stock was thus represented and assigned, that bank took up the two certificates issued to Collins and Havermale, and in lieu of them issued to the 'State Loan & Trust Co. of Los Angeles, as pledgee,' two certificates for one hundred shares each.

"The defendant thus stood upon the registry of the National bank as the holder of two hundred shares of its stock 'as pledgee,' and so stood at the time the bank became insolvent. The indebtedness to defendant for which the stock was given as security, though reduced in amount to \$10,000, continued; and the question presented for decision is whether, under such circumstances, defendant is liable for an assessment upon the two hundred shares of stock for the benefit of the creditors of the insolvent bank. The statute providing for the association of persons for carrying on the business of banking, provides among other things, as follows: 'The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.' Rev. St. § 5139. By section 5151 of the Revised Statutes it is declared: 'The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof in addition to the amount invested in such shares,'—with certain exceptions not applicable to the present case. Section 5152 is as follows: 'Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner, and to the same extent as the testator, intestate, ward, or person interested in such trust funds, would be if living, and competent to act and hold the stock in his own name.'" 56 Fed. 430.

The circuit court gave a judgment in favor of the defendant, and the plaintiff has brought the case to this court by writ of error.

The decision of the circuit court, as appears by said opinion, was placed upon the ground that the defendant was not in fact owner of the stock, and, as the stock register showed that it held the same merely as pledgee, there was no estoppel. Counsel for plaintiff in error controverts these conclusions, contending that a pledgee of stock is the legal owner thereof; that the register, by showing the defendant to be the holder as pledgee, showed it to be the legal owner, having the legal rights, and subject to all the legal liabilities, incident to ownership.

We think, however, that the error is in the argument of counsel, rather than in the decision of the court. By delivery of a pledge as security for the payment of a debt, the pledgee acquires only a lien or special property in the article or things pledged. Story, Bailm. §§ 287, 307; 18 Amer. & Eng. Enc. Law, 590. Even where, in lieu of delivery, an apparent transfer of title is made for the purpose

merely of security, the general property remains in the pledgor. 18 Amer. & Eng. Enc. Law, 591, note; *Cross v. Canal Co.*, 73 Cal. 302, 14 Pac. 885. True, in the opinion of the supreme court of the United States, by Mr. Justice Matthews, in *Easton v. Bank*, 127 U. S. 532, 8 Sup. Ct. 1297, it is said that, "where personal property is pledged, the pledgee acquires the legal title and the possession." From the report of the case, it does not appear whether the point was argued, or the authorities referred to. Considering the facts of that case, it is certainly a question whether or not the one brief sentence quoted has wrought a radical change in the law. But, if so, still we must hold that in California the law is as we have stated. That rule is adopted by express provisions of the Code. Civil Code Cal. §§ 2872, 2877, 2888, 2889; *Cross v. Canal Co.*, *supra*.

The judgment should be affirmed, for the reasons given in the opinion above referred to, and it is so ordered.

H. C. AKELEY LUMBER CO. v. RAUEN.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1893.)

No. 311.

MASTER AND SERVANT—SAFE PLACE—INSUFFICIENT LIGHT.

The third night of plaintiff's employment in the mill of a lumber company, while engaged in pushing a laden car on a platform 20 feet from the ground, which platform, at the place of disaster, was narrowed, by reason of a curve, to a width, outside the car track, of only 6 or 8 inches, he stepped therefrom, and sustained the injuries complained of. The only light furnished to work by was that feebly emitted from the lantern of a fellow workman. *Held* that, on these facts, the verdict of the jury, finding the lumber company guilty of negligence, and plaintiff not guilty of contributory negligence, should not be set aside on appeal.

In Error to the Circuit Court of the United States for the District of Minnesota.

At Law. Action by Ole Johnson against the H. C. Akeley Lumber Company to recover for personal injuries. After verdict, plaintiff died, and Peter Rauen was appointed special administrator. Judgment for plaintiff. Defendant brings error. Affirmed.

Emanuel Cohen, (Stanley R. Kitchel and Frank W. Shaw, on the brief,) for plaintiff in error.

Charles A. Ebert, (Henry Ebert, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by Ole Johnson to recover for personal injuries alleged to have been received through the negligence of the H. C. Akeley Lumber Company. There was a trial to a jury, and a verdict and judgment for the plaintiff, and the lumber company sued out this writ of error. After the verdict was rendered, the plaintiff in the action died, and the defendant in error was appointed special administrator of his estate. The only assignment of error relied upon

in argument is that the court refused to give a peremptory instruction to the jury to return a verdict for the defendant.

These are the leading facts in the case: The lumber company operated a large sawmill. Connecting with the mill was a main platform, raised 20 feet from the ground, extending out from the mill for a considerable distance. From this main platform there branched off, at right angles with it, 15 other platforms, called "alleys." On all the platforms there were tracks made of iron rails, upon which cars loaded with lumber at the mill were run for the purpose of carrying and distributing the lumber so that it could be piled on either side of the alley tracks mentioned. On the main track the cars were drawn by horses, and, as each car came in front of the alley for which it was intended, it was detached, and switched off on the alley track. Sometimes the car switched off was run around the curved switch into the alley by the men having charge of the main track, and at other times it was only shoved on the switch far enough to clear the main track, and had to be pushed around the curve in the switch, and into the alley where it was to be unloaded by the men engaged in unloading the lumber from the cars, and piling it. In alley 9, where the accident occurred, the platform on one side of the switch track was gradually narrowed from the point where it separated from the main track, where it was 6 feet wide, or more, until, at the angle formed by the alley and the platform, it was only 6 or 8 inches wide, and one stepping more than that distance from the iron rail would be precipitated a distance of 20 feet to the ground. The plaintiff was employed to pile lumber at night in these alleys. It was part of his duty to push, or assist in pushing, the cars on the alley tracks to the place where they were to be unloaded. He was not furnished with a lantern, though the man who worked with him had one which gave out a feeble light. The tracks and yard where the lumber was piled were not lighted, and the men at night worked in the dark, save the light emitted from the lantern. The third night after the plaintiff was employed, he was set at work in alley 9. A car load of lumber intended for that alley was placed on the switch by the conductor of the cars on the main track, but it was not run around the curve, and down into the alley. The plaintiff, in company with his fellow workman, who had been waiting in the alley for the arrival of the car, proceeded to it, and the plaintiff, placing his shoulder against the corner of the car, proceeded to push it. He continued in that position, pushing the car, until the point in the curve of the switch was reached where the platform was only 6 or 8 inches wide outside of the rail of the track, when his steps fell beyond this narrow platform, and he was precipitated to the ground, a distance of 20 feet, and received the injuries complained of. He claimed he had no knowledge of the narrowing of the platform around the curve, and that there was not light enough to enable him to see it.

The specific act of negligence charged is that the lumber company did not provide the plaintiff with a reasonably safe place in which

to do the work he was engaged to do,—especially so, considering that the work had to be done after night. The court below, in a commendably brief and clear charge, to which the plaintiff in error took no exception, stated to the jury the rules of law applicable to the case. The jury have found that the defendant was guilty of negligence, and that the plaintiff was not guilty of contributory negligence, and on the evidence in this record this court cannot set aside that finding. The cases of *Ferren v. Railway Co.*, 143 Mass. 197, 9 N. E. 608, and *Stackman v. Railway Co.*, (Wis.) 50 N. W. 404, may be referred to as fully supporting the jury in their conclusions, and the judgment of the lower court.

The judgment of the circuit court is affirmed.

W. B. GRIMES DRY-GOODS CO. v. MALCOLM, (WAPLES, Intervener.)
(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 298.

1. EVIDENCE—DECLARATIONS OF GRANTOR.

On trial of an issue as to whether or not an instrument is a chattel mortgage, or an assignment for the benefit of creditors, testimony of the person executing it, as to statements made by him to a third person as to its character, is inadmissible.

2. TRIAL—SPECIAL FINDINGS BY JURY—FOLLOWING STATE PRACTICE.

Mansf. Dig. Ark. § 5142, in force in the Indian Territory, and providing that the jury may be required to find specially upon particular questions of fact, having been decided by the supreme court of Arkansas not to be mandatory, and, such a statute not being obligatory upon the federal courts, the refusal of the court in the Indian Territory to submit questions for special findings is not a ground for reversal.

3. APPEAL—HARMLESS ERROR—DIRECTING VERDICT.

It is not reversible error for the court to direct a juror to agree with his fellows, when the evidence is of such a character that the court may take the case from the jury and direct a verdict.

4. SAME—INSTRUCTIONS.

Where no other verdict could have been rightfully rendered, the appellate court will not consider exceptions based on instructions given and refused.

In Error to the United States Court in the Indian Territory.

At Law. Action commenced by attachment by the W. B. Grimes Dry-Goods Company against John Malcolm. Paul Waples intervened, claiming the attached goods under a deed of trust. Judgment for the intervener. Plaintiff brings error. Affirmed.

N. B. Maxey and John N. Ritter, for plaintiff in error.

A. G. Moseley, for defendant in error Waples.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This case is identical in its origin, and in the principal questions involved, with the case of *Hat Co. v. Malcolm*, 2 C. C. A. 476, 51 Fed. 734. We need only consider, therefore, the assignments of error which raise questions not decided in that case.

The plaintiff in error examined Malcolm, the mortgagor, as a witness, and in the course of the examination asked the witness if he had not told one Wiswell that the instrument under which Waples, the interpleader, claimed the goods, was an assignment, and that it was void. The interpleader interposed an objection to the question, which the court properly sustained. The mortgagor could not prejudice the rights of the mortgagee by statements made to third parties after the execution of the mortgage, and the delivery of the property thereunder to the trustee.

The court refused the plaintiff's request to submit to the jury 11 questions for special findings. The Arkansas Code, in force in the Indian Territory, provides that "in all actions the jury in their discretion may render a general or special verdict, but may be required by the court in any case in which they render a general verdict to find specially upon particular questions of fact to be stated in writing. * * *" Section 5142, Mansf. Dig. The supreme court of Arkansas has decided that this section is not mandatory, but that whether a jury shall be required to find specially upon particular questions of fact is a matter within the discretion of the court. *Railway Co. v. Pankhurst*, 36 Ark. 371, 378. Moreover, state statutes which require the state courts to submit special questions to the jury are not obligatory upon the federal courts. *Association v. Barry*, 131 U. S. 100, 119, 9 Sup. Ct. 755.

A further assignment of error is that the court, in effect, told one of the jurors trying the case that it was his duty to agree with his fellows in finding a verdict for the interpleader. The record contains all the testimony, and, upon looking into it, we are all of the opinion that there was no evidence tending in the slightest degree to impeach the interpleader's title to the property, and that the court should have so told the jury, and directed them to return a verdict for the interpleader. It was not error for the court to direct one juror to do what it ought to have directed all of them to do before leaving their box. The mortgage, and proof of possession taken thereunder, established the interpleader's title to the property, and there was no evidence tending to establish a contrary conclusion.

This case, as well as that of *Hat Co. v. Malcolm*, supra, seems to have been tried on the assumption, assented to by all parties, that it was competent for the attaching creditors, for the purpose of defeating the mortgagee's title, to contradict and vary the terms of the mortgage by parol testimony, and to show, if they could, that the grantor or mortgagor designed the instrument for an assignment for the benefit of creditors, and not a mortgage, and that, if the grantor intended that the instrument should operate as an assignment, it must have that operation, without regard to its terms, or to the knowledge or intention of the grantee or mortgagee. We do not wish to be understood as assenting to the soundness of these assumptions. An inquiry into their soundness is not necessary, however, to the decision of this case. Assuming, but not deciding, that they are good law, it is sufficient to say that there is not a particle of proof in the case tending to show that either

of the parties to the instrument intended it to be other than what it purports to be on its face, namely, a mortgage.

It is well settled that a federal court may withdraw a case from the consideration of the jury, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Sanger v. Flow*, 4 U. S. App. 32, 1 C. C. A. 56, 48 Fed. 152; *Hinds v. Keith*, 57 Fed. 10. Inasmuch as, upon the pleadings and evidence, the jury could rightfully find only as they did, it is unnecessary to consider exceptions based on instructions given and refused. Upon this record the plaintiff could not have complained of an instruction to return a verdict for the interpleader.

The judgment of the court below is affirmed.

SCHRODER v. TOMPKINS et al.

(Circuit Court, D. Indiana. November 23, 1893.)

No. 8,935.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—COMMON LAW AND STATUTORY.

The Ohio statute relating to assignments for the benefit of creditors merely prescribes the method of enforcing and administering the trust after it is created, and the validity and character of the assignment is to be determined by the common law. *Mayer v. Hellman*, 91 U. S. 496, and *Johnson v. Sharp*, 31 Ohio St. 611, followed.

2. SAME—FOREIGN ASSIGNMENTS—PUBLIC POLICY.

A voluntary common-law assignment, valid in the state where made, carries title to chattels located in another state, and will be enforced by its courts, if not contrary to its own public policy.

3. SAME—ATTACHING CREDITORS.

A voluntary common-law general assignment for the benefit of all creditors alike, executed in Ohio by a partnership having its principal business there, conveys title to personal property of the debtors in Indiana, although one of the partners resides in Indiana; and when possession is taken thereunder by the assignee he can hold the property as against subsequent attaching creditors not residents of Indiana. *Woolson v. Pipher*, 100 Ind. 306, distinguished.

At Law. Action by Jacob Schroder, as assignee for the benefit of creditors, against George W. Tompkins and William Sherry, to recover possession of goods of the assignor held by defendants, as sheriffs, under certain writs of attachment. Judgment for plaintiff.

Jacob Shroder, in pro. per.

Mark E. Forkner and John M. Morris, for defendants.

BAKER, District Judge. This case is submitted on an agreed statement of facts, pursuant to section 553, Rev. St. Ind. 1881. It is agreed that the plaintiff is a citizen and resident of the state of Ohio, and that the defendants are citizens and residents of the state of Indiana; that the goods and chattels in controversy are of the

value of \$3,000 and upwards; that on and prior to October 4, 1893, Frank Leon and Aaron Metzger were partners doing business under the name and style of Leon & Metzger; that they owned a manufactory of clothing, and dealt therein, and had a jobbing house, and operated the same, in Cincinnati, Ohio, and had a branch retail store respectively in Muncie and New Castle, Ind., under the charge of Frank Leon, as a member of the firm of Leon & Metzger; that Frank Leon at the same time was a citizen and resident of Indiana, and has continued to be so until the present time, and Aaron Metzger at the same time was a citizen of Ohio, residing in Cincinnati, and has continued to be so until the present time; that said firm of Leon & Metzger at and prior to October 4, 1893, owned goods, wares, and merchandise in their business in said jobbing house and factory in Cincinnati, and in their branch stores aforesaid; that, being owners and in possession of said goods, they, both being present in Cincinnati as such partners in said city, did voluntarily execute and deliver to the plaintiff on the 4th day of October, 1893, a deed of general assignment of all their goods, wares, and merchandise, and all their partnership property and assets, which assignment was duly accepted by the plaintiff, who, on the said 4th day of October, 1893, filed said deed in the probate court of Hamilton county, Ohio, wherein the city of Cincinnati is located, and executed a bond conformably to the laws of Ohio for the faithful performance of his trust in the penal sum of \$50,000, with surety to the approval of the court; that, pursuant to said assignment, Leon & Metzger surrendered to the plaintiff, on the 4th day of October, 1893, all of said property, of which the plaintiff took possession on the same day, and has remained in possession of all of said property; that the plaintiff has not filed said assignment, or a copy thereof, in the recorder's office in the county where said Leon resides; that at the time of said assignment the store in New Castle was in the possession of Cy. Guyer as agent of Leon & Metzger, who was notified by the plaintiff and Leon & Metzger to hold the same for the assignee, which he did until levied on by the sheriff as hereinafter stated; that the plaintiff, immediately after taking possession of said property, caused the same to be appraised according to the laws of Ohio; that at and long before said assignment Leon & Metzger were indebted to the firm of A. Bacharach & Co., of Philadelphia, Pa., in the sum of \$1,095.75, for goods sold and delivered to Leon & Metzger at their store in Muncie for retail therein; that each member of said firm of A. Bacharach & Co. is, and long has been, a citizen and resident of Philadelphia, Pa.; that said deed of assignment provided for the pro rata payment and distribution of the proceeds of said trust property among all the creditors of Leon & Metzger without preference; that after said assignment, and after the assignee had taken possession of said goods thereunder, on the 18th day of October, 1893, and four days after the firm of A. Bacharach & Co. had notice and knowledge of said assignment and of the possession of said goods by the plaintiff as assignee, the said firm, declining to accept under said assignment, brought suit in

the circuit court of Delaware county, Ind., against Leon & Metzger to recover the amount so due them, and as ancillary thereto they procured writs of attachment to issue to the defendants Tompkins and Sherry, as sheriffs of the counties wherein Muncie and New Castle are situated; that said writs were issued, and came to the hands of said sheriffs, respectively, on the 18th day of October, 1893, who, by virtue thereof, on October 21, 1893, levied upon and seized the goods in said branch stores so as aforesaid assigned to and in the possession of the plaintiff, and refuse to surrender them, or any part thereof, to him.

The sole question is whether the plaintiff has acquired a paramount title to the goods in controversy by virtue of the deed of assignment and the possession thereof taken thereunder. The deed of assignment in this case was not executed under the authority of any statute of Ohio relating to the transfer of property by insolvent debtors for the benefit of their creditors. The instrument is a voluntary conveyance executed in conformity with the principles of the common law, which is prevalent in that state. In *Mayer v. Hellman*, 91 U. S. 496, in speaking of the statute of Ohio on this subject, the court said:

"The statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments. It assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties. It requires them to file statements showing what they have done with the property, and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after-acquired property liable to his creditors, precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio to which reference is made had no existence."

In *Johnson v. Sharp*, 31 Ohio St. 611, in speaking of the legislation of that state on the subject of assignments, the court said:

"Nor is the title of an assignee of such nonresident debtor at all affected by the fact that the probate court of the county in which such assigned property may be located has assumed jurisdiction over the administration of such trust. The validity of such assignments is not, in any case, affected by this legislation, but only the mode of administering them; so that the validity of all such assignments must be determined by the general law in relation thereto; and the administration of those made by nonresident debtors would remain subject to the control of courts of equity."

The deed of assignment in question is a valid conveyance under the common law of Ohio. It conveyed to the plaintiff a good title to all the personal property of the assignors in this state upon his acceptance of the trust and reducing the property into his possession, unless such conveyance conflicts with the positive law or declared public policy of Indiana. The *jus gentium* recognizes the right of disposition as an essential incident of the ownership of personal property; and wherever such property is located it is

generally agreed that the title to it follows the domicile of its owner. "*Mobilia ossibus inhaerent.*" A conveyance of it, valid according to the *lex loci contractus*, is ordinarily binding, and effectual to transfer the title to personal property wherever located. *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. 403; *Catlin v. Silver-Plate Co.*, 123 Ind. 477, 24 N. E. 250; *Martin v. Potter*, 11 Gray, 37; *Warner v. Jaffray*, 96 N. Y. 248; *Green v. Van Buskirk*, 7 Wall. 139; *Law v. Mills*, 18 Pa. St. 185; *Story, Confl. Laws*, 383, 390.

The principles above stated are applicable only to transfers or assignments of property which rest essentially on contract, and are voluntary in the sense that they are the product of a will acting without legal compulsion. Property in a foreign state that has passed from an assignor to an assignee by a voluntary deed, and not by proceedings in invitum by process of law, is distinguished from like property in the hands of a receiver by operation of law, or by assignment under legal compulsion. Assignments of the latter class are generally held inoperative upon property not situated within the territory over which the laws that make, or compel the debtor to make, them have dominion. Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they were made, while a voluntary assignment is a personal common-law right, possessed by every owner of property, and may operate as well in other states as in the state where it is executed. *Rhawn v. Pearce*, 110 Ill. 350; *Smith's Appeal*, 104 Pa. St. 381; *Weider v. Maddox*, 66 Tex. 372, 1 S. W. 168; *Walker v. Whitlock*, 9 Fla. 86.

The principle that a voluntary assignment is as operative upon personal property situated in a foreign state as it is upon like property located in the state where it is executed, yields to the positive law or declared public policy of such foreign state. *Sheldon v. Blanvelt*, (S. C.) 7 S. E. 593. It is claimed that the assignment in question is repugnant to the positive law and declared public policy of this state, as manifested in sections 2662, 2663, Rev. St. Ind. 1881. Section 2662 enacts that "any debtor or debtors in embarrassed or failing circumstances, may make a general assignment of his or their property, in trust for the benefit of all his or their bona fide creditors; and all assignments hereafter made by such person or persons for such purpose, except as provided for in this act, shall be deemed fraudulent and void." Section 2663 enacts that such assignment shall be signed and acknowledged before some person qualified to take the acknowledgment of deeds, and shall, within 10 days, be filed with the recorder of deeds of the county where the assignor resides, whose duty it shall be to record the same as deeds are recorded. It provides in detail what the deed of assignment shall contain, including the oath of the assignor to the schedule of his property. It also requires the assignee to give a bond for the performance of his duties, to file with the clerk of the court an inventory and appraisal of the property, and to report his doings to the court. It is fundamental that statutes have no extraterritorial force or operation. The above sections must therefore be so construed as to embrace

and operate upon deeds of assignment executed in this state, and not elsewhere. This doctrine is firmly established. *May v. Bank*, 122 Ill. 551, 13 N. E. 806; *Juilliard v. May*, (Ill. Sup.) 22 N. E. 477; *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460; *Schuler v. Israel*, 27 Fed. 851; *Atherton v. Ives*, 20 Fed. 894; *Halsted v. Straus*, 32 Fed. 279; *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. 403.

It therefore follows that the assignment in question will be deemed valid and effectual here, unless its enforcement would conflict with the declared public policy of this state, as manifested by the above statutory provisions. The manifest policy and purpose of our statute is to secure the impartial distribution, among all his creditors, without preference, of all the property of the debtor in embarrassed or failing circumstances. It is intended to enforce the principle of sound morality which finds expression in the maxim that equality is equity. All the other statutory provisions are means for the accomplishment of this salutary principle. The assignment in question and the law of Ohio for the administration of the trust carefully provide for and secure the like purpose. It cannot, therefore, be held that it would conflict with the law or policy of this state to uphold the assignment in question as a valid conveyance of the property in controversy. The deed of assignment, coupled with the possession of the goods taken in pursuance thereof, gave to the assignee a valid title to them as against the claims of subsequent attaching creditors who are non-residents of this state. Among the numerous cases supporting this doctrine are the following: *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. 403; *Frank v. Bobbitt*, 155 Mass. 112, 29 N. E. 209; *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460; *May v. Bank*, 122 Ill. 551, 556, 13 N. E. 806; *Smith's Appeal*, 104 Pa. St. 381; *Chaffee v. Bank*, 71 Me. 514; *Coffin v. Kelling*, 83 Ky. 649; *Egbert v. Baker*, 58 Conn. 319, 20 Atl. 466; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Thurston v. Rosenfield*, 42 Mo. 474; *Weider v. Maddox*, 66 Tex. 372, 1 S. W. 168; *Ockerman v. Cross*, 54 N. Y. 29; *Catlin v. Silver-Plate Co.*, 123 Ind. 477, 24 N. E. 250.

In *Barnett v. Kinney*, supra, it is held that an assignment of all his property, made for the benefit of his creditors with preferences, by a citizen of Utah to another citizen of Utah, which is valid by the laws of Utah and valid at the common law, is valid in Idaho against an attaching creditor as to property in Idaho of which the assignee has taken possession, notwithstanding the provisions of the Revised Statutes of Idaho that no assignment by an insolvent debtor otherwise than as therein provided is binding on creditors, and that creditors must share pro rata, without priority or preference. Counsel for the defendants cite and rely on the case of *Woolson v. Pipher*, 100 Ind. 306, as announcing a contrary doctrine. In this they are in error. In this case—which involved an assignment executed in Ohio—it was held that the voluntary assignment of his goods by a failing debtor for the benefit of his creditors, where the possession of the goods is not delivered to nor taken by the assignee, will not defeat the lien of an attaching creditor, created before the consummation of such assignment

by the delivery of the possession of the goods to the assignee. The court said:

"It is certain, we think, that the mere written assignment of the goods, executed as it was in another state, did not give the appellant [the assignee] any such title to the property as would defeat the liens of attaching creditors of the assignors. Possession of the goods was indispensable to the perfection of appellant's title, and, before the delivery of the possession to him, the lien of the attaching creditors on the goods intervened."

The ground on which the judgment of the court was rested supports the conclusion at which I have arrived.

Counsel also press upon the attention of the court the case of *Sheldon v. Blanvelt*, (S. C.) 7 S. E. 593. *Blanvelt*, a citizen of New York, executed a general assignment for the benefit of his creditors, providing for the payment of all wages and salaries of his employes in preference of all other creditors, as required by the statute of New York. The assignment was executed and recorded in all respects as required by the statutes of that state. The principal part of the assignor's property was in New York, though he owned some real and personal property in South Carolina. Before possession of the property in South Carolina had been taken by the assignee, it was seized by virtue of writs of attachment sued out at the instance of creditors residing in New York and Connecticut. A statute of South Carolina provided that any assignment for the benefit of creditors made by an insolvent debtor, containing a preference of one creditor over another, should be absolutely void. It was held that the deed of assignment was void so far as the property located in South Carolina was concerned, and that it was immaterial that none of the attaching creditors resided in that state. If this case is correctly decided,—which may well be doubted, in view of the case of *Barnett v. Kinney*, *supra*,—it still yields no support to the defendants' contention, because the assignee had not perfected his title by taking possession of the property, as had been done in the case at bar.

The agreed statement of facts exhibits an assignment, valid by the laws of Ohio, and valid by the common law, and the delivery to and the taking possession of the goods located in this state by the assignee before the proceedings in attachment were begun. The fact that one of the partners resided in this state does not, in my judgment, affect the question. The principal domicile of the business was in Ohio, and the stores in Indiana were mere branches of that business. The assignment was properly made in the state in which the principal domicile of the business was located, and, being valid by the law of the place where made, it must be regarded as valid here. As was said in *Frank v. Bobbitt*, *supra*:

"It is not necessary to inquire whether this rests on the comity which prevails between different states and countries, or is a recognition of the general right which every one has to dispose of his property, or to contract concerning it, as he chooses."

It was there said that the only qualification annexed to voluntary assignments made by debtors in another state was that the courts would not sustain them if to do so would be prejudicial

to the interests of their own citizens, or opposed to public policy. It is not important to inquire whether or not citizens of this state could wrest the goods in controversy from the possession of the assignee by proceedings in attachment. The attaching creditors in the present case were nonresidents of this state. It is firmly settled that such creditors do not occupy as favorable a situation as if they were citizens of this state. On this subject, in the last above cited case, the court said:

"As to the claim of the plaintiffs that they should stand as well as if they were citizens of this state, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such; and, in the next place, that, the assignment being valid by the law of the place where it is made, and not adverse to the interests of our own citizens, nor opposed to public policy, no cause appears for pronouncing it invalid."

It follows that there must be judgment for the plaintiff pursuant to the agreement, and it is so ordered.

UNITED STATES v. HILLYER et al.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 67.

1. UNITED STATES MARSHAL—FEES PAID TO OFFICERS OF THE UNITED STATES.

A marshal is entitled to witness fees paid by him to officers of the United States by order of the court, the payment of which has been ordered by the court, under Rev. St. § 846, and for which no itemized account was presented or audited by such officers, notwithstanding the provisions of section 850, requiring them to furnish a sworn itemized account of such fees.

2. SAME—FEES PAID BY ORDER OF THE COURT.

The allowance of the items under section 846, paid under order of the court, is not reviewable in an action against the marshal by the government to recover the same as paid contrary to law. *McMullen v. U. S.*, 13 Sup. Ct. 127, 146 U. S. 360, distinguished.

3. SAME—UNITED STATES MARSHAL IN ALASKA—COMPENSATION.

Under Act Cong. 1884, c. 53, § 9, fixing the salary of United States marshal in Alaska at \$2,500 per annum, and providing that he shall pay the fees received by him into the treasury of the United States, he is required to pay over all fees received by him, whether for services rendered to the government or for those rendered to private litigants.

In Error to the District Court of the United States for the District of Alaska.

At Law. Action by the United States against Munson Curtis Hillyer, marshal for the district of Alaska, and James Carroll and others, sureties upon his official bond, to recover moneys retained, misappropriated, and paid out by said Hillyer contrary to law. A jury was waived, and the cause tried by the court, which rendered judgment for the United States, who, being dissatisfied with the judgment, brought error. Reversed.

Charles A. Garter, U. S. Atty., (Charles A. Shurtleff, Asst. U. S. Atty., on the brief,) for plaintiff in error.

George R. B. Hayes, (Stanley, Hayes, McEnerney & Bradley, on the brief,) for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On the 4th of August, 1890, the United States filed a petition in the United States district court for Alaska against M. C. Hillyer, marshal of said district, and the sureties upon his official bond, to recover \$3,941.89, moneys claimed to have been misappropriated to the use of said marshal, and paid out by him, contrary to law. Issue was joined upon the petition, and the court, after hearing the cause, made findings of fact and conclusions of law, and rendered judgment for the United States for \$2,290.16 and costs. Not being satisfied with this judgment, the United States brings the record into this court upon writ of error.

The assignments of error refer wholly to the correctness of the conclusions of law arrived at by the court in allowing certain items of the marshal's account. One item allowed consisted of witness fees, amounting in the aggregate to \$602.80. It is claimed that the payment of these fees was illegal, for the reason that the witnesses to whom the fees were paid were officers of the United States, and, as such, were not entitled to receive witness fees.

Section 850, Rev. St., provides:

"When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court shall be audited and paid, but no mileage or other compensation in addition to his salary shall in any case be allowed."

It is not disputed that the witnesses referred to were officers of the United States. So far as appears from the record, no statement of expenses such as is required by the statute was ever presented or audited. All of the items included in this portion of the account, however, were paid under the order of the court, and were subsequently submitted to the court in the marshal's account, and the expenditure of said sums was approved.

Section 846, Rev. St., reads as follows:

"The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed before they are presented to the accounting officers of the treasury department for settlement. They shall then be subject to revision upon their merits by said accounting officers as in case of other public accounts, provided that no accounts of fees or costs paid to any witness or juror upon the order of any judge or commissioner shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."

It is contended on behalf of the plaintiff in error that under the construction given to this statute in the case of McMullen v. U. S., 146 U. S. 360, 13 Sup. Ct. 127, the allowance of these items is open to investigation in this action. In that case the matter under consideration was the account of the marshal for his fees for attendance upon the court. The supreme court construed that portion of section 846 which provides that after allowance by the court the account shall be then subject to revision by the accounting officers of

the treasury, and held that the allowance by the court does not preclude revision by the proper officers of the treasury, nor justify its payment if such allowance was unauthorized by law. That decision does not affect the construction to be given to the last clause of the section, the plain purport of which, as we construe it, is that no marshal shall be charged for erroneous fees paid by him to witnesses or jurors under the order of the court. *Harmon v. U. S.*, 43 Fed. 560. We find no error in the allowance of these items by the court.

The principal assignment of error refers to the construction given by the court to the act of congress fixing the compensation of the marshal of Alaska, and brings in question the allowance of \$1,682.69 fees for services rendered to the United States. The act creating a civil government for Alaska (23 Stat. 24, § 9) provides for the compensation of governor and marshal as follows:

"They shall generally receive the fees of office established by law for the several officers the duties of which have been hereby conferred upon them as the same are determined and allowed in respect to similar offices under the laws of the United States, which fees shall be reported to the attorney general and paid into the treasury of the United States. They shall receive respectively the following annual salaries, * * * the marshal the sum of two thousand five hundred dollars, * * * payable to them quarterly from the treasury of the United States."

It is argued that, since all of these fees were earned by services rendered by the marshal in behalf of the United States, he had the right to apply any moneys in his hands to the payment of the same; and that, inasmuch as these fees had not been received by him as contemplated by the act, but were still owing to him from the government, they were not included among the fees which he was required to pay into the treasury of the United States; and reference is made to the following sections of the Revised Statutes, as supporting this construction:

"Sec. 856. The fees of district attorneys, clerks, marshals, and commissioners, in cases where the United States are liable to pay the same shall be paid on settling their accounts at the treasury. Sec. 857. The fees and compensation of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of officers of the states respectively for like services are recovered."

We do not so interpret the act. We find in this act a provision that the marshal shall receive the usual fees of his office; that he shall report them to the attorney general, and pay them into the treasury; that he shall be paid an annual salary; and that he shall be allowed his necessary traveling expenses in discharging his official duties. While the words employed in the clause declaring that the marshal "shall receive the fees of office established by law" would include the fees incident to services rendered to the United States as well as those rendered at the instance of private individuals, the further provision that the fees so received shall be paid into the treasury is equally broad and comprehensive, and covers all fees received by the marshal, from whatever source. There is no warrant for holding that it was the intention of congress to confine the latter

provision to fees actually received by the marshal from private individuals, and to exclude therefrom fees allowed or paid to him by the government in the settlement of his accounts for services rendered to the United States. It necessarily follows that, if the fees in question are among those which the act declares the marshal shall receive, they are also included in the fees that the marshal shall pay into the treasury. It is the fees that he receives that he is to account for and pay over to the United States. Further evidence that such was the intention of congress is found in the clause which allows the marshal his traveling expenses. This is an absolute provision for all the expenses incurred by him in the discharge of his duties, whether in the service of private litigants or of the United States. The purport of the whole section is that the marshal shall receive as compensation a salary of \$2,500 per annum, and nothing more.

Since a new trial of this cause must be ordered on account of the error already specified, we deem it unnecessary to discuss the remaining assignments. They refer principally to items of the marshal's expense account, and cover questions that can be better investigated in the trial court upon the evidence that shall be there adduced.

The judgment is reversed, and a new trial is ordered.

BOGGS v. WANN et al.

(Circuit Court, N. D. Ohio, E. D. January 17, 1893.)

No. 4,978.

1. EXECUTORS—POWER TO CONTRACT DEBTS AND GIVE NOTES.

An executor has no authority as such to go into debt and bind the estate by giving notes; nor is such authority deducible from an express power to sell and reinvest assets; and therefore no action at law can be maintained on such notes, though in equity the estate might be held, not on the contract, but to the extent of the benefit actually conferred.

2. NEGOTIABLE INSTRUMENTS—ACTIONS ON—DEFENSES.

In an action on a note, a denial that plaintiff is the lawful owner thereof is a good defense under the Ohio Code.

3. SAME—LEGAL AND EQUITABLE DEFENSES—FIDUCIARY RELATIONS.

It is no defense to an action at law in a federal court on a note that the plaintiff and his agent occupied such a relation of confidence to the maker as enabled them to induce her to enter into an unconscionable contract for the purchase for a large sum of property having only a nominal value, when defendant does not aver a rescission or set up a breach of warranty.

4. SAME—FALSE REPRESENTATIONS.

It is, however, a good legal defense to such note that defendant was induced to purchase the property (being stock of a coal mining company) on the representation that the mine was making large dividends and profits, whereas in fact such apparent dividends and profits were made by fraudulent practices upon a railroad company, to which the coal was sold, for this shows a right of rescission; and, if the property was worthless, a tender back was a needless formality; and if there was only a partial failure of consideration, defendant could reduce the recovery pro tanto. *Withers v. Green*, 9 How. 213, followed.

5. SAME—INADEQUACY OF CONSIDERATION.

Mere inadequacy of consideration is no defense at law to an action on a note.

6. SAME—PLEADING—ANSWER—EQUITABLE RELIEF.

In an action at law on a note, a prayer in the answer that the note may be delivered up and canceled is wholly inadmissible, as being a prayer for equitable relief.

At Law. Action on promissory notes, brought by Samuel L. Boggs against Judson A. Wann, administrator de bonis non of the estate of James C. Allen, deceased, and Mary E. Allen. Heard on demurrers to the answers. Sustained in part and overruled in part.

Day, Lynch & Day, for plaintiff.

Ambler & Son, for defendant.

TAFT, Circuit Judge. The petition states that the plaintiff, Boggs, is a citizen and resident of Pennsylvania, and that the defendants, Judson A. Wann and Mary E. Allen, are citizens and residents of the eastern division of the northern district of Ohio. That on the 28th day of October, 1890, John C. Allen, of Stark county, Ohio, died testate, and by his last will and testament, among other things, provided as follows:

"Item 3. I do hereby nominate and appoint my wife, Mary E. Allen, executrix of this, my last will and testament, hereby authorizing her to compromise, adjust, release, and discharge, in such manner as she may deem proper, the debts and claims due to and from me. I do devise and bequeath to my said executrix and trustee, and to her successors in trust, the title to all the property hereinbefore described. I do also authorize and empower my said executrix and trustee and her successors in trust, whenever in her or their judgment the interests of my estate shall demand, to sell at private sale or otherwise all or any part of my personal estate, in such manner and upon such terms as may be deemed best, and deliver for any and all real estate sold deeds acknowledged by her or them, and reinvest the proceeds arising from any such sales in such manner as she or they may think best; to dispose of any property, real or personal, so acquired, and reinvest the proceeds in the same manner."

—That on November 11, 1890, the said Mary E. Allen accepted the appointment as executrix and trustee under the will, and letters were accordingly issued to her by the probate court of Stark county, and she entered upon the discharge of her duties as such. That as an individual and as executrix and trustee on the first day of April, 1891, for a good and valuable consideration she executed to the plaintiff two promissory notes as follows:

"\$4,000.00.

Canton, Ohio, April 1st, 1891.

"On or before October 1st, 1891, after date, I promise to pay to the order of Samuel L. Boggs, four thousand dollars at Canton, Ohio, with interest from date at six per cent. per annum, value received.

"Mary E. Allen, Executrix of the Will of Jno. C. Allen."

"\$5,700.00.

Canton, Ohio, April 1st, 1891.

"On or before April 1st, 1891, after date, I promise to pay to the order of Samuel L. Boggs, five thousand seven hundred dollars, at Canton, Ohio, with interest at six per cent. per annum from date, value received.

"Mary E. Allen, Executrix of the Will of Jno. C. Allen."

—That on November 18, 1891, said Mary E. Allen tendered to the probate court of Stark county her resignation as executrix and trustee, which was accepted, and on December 1, 1891, Judson A. Wann was appointed and qualified by said court as administrator de bonis non with the will annexed of the estate of said John C. Allen, and continues to act as such.

Plaintiff seeks to recover against Wann, administrator, and Mary E. Allen individually. To this petition the two defendants have filed separate answers. Wann, in his first defense, admits all the allegations of the petition, but denies that Mary E. Allen, as executrix, had authority to execute and deliver said notes on behalf of the estate, or in any wise to bind the estate by them. Wann makes a number of other defenses, which need not be stated. To the answer of Wann the plaintiff files a demurrer on the ground that none of the defenses stated in the answer are sufficient in law to constitute a legal defense to the action on the notes. The recovery sought against Wann is against him as administrator, so that the judgment and execution, if rendered, would be de bonis testatoris.

A demurrer to an answer searches the record, and requires the court to examine into the sufficiency of the facts stated in the petition to constitute a legal cause of action against the answering defendant. The theory of the petition is that the executrix, by signing the notes as such, bound the estate; and that, as the administrator de bonis non is privy to the executrix whom he succeeds, he can be held under the obligations of the estate created by her. This theory cannot be supported, for the reason that the notes, signed by Mary E. Allen as executrix, did not bind the estate of the testator. The authority given to her in the clause of the will quoted in the petition is merely an authority to sell and reinvest the assets of the estate of the testator. No specific authority is given to bind the estate by new contracts of the executrix, except in so far as such contracts may be essential to the sale and reinvestment of the assets. The power to reinvest assets cannot include the power to go into debt and bind the estate to the payment thereof. It is well settled in Ohio that neither an administrator nor an executor has any power by giving a negotiable note to bind the estate, whether the transaction results in good to the estate or not. This is expressly laid down in the case of *Curtis v. Bank*, 39 Ohio St. 579, and the same general principle is announced in the case of *Lucht v. Behrens*, 28 Ohio St. 240, and in *Kittredge v. Miller*, 19 Wkly. Cin. Law Bul. 119.

It is well settled as a general rule, to which there are few exceptions, that, while an executor may disburse and use funds of the estate for purposes authorized by law, he cannot bind the estate by an executory contract, and thus create a liability not founded on a contract or obligation of the testator. Such a contract, however beneficial to the estate, is the personal contract of the executor. He may take credit in his accounts as executor for the payments to which such a contract renders him liable, but he cannot create a privity thereby between his promisee and the estate. The subject is fully discussed, and the view just stated is well supported, in

the cases of *Austin v. Munroe*, 47 N. Y. 360, and *Ferrin v. Myrick*, 41 N. Y. 315. It is possible that, in case of the insolvency of the executor, one who had rendered services or furnished property to the estate on the executor's promise to pay might in a court of equity hold the estate, not on the contract, but to the extent of the benefit actually conferred on the estate. *Austin v. Munroe*, supra; *Kittredge v. Miller*, 19 Wkly. Cin. Law. Bul. 119. This is, however, an action at law on the contract, and there is no allegation that Mary Allen is insolvent. The petition therefore does not state a cause of action against Wann as administrator, and he will be dismissed from the suit.

We come now to the demurrer to the answer of Mary E. Allen. She admits in her first defense all the averments of the petition, except the allegation that the notes were given for a good and valuable consideration, and that Boggs is the legal owner of the same. It is doubtful whether the denial that the notes were given for a good and valuable consideration is equivalent to an allegation that the notes were wholly without consideration, though probably it ought to be so construed. However this may be, the denial that Boggs is the lawful owner of the note is a good defense under the Code of Ohio, and for that reason the demurrer to the first defense of the answer must be overruled.

The second defense is as follows:

"This answering defendant further says that said notes set up in plaintiff's petition are fraudulent and void for the following reasons, and because of the facts herein stated: At and prior to the execution of said notes said plaintiff, Samuel L. Boggs, was the owner of 254 shares of the capital stock of the Monarch Coal Company, a corporation organized under the laws of Ohio, and doing business at Dennison, Ohio, in the mining and selling of coal. Said John C. Allen, in his lifetime, and at the time of his death, was also the owner of shares of the capital stock of the said the Monarch Coal Company. Said Boggs was also the owner at the time above mentioned of an undivided one-third of certain coal lands which were being operated by said the Monarch Coal Company. Said Samuel L. Boggs, being desirous of selling the stock of said the Monarch Coal Company and of his interest in said coal lands, did some time before the execution of said notes set up in the petition enter into negotiations with the said Mary E. Allen for the purpose of inducing her to purchase the same. Said negotiations on behalf of said Boggs were conducted by one F. K. Hurxthal, as the agent of said Boggs, and for and on his behalf; said Hurxthal being also the owner of large interests in said coal company and in said coal territory. Said Mary E. Allen, prior to and before and during the said negotiations and the execution and delivery of said notes, was a woman without experience in business matters, and without knowledge of the value of such property, and by reason of such inexperience and lack of knowieuge, not understanding said business, and reposing trust and confidence in said Boggs and his agent, and their representations, for some time theretofore was a believer in the doctrines of a religion known as 'Christian Science,' and was actuated and controlled by the influences thereof, and was desirous of advancing the interest, doctrines, and beliefs of said religion, by means afforded by the control and operation of said mines of said company. Said Boggs and his agent knew that this defendant was desirous of purchasing said stock and coal interest with a view of obtaining control of said mines of said company, and operating the same for the advancement of the doctrines and the practice of the teachings of said 'Christian Science,' and they knew this defendant was under the control and influence of such teachings and doctrines, independently of which she could not and did not act; and by reason of the same, and by

reason of the premises, she was not able to and did not understand the value of said property, and was induced to purchase said stock of said Boggs, in her capacity of executrix as aforesaid, all of which said Boggs and his agent well knew. Said defendant further says that, had it not been for the matters and facts herein stated, and had she known the real value of said property, she would not have bought the same, all of which was well known to Boggs and his agent. This defendant says that Boggs and his agent, well knowing the premises, and taking advantage of the same, sold and transferred to said Mary E. Allen, executrix, as aforesaid, two hundred and fifty-four shares of the capital stock of the Monarch Coal Company and his undivided one-third interest in said coal rights for the consideration of \$12,700.00, of which said Mary E. Allen paid \$3,000.00 cash out of the funds of said estate to said Boggs, and as executor, by and under the authority and power of said will, executed and delivered said notes set up in the petition; and said notes were given for no other consideration whatever. Said stock and coal interests so transferred were not of the value of \$12,700.00, and were only of nominal value, of all of which said Boggs and his agent had full knowledge, and said Mary E. Allen was wholly ignorant."

Looked at in the most favorable light for the defendant, this defense is that Boggs and his agent occupied such a relation of confidence to the defendant Mary E. Allen as that they were enabled to induce her to enter into an unconscionable contract with Boggs to purchase from him the stock and coal interests at the price of \$12,700, when, as they well knew, the stock and coal interests were of only nominal value. There is no specific act of misrepresentation or fraud at law set out in this defense. It is quite possible that a court of equity, looking into all the circumstances of the transaction, would set aside the contract of sale on the ground of fraud, but legal fraud does not include so much as the fraud against which courts of equity protect parties. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. The defense above stated, if it is a defense at all, is an equitable defense, which cannot be made in a suit at law in the federal courts. *Buller v. Sidell*, 43 Fed. 116; *Doe v. Roe*, 31 Fed. 97; *Parsons v. Denis*, 7 Fed. 317; *Bennett v. Butterworth*, 11 How. 669. The case of *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181, has no application. There the supreme court held that an equitable defense could be pleaded in an action on a note under the Code of Ohio. In Ohio, however, under the Code, there is no distinction now made between actions and defenses at law and in equity. Equitable defenses may be pleaded in what were, before the Code, actions at law. In the United States courts the equity and law jurisdictions are still separate and distinct.

The second defense is not that of a failure of consideration. The defendant does not deny that she received the shares of stock and the coal interests which her contract called for. What she does deny is that they were equal in value to the price she paid for them. Unless she has lawfully rescinded the contract for fraud or breach of warranty, and has tendered back the stock and coal interests conveyed to her in accordance with the purchase, she is not in a position to set up a failure of consideration except by way of recoupment for damages by a breach of warranty. She does not aver any rescission of the contract on her part, nor does she set forth

any warranty or breach of it by Boggs. For this reason the demurrer to this defense must be sustained.

The third defense is as follows:

"For a further defense this defendant adopts and reaffirms the allegations hereinbefore made as to the sale of said stock and coal interests, and the relations and conduct of said parties in giving and taking said notes, and the consideration therefor, as though repeated herein, and says that to induce said Mary E. Allen, as executrix, as aforesaid, to purchase said stock and coal interests, said Boggs and his agent did cause to be known and represented to said Mary E. Allen that said coal mine was making large dividends and profits, whereas in truth and in fact said coal mine was substantially worked out, was of little value, and such profits as said mine had been in fact making were made because of the fraudulent practices of the said the Monarch Coal Company, its officers and agents, in mining and selling said coal. Said company had for many years as its only customer for its products the Pennsylvania Company, operating the Pittsburgh, Cincinnati and St. Louis Railway Company. That said coal company had been for a long time charging said Pennsylvania Company with much more coal than it in fact delivered to it, and had been deducting from the miners much more coal than it was authorized to take from them in allowing their weight for coal mined; and, had such facts been known to her, she would not have entered into such transaction, and would not have given said money or notes, all of which said Boggs and his agent well knew, and of which said Mary E. Allen was ignorant at the time of the transaction, and by means of which statements, representations, and facts she was induced to enter into said transaction and give said notes; whereby said notes are fraudulent and void."

The fraud stated in this defense is what is cognizable as fraud at law. The misrepresentation made by the plaintiff was that the coal mine was making large dividends and profits, whereas in fact the mine was substantially worked out, and the apparent dividends and profits were made by fraudulent practices upon the Pennsylvania Company, to whom the coal was sold. The reasonable interpretation of a representation that a company is making dividends and profits is that it is making lawful dividends and profits; and if, instead of this, the company is stealing from some one money with which to declare fictitious dividends and profits, the representation is untrue. In this case the representation was material, and is alleged to have induced the defendant to purchase. She would therefore have the right to rescind the contract by tendering back the stock and coal interests, and demand her notes. In defense of them she could plead a total failure of consideration. She does not allege a tender and rescission, but she does allege that the value of the stock and coal interests is nominal, which I construe to mean that they are worthless. In such a case, a tender and rescission is a needless formality. Even if it prove to be only a partial failure of consideration, she has the right to reduce the recovery against her by the difference between the value of the thing as represented and as actually furnished. This whole question is fully considered by the supreme court in *Withers v. Green*, 9 How. 213, where, in an opinion by Mr. Justice Daniel, of the supreme court of the United States, the strict rules of the common law as to the necessity for cross actions are much relaxed. In that case the action was on a promissory note. The plea was

that the note had been given in the purchase of a horse, which the defendant had falsely represented as sound and of good pedigree, whereas in truth and in fact the horse was unsound, and had no pedigree. It appeared that the horse had died while in the possession of the defendant, and it did not appear that any notice had been given by the defendant of the rescission of the contract of sale, or that there had been any tender back of the horse after the defendant became aware of the falsity of the representations. The plea went on then to aver that, in view of the foregoing circumstances, the note was fraudulent and void. The supreme court held that the plea was good even though no rescission of the sale or tender back of the property was averred; that, even if it appeared that the horse was worth something, the plea might be construed as a plea of partial failure of consideration. *Withers v. Green* has been followed in *Van Buren v. Digges*, 11 How. 461. For these reasons the demurrer to the third defense will be overruled.

The fourth defense is as follows:

"For a further defense this defendant adopts and reaffirms the allegations hereinbefore made as to the sale of said stock and coal interests, and the relations and conduct of said parties in giving and taking said notes, and the consideration therefor, as though repeated herein, and says that said attempted transaction for the sale of said stock and said coal interests was and is fraudulent and void, because of the fact that the said stock in said the Monarch Coal Company and said coal interests were and are worth but a nominal sum, and were so undertaken to be sold to said Mary E. Allen, executrix, as aforesaid, for the sum of \$12,700, a sum grossly exceeding the value of said stock and coal interests; and said transaction is unconscionable and fraudulent and void because of said gross inadequacy of consideration for said notes."

This defense is bad. It rests solely on the inadequacy of the consideration. Inadequacy of consideration, in equity, is sometimes such strong evidence of fraud as to induce a court of equity to set the sale aside, especially if there are circumstances showing that the party receiving such a consideration was overreached in any way, but it is not a good defense at law, unless accompanied by misrepresentation or fraud. If the defendant intends to rely on the inadequacy of the consideration or the other circumstances stated in her second defense, she should file her bill in equity against Boggs, tendering back the stock and coal interests which she procured under the contract, averring the fraud set forth in that defense, and praying the court to enjoin the suit at law on the notes, to rescind the contract, and to require Boggs to deliver the notes up to be canceled. This relief she cannot obtain as a defendant in a suit at law on the notes.

The fifth defense is that she signed these notes as executrix by virtue of the authority given her by the will, and that the stock purchased is a part and parcel of the estate, and that, therefore, she is not personally liable. As we have seen in considering the demurrer to Wann's answer, the executrix, in signing these notes, binds only herself. She did not bind the estate. If she has any claim against the estate for turning over the stock purchased to it, that is a matter of adjustment between her and the adminis-

trator de bonis non. She alone is liable on the notes, whatever benefit the transaction in which they were given has conferred upon the estate.

The answer concludes as follows: "Therefore this defendant prays that the petition of the plaintiff may be dismissed, and that said notes may be delivered up and canceled, and for all proper relief." The prayer is for purely equitable relief in an answer at law. This is wholly inadmissible, and makes plain in one sentence the erroneous theory on which the second and fourth defenses are founded.

The demurrer to the first and third defenses will be overruled. The demurrer to the remaining defenses will be sustained.

UNITED STATES v. ALDRICH et al.

(Circuit Court of Appeals, First Circuit. September 29, 1893.)

No. 49.

1. UNITED STATES MARSHAL.—PER DIEM FEES.

The provision in the act of August 4, 1886, (24 Stat. 253,) that no part of the money thereby appropriated should be used in payment of per diem compensation, except when business was actually transacted in court, merely related to that appropriation, and the legal right to per diems remained the same as before.

2. SAME.

Under Rev. St. § 829, a marshal is entitled to his per diem when he attends court because he is required to attend, even though no judge is present, and no business is transacted; and it is immaterial that the record does not show whether there was any written order directing the opening of the court. U. S. v. Pitman, 13 Sup. Ct. Rep. 425, 147 U. S. 669, followed.

In Error to the Circuit Court of the United States for the District of Rhode Island.

At Law. Action by the United States against Elisha S. Aldrich and another, executors of James H. Coggeshall, to recover moneys paid to said Coggeshall, as United States marshal, for attendance on court, etc. The case was submitted on an agreed statement of facts. Judgment was rendered for the United States for \$15.20, and it appeals therefrom. Affirmed.

Charles E. Gorman, U. S. Dist. Atty. for R. I., (Frank D. Allen, U. S. Dist. Atty. for Mass., on the brief,) for the United States.

Henry Marsh, Jr., and James M. Ripley, for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The United States waive all question except as to the items in paragraph 1, 2, 3, and 4 of the agreed statement. The item in paragraph 1 was disallowed by the circuit court, and, with the commissions on it, constitutes the amount of the judgment below for \$15.20, and there is now no question touching it.

The items in paragraph 4, beginning August 6, 1886, and ending September 7, 1886, are claimed to be covered by the appropriation act of August 4, 1886, (24 Stat. 253,) which provided that no part of any money appropriated by that act should be used in payment of per diem compensation, except for days when business was actually transacted in court. This is not a prohibition of a per diem, but extends merely to that appropriation; so that the legal right to the per diem remained the same as though the act had not been passed, and the marshal stands, with reference to those days, precisely as he stands with reference to the others in items 2, 3, and 4. The appropriation act of March 3, 1887, (24 Stat. 541,) is of another character, and relates to all moneys thereafter appropriated. Therefore, this statute was held by the court of appeals for the eighth circuit, in *U. S. v. Perry*, 1 C. C. A. 648, 50 Fed. Rep. 743, to be a substantial amendment of the Revised Statutes touching the right to a per diem.

U. S. v. Pitman, 147 U. S. 669, 13 Sup. Ct. Rep. 425, seems to meet all the objections of the United States to the effect that a court is not in session for the purposes of a per diem when no judge is present; also, to the effect that the act of March 3, 1887, already referred to, does not furnish a legislative construction of the words "in session," occurring in Rev. St. § 829. Indeed, *U. S. v. Pitman* fully settles that under this section an officer present to attend a court, when required to be present, is entitled to his per diem whether the court is opened by the judge or not, or whether the judge is present or not.

The above suggestions dispose of all items in paragraphs 3 and 4, although it is particularly claimed by the United States that the record does not indicate that the court was in session for the days set out in paragraph 4 within the meaning of section 829; the point seeming to be that the agreed statement does not show whether the court remained open during the entire day, or whether it was opened, and forthwith adjourned. This is immaterial, under *U. S. v. Pitman*, as that case holds that the marshal is entitled to his per diem when he attends because he is required to attend, even though no judge is present, and no business is transacted.

A large portion of the argument of the United States is based on the claim, that it does not appear that there was any written order directing the opening or adjourning of the court on the days named in paragraph 2. It is of no consequence whether there was a written order adjourning from those days, because the only question, under *U. S. v. Pitman*, is whether the marshal was required to be then in attendance for whatever emergency might arise. Even if an improper attempt was made to then adjourn the court, it would not affect the right of the marshal to receive his per diem for those days; but the question, if any, would arise with reference to those to which the court was adjourned. No such question is made in this record. Neither is the mere fact that there was no written order directing the opening of the court material. If, by the expression, "no written order of the judge directing the opening," it was intended to mean that there was no written order of

the judge directing an adjournment to those particular days, even this would not go far enough, because there may be adjournments without a written order—in the district court, by the judge in person, and in the circuit court, by the judge in person, or under Rev. St. § 671, by the marshal in person. It appearing that a court was opened on the days named, it is to be presumed that it was regularly opened. This presumption cannot be met without negating all the conditions providing for its opening, which the agreed statement fails to do.

On the whole, as this record stands, *U. S. v. Pitman* protects the marshal, as to his entire account, except item 1, already referred to. Judgment of the circuit court affirmed.

UNITED STATES v. CHINA & JAPAN TRADING CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 17, 1893.)

CUSTOMS DUTIES—JAPANESE WALL DECORATIONS.

Japanese wall decorations, made of paper, or of paper and cotton, or of narrow strips of bamboo joined together with cotton cord, and upon which representations of flowers, of birds, or of human figures are painted in water colors, the large bodies of colors being applied by stenciling, while the features of the work which are delicate and ornamental and give character to the article are by hand, are dutiable, under paragraph 465 of the act of October 1, 1890, at 15 per cent. ad valorem, as "paintings in oil or water colors." Such articles are not dutiable, respectively, according to the component material of chief value, under paragraph 425, as manufactures of paper not specially provided for, paragraph 355, as manufactures of paper and cotton, cotton chief value, not specially provided for, and paragraph 230, as manufactures of wood not specially provided for, at 25, 40, and 35 per cent. ad valorem, respectively.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by the China & Japan Trading Company, Limited, for review of a decision of the board of general appraisers in relation to certain importations of wall decorations by said company. The circuit court reversed the decision of the board of general appraisers. The United States appeal. Affirmed.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Dist. Atty., for the United States.

Albert Comstock, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The China & Japan Trading Company imported into the port of New York, in the year 1891, sundry invoices of Japanese wall decorations, which were invoiced as paintings. These articles were made either of paper, or of paper and cotton, or of narrow strips of bamboo joined together with cotton cords, and upon which representations of flowers or of birds or of human figures were painted in water colors. They were very cheaply made in Japan, and were valued at from 17 to 45 cents

each. The theory of the collector was that the figures and devices were produced by stenciling; that this process did not convert the material to which it was applied into painting; and that the articles were dutiable, respectively, as manufactures of paper not specially provided for, at 25 per cent. ad valorem, as manufactures of paper and cotton, cotton chief value, not specially provided for, at 40 per cent. ad valorem, and as manufactures of wood not specially provided for, at 35 per cent. ad valorem, according to the component material of chief value in the respective articles. This classification was under paragraphs 425, 355, and 230 of the tariff act of October 1, 1890.

The importers duly protested, upon the ground that the merchandise was properly dutiable at 15 per cent. ad valorem, as "paintings in oil or water colors," under paragraph 465 of the same act. The board of general appraisers affirmed the action of the collector. Upon appeal, this decision was reversed by the circuit court for the southern district of New York, which held that the merchandise was dutiable at 15 per cent. ad valorem. The decision of the general appraisers was based upon the finding that no evidence was presented to them which overthrew the appraisers' statement that the figures upon the several kinds of decorations were produced by stenciling, and they therefore found that the articles were decorated by means of a stencil or some other mechanical process. The articles were made for the purpose of hanging upon the wall of a room, and were not intended to be objects of utility, but to be merely decorative. The samples of the merchandise which represent animals or human figures are grotesque, while those which represent birds or flowers have an attractiveness which could materially mitigate the homeliness of the plain or rough wall of a room, which needed inexpensive decorations. If they were produced by some mechanical process, they cannot properly be called "paintings." If made by stamping or by impressing, they would be called "prints." If they were produced by hand painting, they are inexpensive paintings in water colors, and are included within the general term, which, without limitation or definition, was used in paragraph 465, for the purpose of classification, and which did not restrict paintings to those of an artistic character.

The general appraisers had before them the samples, the statement of the assistant appraiser, who thought that the articles were entirely stenciled, and the testimony of a clerk of the importers, who thought otherwise. In our opinion, the samples are by far the most important part of the testimony, and show that, while the large bodies of color may have been applied by stenciling, the features of the work, which are delicate and ornamental, and which give character to the article, were added by hand.

The decision of the circuit court is affirmed.

UNITED STATES ELECTRIC LIGHTING CO. v. EDISON LAMP CO.

(Circuit Court of Appeals, Third Circuit. November 27, 1893.)

No. 29.

1. PATENTS—ANTICIPATION.

Patent No. 306,980, granted to Edward Weston for an improvement in the process of making carbon conductors for incandescent lamps, is void because anticipated by the Sawyer & Man patent, No. 211,262, for the same invention. 51 Fed. 24, affirmed.

2. SAME—PRIOR PUBLIC USE.

The Weston patent is also void because of public use of the invention by Sawyer & Man two years before application for the patent. 51 Fed. 24, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey

In Equity. Suit by the United States Electric Lighting Company against the Edison Lamp Company for infringement of patent. Bill dismissed. 51 Fed. 24. Complainant appeals. Affirmed.

Thomas B. Kerr and George H. Christy, for appellant.
Frederic H. Betts, for appellee.

Before DALLAS, Circuit Judge, and BUTLER, District Judge.

DALLAS, Circuit Judge. This suit was brought for alleged infringement of letters patent of the United States No. 306,980, dated October 21, 1884, granted to Edward Weston, for "process of making incandescents." The claim is as follows:

"The improvement in the art of making carbon conductors for incandescent lamps, which consists in first forming a carbon core or base, and then building up said core with carbon obtained and deposited upon the same by and during the operation of electrically heating said core while surrounded by or saturated with a carbonaceous substance, substantially as hereinbefore set forth."

The assignments of error raise no material and substantial question which was not fully investigated, and rightly decided, by the court below. The learned judge of that court deemed it necessary to consider only:

"First, the prior letters patent of the United States, No. 211,262, for the same invention, dated January 7, 1879, granted to William E. Sawyer and Albon Man, upon an application filed October 15, 1878, [the application for the Weston patent, in suit, was filed on May 27, 1881;] and, second, the alleged public use of the invention by Sawyer & Man, and those acting under them, for more than two years before Weston's application for a patent."

The evidence bearing upon these matters is reviewed and properly dealt with in the opinion of the circuit court, and the conclusions there reached are that the proofs, as a whole, do not satisfactorily show that Weston's alleged invention preceded that of Sawyer & Man, and that the defense of two years' prior public use of the invention before the application for the patent in suit was impregably established. No purpose would be subserved by again discussing this evidence. It is enough to say that our own examination of this record has entirely convinced us that the ac-

tion of the circuit court in dismissing the bill was based upon a true apprehension of the facts, and a correct conception of the law.

The decree of the circuit court is affirmed, with costs.

ROGERS TYPOGRAPHIC CO. v. MERGENTHALER LINOTYPE CO.

(Circuit Court, D. New Jersey. November 28, 1893.)

1. PATENTS—ESTOPPEL—INTERFERENCE—ACQUIESCENCE.

The fact that a contestant does not move to dissolve an interference is not such an acquiescence as will estop him, when subsequently sued upon his opponent's patent, from setting up a prior state of the art, so limiting the claims thereof as to prevent infringement.

2. SAME—PRELIMINARY INJUNCTION—WHEN GRANTED.

A preliminary injunction will not be granted when the proofs leave complainant's case in doubt, when defendant's pecuniary responsibility is not questioned, and when very serious injury would be caused to defendant's business, while no irreparable damage would accrue to complainant by a denial of the injunction.

In Equity. Bill by the Rogers Typographic Company against the Mergenthaler Linotype Company for infringement of letters patent No. 474,306, issued May 3, 1892, to Jacob W. Schuckers for "improvements in mechanism for justifying composed lines of type." Heard on motion for a preliminary injunction. Denied.

B. M. Philipp and M. H. Phelps, for the motion.
Frederic H. Betts, opposed.

ACHESON, Circuit Judge. The patent in suit is of recent date, having been granted on May 3, 1892. Acquiescence in its claims by the public cannot be asserted upon the evidence. It has not been the subject of judicial decision. True, in the interference proceedings between Schuckers and Mergenthaler, the concurrent judgment of the examiner of interferences, the examiner in chief, and the commissioner of patents was in favor of Schuckers upon the question of priority of invention; and this might well be deemed good ground for the allowance of a preliminary injunction were that the only question here raised. But such is not the case. Infringement is strenuously denied. The defendant maintains that the antecedent state of the art imposes such limitations upon the Schuckers claims that they cannot rightly be construed to cover the defendant's machine. This is a fundamental question, and one for judicial determination. I do not see how the question could well have been involved in the interference proceedings. Nor am I convinced that by reason of what occurred in the patent office the defendant is precluded from setting up this defense at this preliminary stage of the case. Undoubtedly, the patent office officials gave a very broad interpretation to the interference issues. We discover, however, from a perusal of the decision of the examiner of interferences, that he had great difficulty in determining what scope should be given to the language in which the issues had

been framed, and what was the meaning of certain words and phrases therein employed. Furthermore, it appears that Mergenthaler took the position that certain features of construction were old, and he cited earlier patents, to Ray and others, to show that the issues should receive a very limited and specific construction. He did not, indeed, move to dissolve the interference, and hence may be said to have acquiesced in the view that the respective claims of the contestants were properly put in interference. But the defendant is not thereby estopped, and ought not to be embarrassed in making defense to the present bill because of such admission.

The views of the experts of the respective parties to this suit, as expressed in their affidavits, are wide apart in material matters. Upon the *ex parte* affidavits and accompanying documentary evidence it cannot be confidently affirmed that the plaintiff's case is entirely free from doubt. The proofs lack completeness. Moreover, the defendant has an established manufacturing business, employing a great force of hands and a large capital. Interference therewith by a preliminary injunction would cause serious injury to the defendant. On the other hand, no irreparable damage can result to the complainant by the denial of summary relief. The pecuniary responsibility of the defendant is not questioned. These combined considerations lead to the conclusion that the court should avoid summary interposition. For such course, in the circumstances of this case, there are safe precedents. *Dickerson v. Machine Co.*, 35 Fed. 143; *Ironclad Manuf'g Co. v. Jacob J. Vollrath Manuf'g Co.*, 52 Fed. 143. It is hardly necessary to add that with respect to the ultimate rights of the parties the court has formed no opinion. They are to be determined upon full proofs at final hearing.

The motion for a preliminary injunction is denied.

GRANT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 108.

SEAMEN—HARBORING AND SECRETING.

Rev. St. § 4601, prescribing a penalty for harboring or secreting "any seaman belonging to any vessel," does not apply to the harboring or secreting of a person employed or engaged to serve on a vessel which does not belong to a citizen of the United States.

In Error to the Circuit Court of the United States for the District of Oregon.

At Law. Information against Peter Grant for violation of section 4601, Rev. St. U. S., by harboring and secreting five seamen belonging to the *Invergarry*, a British vessel. Trial in the circuit court without a jury. Findings and judgment against the plaintiff in error. 55 Fed. 414. Reversed.

Milton Andros, for plaintiff in error.

Charles A. Garter, U. S. Atty., and Charles A. Shurtleff, Asst. U. S. Atty., for defendant in error.

Before McKENNA, Circuit Judge, and HANFORD, District Judge.

HANFORD, District Judge. The plaintiff in error was, by a criminal information presented by the United States attorney for the district of Oregon, and filed in the United States circuit court for that district, accused of committing an offense against the laws of the United States, in this: that for a period of 27 days, in said district, he did unlawfully harbor and secrete five seamen belonging to a vessel called the Invergarry. A jury was waived, and the case was tried before Hon. William B. Gilbert, Circuit Judge, who made his findings in writing, and thereupon adjudged the defendant to be guilty, and sentenced him to pay the penalty prescribed by section 4601, Rev. St. U. S., and costs, amounting to the total sum of \$919.44, and committed him to jail till said penalty and costs be paid, or until he be discharged according to law. The information does not mention the nationality of the Invergarry, but by the findings and opinion of the court it appears that she is a British vessel.

Finding that the judgment must be reversed, regardless of any conclusion to which we might arrive concerning the points covered by the opinion of the circuit judge, we pass without consideration thereof to a question not discussed in the circuit court, but which nevertheless arises from the facts presented by the record, viz. whether the harboring or secreting of seamen belonging to a foreign vessel is a violation of the statute upon which this case is founded. The nature of this question prevents application of the doctrine of waiver. We are obliged to give it consideration.

Section 4601, Rev. St., was originally enacted as the fourth section of the act of July 20, 1790, entitled "An act for the government and regulation of seamen in the merchant service." 1 Stat. 133. In the revision it is included in the seventh chapter, entitled "Offenses and Punishments," of title 53, entitled "Merchant Seamen." This chapter is composed of the sections and clauses relating to offenses and punishments contained in said act of 1790; the act of September 28, 1850, (9 Stat. 515;) the act of July 27, 1866, entitled "An act to prevent the wearing of sheath knives by American seamen," (14 Stat. 304;) and the act of June 7, 1872, entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." These several statutes were made to govern the conduct of American seamen within the territorial limits of the United States, and on board American vessels elsewhere within the admiralty and maritime jurisdiction of the United States. The title and context of each shows forth the intention of congress to make laws for the vessels and seamen of the United States; and by section 4612 a definition of terms and rule of construction is given, which limits the application

of all the provisions of these laws to cases affecting American vessels, or the owners, masters, or seamen thereof. Section 4601 imposes a penalty for harboring or secreting any seaman belonging to any vessel, knowing him to belong thereto. Section 4612 declares the word "seaman," as there used, to be restricted to designate a person employed or engaged to serve in any capacity other than as an apprentice on board any vessel belonging to a citizen of the United States. Now, as the persons harbored by this plaintiff in error were not employed or engaged to serve on board a vessel owned by a citizen of the United States, the case does not come within the letter of the statute, and the prosecution must fail.

In this opinion we are supported by a preponderance of the authorities. In *Ex parte D'Oliveira*, 1 Gall. 474, (decided in 1813), Mr. Justice Story, referring to the act of 1790, says:

"We are of the opinion that the act for the regulation of seamen exclusively applies to seamen engaged in merchants' service of the United States. It may be a serious inconvenience that congress has not extended the provisions to cases of foreign seamen in foreign vessels, in compliance with that comity which it is understood many foreign nations exercise in favor of this country. Whatever may be the evil, we can only regret it. It is for another tribunal to apply the remedy."

In 1873 Mr. Attorney General Williams, in a communication to the secretary of the treasury, gave the following opinion:

"The provisions of the act of 1872 relating to 'discipline of seamen' are nearly identical in language with, and appear to have been copied from, the provisions of the British merchant shipping act of 1854, relating to the same subject. In a case arising under the latter act, its provisions concerning that subject were held by the court of queen's bench to have reference to British ships alone, (see *Leary v. Lloyd*, 3 El. & El. 178;) and I am inclined to the view that the provisions of the act of 1872, adverted to above, were intended by congress to apply only to seamen lawfully engaged for service on American vessels." 14 Op. Attys. Gen. U. S. 326.

Judge Wallace, in the case of *U. S. v. Kellum*, 7 Fed. 843, and Judge Billings, in the case of *The Montapedia*, 14 Fed. 427, held the same way. In *U. S. v. Minges*, 16 Fed. 657,—a case exactly in point,—Judge Bond held that section 4601 does not apply to cases of harboring or secreting seamen belonging to foreign ships. To the contrary are the decisions by Judge Deady in *U. S. v. McArdle*, 2 Sawy. 367, and *U. S. v. Sullivan*, 43 Fed. 602, and the decision of Judge Benedict in *U. S. v. Anderson*, 10 Blatchf. 226, in which Mr. Justice Blatchford concurred.

By the act of June 9, 1874, (18 Stat. 64,) and again by the act of August 19, 1890, (1 Supp. Rev. St. [2d Ed.] 780,) congress has declared the effect to be given to the shipping laws upon domestic vessels in the coasting trade. But notwithstanding the fact that public attention was, by the opinions above quoted from, called to the omission to extend these laws to foreign vessels and seamen, it has failed to change them, in this respect, either in the revision or subsequent amendments. From this we think that acquiescence on the part of the legislative branch of the government in the interpretations given by Story and Williams may be fairly inferred. Judge Deady gives excellent reasons for the making of suitable laws

for the protection of foreign seamen and vessels in our ports, and the case at bar illustrates the vicious practices to which he alludes. The plaintiff in error is guilty of enticing men to abandon employment for which they were engaged, and to remain idle at his boarding house until after the Invergarry had gone to sea, thereby causing expense to the ship, and loss of time and wages to the men, while he doubtless profited by shipping them on other vessels. Such acts are reprehensible, and prejudicial to all classes of persons connected with the shipping interests of the country. But the evil of permitting such offenses to go unpunished is not greater than the demoralizing effect of a decision which adds to or takes from the law. If the laws which we have are found to be insufficient, when fairly interpreted, congress should be called upon to amplify them.

Judgment reversed, and cause remanded, with directions to discharge the defendant.

THE CHILIAN.

GODWIN et al. v. THE CHILIAN.

(District Court, S. D. New York. October 31, 1893.)

MARITIME LIEN — CHARTERED VESSEL — CUSTOMHOUSE ENTRY — PERSONAL CREDIT.

Where services were rendered and moneys paid out by customhouse brokers in entering the British steamship C. at the customhouse in behalf of known charterers, who were required to pay such fees, and the service was rendered in accordance with a long course of dealings with the charterers, and no demand was ever made therefor against the master, owners, or their agents, *held*, that the brokers acted on the personal credit of the charterers, and that no maritime lien arose upon the ship. *The Kate*, 56 Fed. Rep. 614, followed.

In Admiralty. Libel to enforce an alleged lien for entering vessels. Dismissed.

Hess, Townsend & McClelland, for libelants.
Convers & Kirlin, for defendant.

BROWN, District Judge. The libelants, as customhouse brokers, seek to recover for services, and moneys paid out, in entering the British steamship *Chilian* in this port on February 7, 1893. The *Emily Souder*, 17 Wall. 666, 670. The steamer was at that time in the possession of the United States & Brazil Mail Steamship Company, being operated by them under a time charter, which required the company to pay all entrance fees of the ship. The libelants were the general customhouse brokers and agents of the company for entering all the company's vessels, whether belonging to the company, or chartered by it. The *Chilian* was entered in the ordinary course of the libelants' employment, and the bill therefor was rendered to the company, and against the company only. At the time of the entry, the master was present, because his signature was, by law, required to the entry; but the libelants were not in any way employed by him; nor were the master, the owners, or their agents, requested or expected to pay for this service. The libelants

understood that the Chilian was under a time charter. They had previously been paid by the company for similar services to other vessels chartered by the company; and they either knew, or would have learned on the least inquiry, that the company, by the charter of the Chilian, was bound to pay for the charges in question. Had the vessel been, in fact, looked to for payment, and a bill therefor rendered either to the master or to agents of the owners of the ship in this port, the charges, if proper against either, would have been paid at once; for the agents of the vessel, it is proved, had abundant means in their hands to discharge all the ship's obligations. The bill was not presented to either, because neither was expected to pay it, but the company only.

Under such circumstances, this court has uniformly held the services to have been rendered on the personal credit of the charterer; and that no lien arises upon the vessel, or any claim upon her owners. See *The Kate*, 56 Fed. Rep. 614, and cases there cited.

The libel must be dismissed, with costs.

THE VIGILANCIA.

THE ALLIANCA.

THE ADVANCE.

**AMMON et al. v. THE VIGILANCIA. SAME v. THE ALLIANCA.
SAME v. THE ADVANCE.***

(District Court, S. D. New York. November 2, 1893.)

1. MARITIME LIEN—SUPPLIES—WHAT DELIVERY CREATES LIEN.

There can be no delivery to the ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, until the goods are either actually put on board the ship, or else brought within the immediate presence or control of her officers.

2. SAME—HOME PORT — GOODS DELIVERED TO TRUCKMAN IN FOREIGN PORT—PLACE OF SUPPLY.

A steamship company was organized under the laws of New York, and its ships were docked in Brooklyn, the home port. Libelants, at Jersey City, delivered such supplies of oleomargarine as were ordered from time to time by the steamship company to trucks employed by libelants, which transported the supplies to the ships. The sale of oleomargarine is prohibited by the laws of New York. On the failure of the steamship company, libelants claimed that as the supplies had been delivered at Jersey City, to which port the ships were foreign, the title to the supplies passed there, and that a maritime lien was thereby created on the vessels. *Held*, that the place where the ships lay was the test of the place of supply, and that the supply was not complete until the delivery to the ships where they lay, and, as this was in their home port, no maritime lien was created thereby.

In Admiralty. Libels in rem for the value of supplies furnished. Dismissed.

Hyland & Zabriskie, for libelants.
Carter & Ledyard, for claimant.

* Reported by E. G. Benedict, Esq., of the New York bar.

BROWN, District Judge. By the libels in the above cases a lien is claimed on the steamships above named for oleomargarine, or butterine, supplied for those steamers in 1892. The facts as to the supplies, and their amounts, are admitted. The conditions required for obtaining a statutory lien not having been complied with, the only question is, whether a maritime lien was acquired under the circumstances of an alleged sale and delivery of the goods in New Jersey.

The libelants are copartners, doing business at Jersey City, N. J. The steamers, at the time the supplies were furnished, were the property of the United States & Brazil Mail Steamship Company, a New York corporation, and lay at Roberts' Stores, Brooklyn, within the port of New York, their home port, where the goods were delivered on board. They were forwarded to the steamers from Jersey City, upon a written request, or message by telephone, sent in each instance from the general office of the steamship company in this city, by one of its office employes, known as the "port steward," calling for the supply of a certain amount of butter to the steamer named. Upon such orders, the libelants delivered the goods specified to truckmen employed by them in Jersey City, who took them over to the steamers at Roberts' Stores, Brooklyn, and there delivered them on board, and at the time of such delivery obtained an acknowledgment on behalf of the company of the receipt of the goods named, properly signed by one of the officers, or persons, on board the ship. The libelants had been accustomed to deal in this manner with the steamship company, and their vessels, for several years previous.

The sale of oleomargarine being prohibited by the laws of the state of New York within the limits of the state, it was contended for the libelants that by an arrangement between the libelants and the steamship company, the sale and delivery of the goods were intended to be complete, and were complete, in Jersey City, upon the delivery of the goods ordered to the truckmen there, so that the title to the goods passed in the state of New Jersey; and that the furnishing of the goods having been complete within the state of New Jersey, a maritime lien was acquired therefor. The truckmen, as I understand the evidence, were not in the general employment of the libelants, but were engaged by them to carry the goods to the steamers; they were paid, however, for the cartage, by the libelants. In the bills rendered to the company for the goods, there was no separate charge for cartage, because, as was testified, there had long been an understanding with the company that the prices at which the butterine was billed should include the cartage from Jersey City to the steamers. A maritime lien is claimed upon the contention that the delivery to and for the vessel was completed in Jersey City upon the delivery of the goods to the truckmen for the benefit of the ship.

I am unable to sustain the lien in these cases upon either theory that can be presented on behalf of the libelants. If the sale and delivery of the supplies to the steamship company were not complete

until the delivery of the goods to the ship at Roberts' Stores, clearly no maritime lien arises; since, in that view, the supplies were wholly furnished in the vessel's home port.

If, on the other hand, the libelants' evidence be deemed sufficient to prove that the title to the property passed in Jersey City to the steamship company, and that the delivery to the truckmen there was, in law, a delivery to that company; still, that would not amount to a delivery, or to a furnishing of supplies, to the ship in Jersey City; but only to a common-law delivery to the company, sufficient to bind the company in personam; which is a very different thing from a delivery to the ship, or binding the ship in rem. The ship was not in Jersey City; but within a different jurisdiction, a mile or two away. There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship. *The Cabarga*, 3 Blatchf. 75; *Pol-lard v. Vinton*, 105 U. S. 7, 9-11; *The Caroline Miller*, 53 Fed. 136; *The Guiding Star*, Id. 936, 943, and cases there cited.

Had the goods in question been lost while in transit from Jersey City to Roberts' Stores, where the ship lay, the steamship company might possibly have been personally liable for the goods; but plainly no lien for them could have arisen against the ship, because they would never "have come to the benefit of the ship." Per Nelson, J., (*The Cabarga*, supra.) No lien, therefore, arose when the goods were delivered to the truckmen in Jersey City, since the ship had not yet received the goods, and might never receive them. Something more had to be done, viz., to deliver them to the ship. As that delivery was an act necessary to the creation of a maritime lien, it follows that the "furnishing to the ship," so as to acquire a lien, was only completed at the place where the ship herself actually was. As this was in the home port, no maritime lien could arise. The place where the ship is at the time the supplies reach her, is the test in all such cases. Accordingly, where the supplies have been ordered and sent from the home port, but are delivered to the ship while she is in a foreign port, a maritime lien arises. *The Sarah J. Weed*, 2 Low. 555; *The Agnes Barton*, 26 Fed. 542; *The Huron*, 29 Fed. 183; *The Chelmsford*, 34 Fed. 399. The cases of *The Patapsco*, 13 Wall. 334; *The Comfort*, 25 Fed. 159; *The Havana*, 54 Fed. 203, cited for the libelants, are all cases in which the supplies were delivered on board the ship, while the ship was in a foreign port.

Holding, therefore, that the furnishing of supplies, for the purpose of obtaining a lien on the ship, is not performed until a delivery to the ship, or within the immediate control of her master, and that being done in these cases within the home port, it follows that the libels must be dismissed, with costs.

THE LOWELL M. PALMER.

MACE v. THE LOWELL M. PALMER.¹

(District Court, S. D. New York. October, 1893.)

COLLISION—STEAM VESSELS MEETING—PROPER SIDE OF CHANNEL—INATTENTION TO SIGNALS.

A steamship and a tug with a tow met in the East river, the tow going up and the steamship coming down. When the tug was below the East River bridge, she three times gave a signal of one whistle to the steamship, which signals were disregarded, and no whistles blown to the tug, until too late to be of any use. The steamship was on the left-hand side of the river, and improperly directing her course towards the Brooklyn shore. There were no obstacles to prevent her going on the New York side. The tug backed as soon as danger of collision became manifest. *Held*, that the steamship was solely liable for the collision.

In Admiralty. Libel by Alfred E. Mace against the tug **Lowell M. Palmer** for collision. Dismissed.

Convers & Kirlin, for libellant.

Benedict & Benedict, for respondent.

BROWN, District Judge. On the 11th of May, 1892, the steamer **Cilurnum**, 300 feet long, and of about 1,370 tons register, bound down the East river, soon after passing the Brooklyn bridge came in collision with a railroad float in tow of the tug **Lowell M. Palmer**, the starboard corner of the float striking the starboard side of the steamer and breaking in some plates, for which damage the above libel was filed.

There is great contradiction in the evidence, both as to the place of collision, and the relative positions of the two vessels during the few minutes previous. In all essential particulars, however, the witnesses for the respondent,—many of whom are from other vessels and apparently wholly disinterested—evidently predominate, and are entitled to superior credit. They establish, without doubt, the fact that the collision was abreast, or very nearly abreast of the Fulton Ferry slip, on the Brooklyn side, and not more than from two to four hundred feet from the dock; that the **Palmer**, being upon the Brooklyn side of the river, when at least a quarter of a mile below the bridge, saw the **Cilurnum** above the bridge, and three times gave her a signal of one whistle, indicating that the vessels should each pass to the right, that is, port to port; that the **Palmer** directed her course still more to the Brooklyn shore; that no attention or answer was given by the **Cilurnum** to these whistles, nor any whistles blown by her to the **Palmer**, except two whistles given when she was quite near,—within two or three hundred feet, and too late to be of any use; that the **Cilurnum** was herself on the left-hand side of the river, and improperly directing her course somewhat towards the Brooklyn shore; that the angle of collision was nearly a right angle, and that the **Palmer** backed, until at the collision she was heading nearly straight across the river towards the Fulton Ferry slip; and that there were no

¹Reported by **E. G. Benedict**, Esq., of the New York bar.

obstacles in the river to prevent the steamer from going to the right, on the New York side.

Under these circumstances, the steamer is plainly in fault, for not observing the whistles of the Palmer; for not going to the right, as was her duty in that situation; and for making over, on the contrary, towards the Brooklyn side of the river. The Palmer seems to me to have done all that was incumbent upon her, in the endeavor to avoid collision; and the libel must, therefore, be dismissed, with costs.

PRENTICE et al. v. UNITED STATES & CENTRAL AMERICAN STEAMSHIP CO., (two cases).¹

(District Court, S. D. New York. November 6, 1893.)

CHARTER PARTY—GENERAL AGENT OF COMPANY—AUTHORITY TO CHARTER.

When a steamship company, having no vessels of its own, had, by authority in writing, duly constituted one W. its general agent, and he chartered two steamers by the authority of the board of directors, as he testified, but which authority was denied, and it appeared that he had previously chartered other vessels by similar charters, and the letter heads of the company expressly stated that W. was its general agent, and libellant dealt with him as such, *held*, that in such a case it was not necessary to produce record evidence of action by the board of directors, in order to bind the company; that W. had authority to make the charters; and that the company was liable to the shipowner for its refusal to accept the vessels under the charters.

In Admiralty. Libels for damages for refusal to accept chartered steamers. Decrees for libellants.

Convers & Kirlin, for libellants.

F. E. Burrows, for respondents.

BROWN, District Judge. The above two libels were filed to recover damages for the refusal of the respondents to accept the steamships Aracuna and Burnley under two charters, dated March 21, 1893. The charters were negotiated and signed by R. Williams, Jr., the general agent of the respondents. The signature was "For the United States & Central American Steamship Company, R. Williams, Jr., General Agent." Due tender of the steamers was made to the defendant company, which refused to accept them. The defense is, an alleged want of authority in Williams to execute the charters on the defendant's behalf.

The defendant was incorporated under the laws of West Virginia in 1892, for the purpose, among other things, of carrying on a maritime business in the transportation of passengers and freight between New York, Jamaica, and Central America. The company had no steamers of its own. It had entered upon its business, however, a few months before by the chartering of two other steamers before the present, both of which were chartered under instruments executed in the same manner as the charters in the present case. Williams, by due authority in writing, had been made the general agent of the company. He testifies that all the particulars of the negotiation before these charters were signed, were re-

¹ Reported by E. G. Benedict, Esq., of the New York bar.

ported from time to time to the executive committee of the board of directors; and that when he had obtained orally the most favorable terms he could from the libelants, he was directed by the committee of the board to execute the charters in question, and that he then executed them accordingly. The president of the board was the only adverse witness examined. He testifies that no express authority of the board was given on the subject of these charters; and that no action was taken by the board as such, though he admitted that the matter had been spoken of with the members individually.

It is not necessary, in cases like the present, to produce record evidence of action by the board of directors in order to bind the corporation. The chartering of vessels necessary to carry on the ordinary business of the company, was not an act of such importance, solemnity, or rarity, as necessarily to require any vote of the board of directors, or of the executive committee, where no particular rules of the company require it; and here there is no evidence of any such rules or by-laws. The letter heads in daily use in the correspondence of the company, several of which are in evidence, expressly stated Mr. Williams to be the general agent of the company, and so held him out to the world. The libelants dealt with him as such. Previous charters, admitted to have been approved by the board, were executed by Mr. Williams as general agent, precisely in the same form as the present charters. There is no evidence that the act of chartering vessels was beyond the scope of the powers of a general agent, such as the company held out Mr. Williams to be. The very fact that in chartering the previous steamers the board authorized Mr. Williams to execute the charters as "general agent" of the company in the ordinary course of business, instead of having those charters executed under the seal of the company, and signed by the president and secretary, is of itself strong evidence that the execution of charters was an act appropriate to a general agent and within the scope of his ordinary powers, and that it was so regarded by the company.

Even, therefore, if Mr. Williams had exceeded his actual authority in executing the charters in question, I doubt whether the defense now made would have been available to the respondents. But the weight of evidence in the present case is, that he did have such authority. This does not rest on the testimony of the libelants alone. The letter of April 6, 1893, bearing the seal of the company, and the official signatures of both the president and the secretary, declares expressly that "this company has under charter the S. S. Aracuna and Burnley; it is proposed to put these steamers on the Jamaica route, if established."

I am quite satisfied, therefore, that these charters were executed by Mr. Williams, not merely under his lawful power as general agent, but with the express knowledge and approval of the general officers, and of the board of directors of the company; that all Mr. Williams' negotiations were duly reported and known to the responsible officers of the company; and that the charters were approved by the executive committee before they were executed, and were ratified by the board afterwards. The evidence indicates

that the subsequent refusal to accept the vessels when tendered, was only because the company then found itself in a straitened financial condition. Its refusal to accept the vessels may have been prudent; but that in no way absolved the company from its liability to make good the actual damages which the libelants have thereby sustained.

Charters of vessels have long been held to be maritime contracts; damages for the breach of such contracts are, therefore, recoverable in this court, as a court of admiralty. Ben. Adm. § 287.

Decrees in each case for the libelants, with costs; with an order of reference to ascertain the damages, if not agreed upon.

THE BATTLER.

(District Court, E. D. Pennsylvania. November 14, 1893.)

No. 115.

1. SHIPPING—LIMITATION OF LIABILITY—INTEREST.

Owners who surrender a vessel for the purpose of limiting liability cannot be required to add interest on her appraised value from the time the liability was incurred, although they have long delayed the surrender.

2. SAME—GIVING BOND FOR VALUE.

Where the owners, instead of turning over the vessel herself, or paying her appraised value into court, elect to give a bond therefor, they may be required to provide for interest until such time as the money is paid.

In Admiralty. Petition by the owners of the steam tug Battler for limitation of liability in respect to the loss of the barges Tonawanda and Wallace. A libel against the tug was sustained, June 2, 1893. See *The Battler*, 55 Fed. Rep. 1006.

J. Rodman Paul and N. Dubois Miller, for owner of the Battler.
Henry Flanders and Edward F. Pugh, for owners of barges sunk.
John F. Lewis, for Western Assurance Co.

BUTLER, District Judge. The compensation earned by towage and salvage services is not "freight." The claim to have interest added to the appraised value of the vessel from time of the sinking of the barges Tonawanda and Wallace to this date, cannot be sustained. No case is found in which such a claim was allowed, or made. In *The City of Norwich*, 118 U. S. 492, [6 Sup. Ct. Rep. 1150,] and *The Benefactor*, 103 U. S. 239, there was equal reason for such a claim. The terms of the statute and the rules prescribed in pursuance of it, seem to forbid the demand. Assuming that the owners have not forfeited their rights by delay, as I do at present, (the question not being raised,) they are entitled to a discharge on turning over the vessel, or paying her value into court. It is proper, however, that they should provide for the payment of interest on her value until such time as the money is paid, if they prefer to give bond, instead of paying it at present. I have no doubt of the court's power to require this. It was so decided in *Re Harris*, by the circuit court of appeals (2d Circuit, 57 Fed. Rep. 243.) The petitioners must therefore either turn over the vessel, pay in her appraised value, or enter into stipulation to pay it with interest, at such time as it may be required.

SMITH & DAVIS MANUF'G CO. v. MELLON.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 186.

1. APPEAL—OBJECTIONS NOT RAISED BELOW.

The objection that the defense, to a suit for infringement of a patent, of prior public use, was not well pleaded, in that the answer failed to allege that such use was "in this country," as the statute provides, (Rev. St. § 4920, cl. 5,) cannot be raised for the first time on appeal.

2. PATENTS—ABANDONMENT—PRIOR PUBLIC USE.

The advertising and sale by a manufacturer of an invention, to test the market, and to see how it would sell, is a trader's and not an inventor's experiment, and such use will not carve an exception out of the statute making prior public use a defense to a suit for infringement, (Rev. St. § 4920, cl. 5.)

3. SAME.

Where the only difference between an invention of a spring bed consisting of a bank of wire springs fastened together at top and bottom by a series of lateral and crosswise tie rods and hooks, as manufactured and sold by the inventor more than two years prior to his application for letters patent, and that as claimed in his specifications, was in "a more desirable means of locking the tie loops," to which means he did "not desire to be confined," prior public use is a good defense to a suit for infringement. 52 Fed. 149, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Bill by the Smith & Davis Manufacturing Company against Peter H. Mellon for infringement of letters patent. Bill dismissed. 52 Fed. 149. Complainant appeals. Affirmed.

William M. Eccles, for appellant.

George H. Knight, for appellee.

Before BREWER, Circuit Justice, and SANBORN, Circuit Judge.

BREWER, Circuit Justice. This case is before us on an appeal from a decree of the circuit court of the United States for the eastern district of Missouri, dismissing the plaintiff's bill. The suit was one for the infringement of a patent, that patent being No. 269,242, dated December 19, 1882, issued to John G. Smith, and by him assigned to complainant, and was for an improvement in spring beds. The ground on which the circuit court dismissed the bill was that the invention covered by the patent had been in public use and on sale for more than two years prior to the date of the application, and that for this reason the patent was void. 52 Fed. 149. Counsel for the appellant insists that this defense was not properly presented by the pleadings, and, therefore, that all testimony tending to support it should be ignored; further, that the only use disclosed by the testimony was an experimental one, and therefore not such as to avoid the patent; and, finally, that the precise invention for which the patent was obtained was not in use or on sale prior to the application for the patent.

With reference to the first of these propositions but a word is necessary. The statute (Rev. St. § 4920, cl. 5) provides for, among
v.58F.no.5—45

other special defenses to a suit for infringement, this: that the invention has "been in use or on sale in this country for more than two years before his application for a patent." The answer set up "that the alleged invention was in public and common use, and on sale, with and by the knowledge and consent of the patentee, for more than two years before the application." It did not in terms allege that such public use was "in this country," as the statute provides. While this defense may not have been pleaded with technical accuracy, yet the testimony tending to establish it was received on the final hearing without any objection. The first time the question has been raised, as appears from the record, is on the argument of the appeal in this court; and here it is too late. *Roemer v. Simon*, 95 U. S. 214, 220; *Loom Co. v. Higgins*, 105 U. S. 580, 595.

That the invention covered by the patent, or at least something very similar to it, had been in use and on sale for more than two years prior to the date of the application, does not admit of doubt; and that such use was not an experimental one seems to be clear from the testimony. The application for a patent was on October 14, 1882. In the spring of 1880, J. G. Smith & Co., the predecessors of appellant, were engaged in the manufacture and sale of bed bottoms. In the catalogue issued by them in March, 1880, there is described and advertised what is called "No. 27;" and the testimony of the patentee, a member of the firm, is that during the years 1880 and 1881 they sold quite a number of them,—probably 200 or 300, and possibly 500,—50 or more having been sold before the 14th of October, 1880. In that catalogue, beneath the cut of No. 27, were these words:

"In offering our No. 27 to the trade, we recognize the growing demand for an all-wire spring bed. After a long series of experiments, we have been able to produce a bed which is unequalled for cheapness, lightness, durability, and comfort. Mattress manufacturers will find this an excellent bed to upholster."

The patentee testified, in answer to a question as to whether the sales made in 1880 and 1881 were as an experiment or for gain, that "the sales were made as an experiment, as we do with everything else we get up; to put it on the market to see how the trade will take it; to see how it will take with the trade,"—and in response to a further question, as to what arrangement or understanding was had with the purchasers about the beds giving satisfaction, made this reply: "I had the understanding that, if any of them did not give satisfaction, they could return them, and I would replace them with the latest improvement of that or other beds; so they were satisfied." It is scarcely necessary to refer to the testimony offered by the defendant, tending to show that some at least of these sales were made in the ordinary course of business, and without any conditions named or suggested, and that a market was sought for the goods precisely as for other manufactured articles; for, upon the testimony of the patentee himself, it is obvious that what was done in the spring and summer of 1880 was not for the mere purpose of "experiment," as that term is used in patent law. The invention was one which the inventor could have tested in his own home, and

by use in his own family. He did not sell simply one or two, and wait to see how they satisfied the purchasers or what defects were discovered by them; but the firm of which he was a member invited the public to buy, representing the beds to be unequaled, and continued to manufacture and sell them from month to month and from year to year, in the same manner as any other article in their stock was manufactured and sold; and each sale was made at a profit, and with the contemplation of a profit. The experiment was not a testing for the purpose of discovering defects and perfecting the invention, but a testing of the market, and to see how the article would sell, or, as the inventor said, "to see how it will take with the trade." It was a trader's, and not an inventor's, experiment. Such a use does not carve an exception out of the statute. See the following cases: *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Egbert v. Lippmann*, 104 U. S. 333; *Manning v. Glue Co.*, 108 U. S. 462, 2 Sup. Ct. 860; *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122; *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101; *Root v. Railroad Co.*, 146 U. S. 210, 13 Sup. Ct. 100. In *Egbert v. Lippmann* (page 336) it was said by the supreme court:

"We observe, in the first place, that, to constitute the public use of an invention, it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof, but one well-defined case of such use is just as effectual to annul the patent as many. *McClurg v. Kingsland*, 1 How. 202; *Fruit-Jar Co. v. Wright*, 94 U. S. 92; *Pitts v. Hall*, 2 Blatchf. 229. For instance, if the inventor of a mower, a printing press, or a railway car makes and sells only one of the articles invented by him, and allows the vendee to use it for two years, without restriction or limitation, the use is just as public as if he had sold and allowed the use of a great number."

And in *Manufacturing Co. v. Sprague*, 123 U. S. 264, 8 Sup. Ct. 122, this rule as to the character of the testimony was laid down:

"In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing."

Finally, it is insisted that the patented invention is substantially different from that manufactured and sold in 1880. In the language of counsel:

"The bed bottom used by Smith prior to October 14, 1880, was not the same invention patented by him, but was an imperfect, immatured, impractical, and unsuccessful bed bottom, and a mechanical and commercial failure, and wholly a different mechanical structure from the one patented, both in its results and construction."

The invention, it may be said in a general way, consisted of a bank of wire springs fastened together at both top and bottom by a series of tie rods and hooks, running laterally and crosswise. These tie rods and hooks, and the upper and lower coils of the springs to which they were attached, formed, as it were, two horizontal planes, kept apart by the intervening springs. A pressure upon any part of the upper plane was met, not simply by the resist-

ance of the particular spring under the place of pressure, but, by reason of the hooks and tie rods, was distributed upon the surrounding springs. These hooks and rods were therefore important factors in keeping the springs in place, and thus securing the stability of the bed. In both the bed manufactured and sold in 1880 and that described in the patent the hooks were formed by an extension of the upper coils of the springs. In the latter this extension was carried round the next lower coil, making what is called a "closed head," while in the former it was not so carried round. But this change does not seem to us a vital one, nor was it apparently so regarded by the patentee. In the specifications he says: "The hooks, b, b, are preferably an extension of the upper coil, being carried around the next lower coil, and then extended in the form of a hook." And, again: "The hooks, b, b, are the most desirable means for locking the tie loops, C, C, to the springs; but I do not desire to be confined thereto, as other means can be used to fasten the ties, C, C, to the springs." The manner of tying was evidently not of the substance of the invention.

In conclusion it may be said that the matter of obtaining a patent was an afterthought, and one that came too late to be of any avail to the patentee, even if there was in the construction of the bed such a display of inventive skill, and such novelty and utility, as gave a right to a patent, and of that we express no opinion.

The decree is affirmed.

GILCHRIST et al. v. HELENA HOT SPRINGS & SMELTER R. CO. et al.

(Circuit Court, D. Montana. November 6, 1893.)

No. 114.

1. EQUITY JURISDICTION—STATUTORY LIENS—ENFORCEMENT.

Equity has jurisdiction to enforce statutory liens when the statute itself provides no method of enforcement. *Machine Co. v. Miner*, 28 Kan. 441, distinguished.

2. SAME—FEDERAL COURTS—ENFORCING STATE STATUTORY LIENS.

In cases of proper citizenship, the federal courts have equitable jurisdiction to enforce against railroad companies judgments rendered in the state courts on material or labor claims, when the state statute makes such judgments superior liens on the property of the company in the county of their rendition, without providing any method of enforcing the same or binding other persons who claim interfering liens.

3. SAME—RIGHTS OF THIRD PERSONS.

In such a proceeding the fact that the judgment was based upon a bill of exchange will not prevent the court, at the instance of other lien claimants, from going behind the same, and determining whether the consideration therefor consisted in fact of labor or material furnished. *Hassall v. Wilcox*, 9 Sup. Ct. Rep. 590, 130 U. S. 493.

4. CONSTITUTIONAL LAW—RESTRICTIONS ON STATES—EQUAL PROTECTION OF THE LAWS—RAILROAD COMPANIES.

A provision in a state statute (Comp. St. Mont. c. 25) that judgments for labor and materials furnished to railroad companies organized thereunder shall constitute a lien superior to that of any mortgage or deed of trust does not deprive such companies or their mortgagees of the equal protection of the laws, within the meaning of the fourteenth

amendment to the constitution of the United States. *San Mateo Co. v. Southern Pac. R. Co.*, 13 Fed. Rep. 722, 8 Sawy. 238, distinguished.

5. SAME—STATE CONSTITUTIONS—LEGISLATIVE POWER.

Limitations placed upon the legislative power of a state by its constitution cannot invalidate a pre-existing territorial law, which was adopted and continued in force by the same convention which formed the constitution.

6. RAILROAD LIEN LAWS—"WORK AND LABOR" CLAIMS—WHAT ARE.

Persons who occupy the positions of managing agent and superintendent of trains, but who also, on occasion, run trains, clean cars, repair track, and act as "general utility" men, must be considered as performing "work and labor," within the Montana railroad lien law, (Comp. St. Mont. c. 25, § 707;) but it is not so with one who merely has charge of the office and of the receipts, and keeps in a book the time of the workmen as handed in to him. *Mining Co. v. Cullins*, 104 U. S. 176.

In Equity. Bill by Thomas Gilchrist, Charles Gilchrist, and W. B. Edgar, copartners as Gilchrist Bros. & Edgar, against the Helena, Hot Springs & Smelter Railroad Company, to enforce the lien of certain judgments recovered in the state courts. The cause was commenced in a state court, but the Northwestern Guaranty Loan Company, having intervened and filed a cross bill, removed the case to this court.

For former opinions, see 47 Fed. Rep. 593, and 49 Fed. Rep. 519.

Leslie & Craven, for plaintiff.

Toole & Wallace and A. K. Barbour, for defendant Northwestern Guaranty Loan Co., intervenor and cross complainant.

Walsh & Newman, F. P. Sterling, McConnell, Clayberg & Gunn. M. Bullard, and H. C. Smith, for defendant lienholders.

H. G. McIntire, for defendant Farmers' Loan & Trust Co.

KNOWLES, District Judge. Thomas Gilchrist and his partners obtained a judgment against the Helena, Hot Springs & Smelter Railroad Company for the sum of \$2,299.81, in the district court of the county of Lewis and Clarke, state of Montana. They allege in their bill that their said judgment was for material bought and furnished to said railroad company by plaintiffs upon and in the use of the property of said company. It is alleged that the Helena, Hot Springs & Smelter Railroad Company is a corporation organized under the laws of the state of Montana; that, by virtue of said law, said judgment is a lien upon the property of said railroad company in Lewis and Clarke county, Mont. They also set forth the railroad property of said company in said county. It appears, further, that the Farmers' Loan & Trust Company, one of the defendants, is a corporation organized under the laws of the state of New York, and holds a trust deed upon the property of said railroad company to secure the payment of certain bonds of the said railroad company. They further charge that certain other defendants named in the bill have judgments which they claim are liens upon the property of said railroad company.

This cause was commenced in the district court of Lewis and Clarke county, Mont. Upon its own motion, the Northwestern Guaranty Loan Company was made a party defendant. It is a

corporation, as it appears, organized under the laws of the state of Minnesota. Said company, upon its petition, had said cause removed to this court. In this court said Northwestern Guaranty Loan Company filed its cross bill, contesting the rights of all the parties to the original bill, save those of the Farmers' Loan & Trust Company. In said cross bill it was claimed that the deed of trust given to said Farmers' Loan & Trust Company was prior to the lien of plaintiffs and of all the other lien claimants in the bill, and that it was a beneficiary under said deed of trust, being the holder of certain bonds secured thereby, and that said Farmers' Loan & Trust Company, had failed to protect their rights. Issues were joined upon the allegations of the cross bill, setting forth the prior lien under the deed of trust. The matter was referred to the master in chancery of the court to determine as to whether the judgment of plaintiffs and the several judgments obtained by certain of the defendants against the Helena, Hot Springs & Smelter Railroad Company were for materials furnished for, or labor and work done upon, the property of said company. The deed of trust antedated the judgments. By the terms of this deed of trust, a conveyance was made of all the property, franchises, and income of the said railroad company, and of all property, rights, and franchises of the company, of whatsoever nature, it should acquire thereafter. This was in accordance with the power conferred upon such corporations by Comp. St. Mont. p. 824, § 706.

The defendants, in the cross bill, claimed a lien by virtue of the provisions of said Comp. St. p. 824, § 707, which is as follows:

"A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

The act referred to is found in chapter 25, p. 807, Comp. St. Mont., and is the act authorizing the formation of such corporations as the Helena Hot Springs & Smelter Railroad Company. The first point I shall consider is the jurisdiction of this court over the subject-matter presented in the original bill, sitting as a court of chancery. It is claimed by the plaintiff in the cross bill that the lien of the judgment creditors in the case at bar is a legal lien given by law, and hence cannot be enforced in a court of chancery, and hence this court can have no jurisdiction of the matters set forth in the original bill. No doubt this point can be presented at any time in this court. It is true that the lien given in this case is a statutory lien. But that is no reason why it may not be enforced in equity. Pomeroy, in his *Equity Jurisprudence*, (volume 1, § 167,) classes statutory liens as coming exclusively within the jurisdiction of a court of equity, and adds:

"In addition to the liens above mentioned, which belong to the general equitable jurisdiction, the legislation of many states has created or allowed other liens which often come within the equity jurisdiction in respect at least to their means of enforcement. The so-called 'mechanics' liens may be taken as the type and illustration of this class."

A lien is a security, and, in a case like the one at bar, is given by law to secure the payment of money. It is as much a security as a mortgage, which is given by contract. In the Case of Broderick's Will, 21 Wall. 520, the supreme court said:

"Whilst it is true that alterations in the jurisdiction of the state court cannot affect the equitable jurisdiction of the circuit court of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of a state. * * * Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

In the case of *Ex parte McNiel*, 13 Wall. 236-243, the supreme court said:

"A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is evoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence."

Generally, it may be said, when a statute gives a new equity, a federal court can be called upon in a proper case to enforce it. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495. Here, in this case, is a lien given,—a right. Is there a plain, speedy, and adequate remedy at law for enforcing it and making it available? The corporation against which a judgment, such as is provided for in section 707, is obtained would be bound by it, but no corporation or person other than the one who was a party to that judgment would be bound thereby. This the plaintiff in the cross bill contends for. In pursuance of this principle, the said judgments were referred to a master in chancery for examination. This was the view of the supreme court in the case of *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. Rep. 590, which was a case involving the rights of a lien claimant under a statute of Texas similar to the one under consideration. None of the other judgment claimants in this case would be bound by the judgment of Gilchrist and others so far as it was sought to be enforced as a lien. As to the question as to whether Gilchrist and others had a right to a lien for supplies furnished the railroad company, the Farmers' Loan & Trust Company, and any one claiming under their deed of trust, in a proper case, had a right to inquire into the facts. As to whether it was a lien prior to other judgments, the persons holding those judgments had a right to inquire as to the facts. As to whether the lien of Gilchrist and others was a lien prior and superior to the deed of trust of the Farmers' Loan & Trust Company depended upon extrinsic facts. As against such company, the judgment does not establish this. What plain, speedy, and adequate remedy at law is afforded said plaintiff in the original bill, at law, to establish this lien? None. But this lien is a right which these parties had a right to have enforced. Here is a ground for the interposition of a court of equity. The law says that the lien shall

be prior and superior to the deed of trust, but there is no way of declaring this, and binding the parties, but in a court of equity, upon an investigation of the facts. One of the reasons for exercising equity jurisdiction in certain cases arises from the necessity of determining the priority of liens. Pom. Eq. Jur. §§ 677, 716. The case of *Insurance Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138, shows how, when required by the necessity of a case, a court of equity may be resorted to in order to make judgments at law effectual. In that case certain parties had obtained judgments against a railroad company for damages for injuring their lots jutting upon a street along which a street railroad passed. There damages were given by the constitution of the state of Illinois. The railroad company had executed a mortgage with provisions similar to these in the deed of trust in this case. The question presented was as to whether these judgments could be made a prior charge upon the railroad to that of the mortgage. There was no question as to the jurisdiction of the court in that case. It was held they could.

The case cited by the plaintiff in the cross bill, of *Machine Co. v. Miner*, 28 Kan. 441, I do not think is in point in this case. There the judgment was an ordinary judgment at law, and was made a lien by law. There was no necessity of establishing any extrinsic facts to show that it was a lien. The judgment was a lien from the date it was docketed. There was no question of prior liens, and the court said that, upon the facts stated in the bill, the plaintiff had a plain, speedy, and adequate remedy at law. If Mr. Jones, in his work on Liens, (section 112,) maintains that in all cases where a statutory lien is created, if the statute does not provide a means for enforcing the same, it cannot be made available, I do not think he is supported by the authorities or by reason. Undoubtedly, where a lien is created by statute, and the statute provides a remedy for enforcing it, and it appears to be an exclusive remedy, no other can be resorted to. But where a lien is created by statute, and no adequate remedy is provided for enforcing it, a resort to a court of equity may be had. As before stated in *Ex parte McNiel*, supra, when such a right as a lien is established, generally a court of equity may be invoked to give effect to the right by applying the proper remedy. The case cited to support what would appear to be the position of that learned author is *Canal Co. v. Gordon*, 6 Wall. 561, but surely that case does not support any such position. In that a mechanic's lien is enforced by an action in equity, and there is no claim that the statute provides this remedy. In fact, as before stated, the state legislature could not give a federal court that jurisdiction. Its chancery jurisdiction depended upon its general equity powers. Of course, as said in that case, the court could not give any rights to the lienholders beyond those given by the statute. But rights and remedies are not the same. Upon a full consideration of this point, I am satisfied that the state court had, and that this court has, jurisdiction, as a court of chancery, to enforce this lien. I

should not have considered the matter so fully had counsel for the plaintiff in the cross bill not so persistently urged it upon the court.

The next point for consideration is as to whether that provision of said section 707 which makes the lien given a lien prior to the deed of trust executed by the railroad company to Farmers' Loan & Trust Company is void, as being in contravention of the fourteenth amendment to the constitution of the United States, in so far as it provides that no state shall deny to any person within its jurisdiction the equal protection of the law. It is claimed that this statute applies only to corporations, and not to natural persons, and embarrasses the corporations in raising money to build railroads, while natural persons labor under no such disabilities, and that, within the meaning of this amendment, a "corporation" is a person entitled to the benefits of its provisions. It will be observed that the lien of the judgment named in section 707 is to be prior and superior to the lien of any mortgage or deed of trust provided for in the act in which it is found, which is the act providing for the creating of railroad corporations. Section 691 of that act provides generally that the corporation it authorizes may mortgage its property and income. Section 706 of that act, after providing that any railroad corporation may make securities and bonds, reads:

"And to secure the payment of all or any of such bonds, securities or obligations and the interest thereon, may make, execute and deliver such mortgages or deeds of trust upon all or any part of its property, income and franchises, as the board of directors may determine or direct; and if any such mortgage or deed of trust shall so provide and to that extent it shall so provide, it shall be and remain a valid lien upon property, rights, and franchises of the company of whatever nature or kind afterwards acquired, as well as upon property, rights and franchises owned or possessed by the company at the time of its execution, irrespective of the law relating to chattel mortgages, and any such mortgage or deed of trust shall be taken, held and enforced in the same manner as mortgages of real estate."

Here it will be seen that a railroad company may mortgage its income, its property, both real and personal, which it has at the date of the mortgage or deed of trust, and also all that it may thereafter acquire. Its mortgage upon personal property shall be treated as a mortgage upon real estate. No such powers as these are given to a natural person building a railroad. It will be seen that under such powers a railroad corporation may, as soon as it establishes the right of way for its railroad, execute a mortgage or deed of trust which will effectually cover up its property, of every kind and nature, and practically prevent it being subject to the payment of any debts it may contract without some such provisions as are contained in such section 707. It is well known that about all the property a railroad corporation possesses when it undertakes to build a railroad is its franchise and a right of way. Labor builds the road, equips it, and runs it. If a natural person undertakes to build a railroad, those who contribute work for its construction or furnish materials therefor have a lien upon the same, in fact prior to any mortgage upon the same. It will

be observed by reference to sections 1370 and 1376, div. 5, Comp. St. Mont., that this must be so, for about all that pertains to a railroad is the result of labor. Railroad property is classed as belonging to a peculiar class. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 192. Statutes which create liens for labor and material furnished a railroad company, and which make them prior to a mortgage or deed of trust thereon, are not uncommon. Jones on Liens (volume 2, § 1628) says: "It is within the legitimate scope of legislative power to provide for such liens."

The very question under consideration in this case was decided in the case of *Trust Co. v. Sloan*, 65 Iowa, 655, 22 N. W. Rep. 916, and it was there held that such liens were not in contravention of the fourteenth amendment to the United States constitution. Liens created in certain cases subsequent to the execution of a mortgage have been sustained. In the case of *Provident Inst. v. Jersey City*, 113 U. S. 515, 5 Sup. Ct. Rep. 612, the question as to whether certain water rates which were made a lien on the property where used prior to any mortgage thereon, although the lien accrued subsequent to the mortgage, was considered with reference to the fourteenth amendment to the constitution. There the contention was that such a law deprived a mortgage holder of property without due process of law. This the court denied, and said:

"When the complainant took its mortgages, it knew what the law was. It knew that by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgage subject to this law, and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act—its own consent—is an element in the transaction."

Now, while the point was not presented in that case that the mortgagee was deprived of the equal protection of the law, it does seem that the same principle was invoked in that case as should apply to this. Knowing the law, the grantee in the deed of trust took the conveyance, and voluntarily took it. A lien of this class was sustained without question in *Brooks v. Railway Co.*, 101 U. S. 443.

The law allowing such liens being constitutional in all cases where the question is not presented as to whether it deprives any one of the equal protection of the law, the question would arise as to whether any one having the same rights under the law as a railroad corporation was given different privileges, and not made subject to the same conditions as the railroad corporation under the state law. The truth is that, with the view of facilitating the construction of railways, corporations organized for that purpose are given privileges under the statute not given to a natural person. They stand upon a different footing, and ought not to complain because different laws are made applicable to them. The statute affects all railroad corporations organized under the laws of the state. In the case of *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, the supreme court, speaking by Justice Field, said:

"And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions."

I do not think the case of *San Mateo Co. v. Southern Pac. R. Co.*, 8 Sawy. 238, 13 Fed. Rep. 722, in point. In that case it appears that, by a law of California, the property of the railroad company was so assessed as to make it pay in taxes \$2,000, when a natural person, on property of the same assessed value, would be compelled to pay only \$400. This was in its nature compulsory,—nothing voluntary about it. That was certainly a different case from the one at bar. Here the contract was entered into voluntarily, with a knowledge of the law which entered into, and formed a part of the contract, as much as though written out therein. None of the other cases cited upon this point seem to me to be more pertinent than this. For these reasons, I think it cannot be maintained that said section 707 is in contravention of any of the provisions of said fourteenth amendment, as claimed by said plaintiffs in the cross bill.

This court is also asked to declare that this section 707 is in violation of that provision of the constitution of the state of Montana which provides that, in all cases where a general law can be made applicable, no special law shall be enacted. Federal courts always approach the construction of a state constitution with some hesitancy. Where a state court of authority has performed that duty, a federal court will follow its ruling. In this case, so far as I am informed, this question has not been considered by our state courts. The question, however, has been presented in other states, where a similar provision prevails. It has been generally decided that, when the question arises, it is within the province of the legislative authority to determine when a general law would be applicable, and when not. *State v. Hitchcock*, 1 Kan. 178; *Johnson v. Railroad Co.*, 23 Ill. 202; *Hess v. Pegg*, 7 Nev. 23; *Gentile v. State*, 29 Ind. 409.

It should be further remarked that the provision of the constitution of the state referred to is a limitation upon the powers of the legislative assembly of the state, which assembly was created by that constitution, and hence must refer to the acts of that assembly. The statute under consideration was a territorial statute, and was adopted by the constitutional convention which formed the state constitution, and provided that it, with all other laws not in conflict with the constitution, should remain laws of the state until repealed by the legislative authority; hence this law cannot come within the provisions of the constitution referred to.

Plaintiff in the cross bill makes several objections to the report of the master in chancery to whom this cause was referred. The first of these is that the master erred in finding that the judgment of Gilchrist and others was for material furnished for and used upon the road of said railroad company, because the cause of action upon which they obtained judgment was based upon a bill of exchange, and not upon an account. I have before said those claiming under

the deed of trust were not bound by that judgment; that it could be shown, where it was a party, whether or not the judgment was for material furnished for, or for work or labor done on, the railroad property of said railroad company. In the case of *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. Rep. 590, it was held that the master could inquire into the consideration of a promissory note which was the basis of a cause of action upon which a judgment was obtained, and determine how much of it was for work and material furnished the railroad company in that case mentioned, with the view of showing how much of the judgment obtained upon the promissory note was a lien under the laws of Texas. In the light of this decision, I can see no objection to the master inquiring into the consideration for that bill of exchange, and determining whether or not the consideration therefor was for materials furnished the railroad company. The objection is overruled.

The second objection I will notice is that referring to the objection to the finding that William C. Humbert and James S. Dunn each performed work and labor upon the property of said railroad company. Humbert testified:

"I suppose I was managing agent of the company. I had various positions there. I had charge of their business in carrying on, conducting, and operating the road. Kept the time books, and looked after the men. Paid them when I had money. Ran as conductor. Worked on the railroad track,—kind of a general utility man. Helped around the roundhouse."

The testimony of Dunn was as follows:

"I was hired to take general charge of the running of the trains. In doing that, I have at times acted as conductor of the cars, fired engines, run them, helped clean, fired, attended to track repairs, etc.; that is to say, whenever my services were wanted, at any time, I was always generally on hand to take my hand in it, either as superintendent or a laboring man. I acted in all capacities."

This testimony brings these men within the rule expressed in the case of *Mining Co. v. Cullins*, 104 U. S. 176. The lien law of Utah under which the action arose provided that any person or persons who shall perform any work or labor upon any mine, or furnish any materials therefor, etc., shall be entitled to a lien. The court, in interpreting that statute, held that a person hired to oversee the mines, and generally to control and direct the working and development of a mine, and who did, in the performance of his duties, some manual labor, came within the meaning of the statute, and was classed as a man who performed work and labor upon the mine. The lien given in the said section 707 is for a "judgment against any railroad corporation * * * for work or labor done upon any of the property of such corporation." The language of the two statutes is the same, and the interpretation should be the same. This objection is overruled.

The third objection calling for notice is as to the finding that one William Kirkham had performed work and labor upon the property of the railroad company. In his evidence he said:

"I had charge of the office and charge of the receipts, and kept the time book, and looked after things generally in the office. By the time books, I mean the time of the men who worked."

This cannot be classed as work done on the property. It is not claimed that he looked after the men and kept their time, but that he kept in a book an account of their time given in to him. If his work could be classed as work and labor done on the property of the company, then the services of a secretary of the company or of an attorney of the company would come under the same class. While the law under consideration should be liberally construed, still the language "work and labor upon any of the property of the company" should not be extended beyond its general meaning.

I think this objection is good, and should be sustained.

BRIGGS v. STROUD et al.

(Circuit Court, E. D. Wisconsin. November 23, 1893.)

1. EQUITY PLEADING—JURISDICTIONAL PLEAS—DUPLICITY.

A plea to the jurisdiction which sets up matters affecting the validity of the service, matters showing want of proper citizenship, and also the pendency of a prior suit, is bad for duplicity.

2. SAME—SUFFICIENCY—PRIOR SUIT PENDING.

Where a bill is brought to set aside an alleged fraudulent appointment under a will and to enforce the rights of a distributee in the estate, a plea which merely alleges the pendency of prior proceedings in the orphans' court of another state, without distinctly showing that such court has possession of the res, should not be sustained.

3. APPEARANCE.

An appearance by attorney, so as to secure an extension of time to plead or answer, is a general appearance, and defendants cannot thereafter have their appearance taken as special to plead to the jurisdiction.

In Equity. Bill by Elizabeth H. Briggs against Eliza J. Stroud and Mary E. Burson. Heard on pleas to the jurisdiction. Pleas overruled.

Spooner, Sanborn & Kerr, for complainant.

Van Dyke & Van Dyke and S. Holmes, for defendants.

SEAMAN, District Judge. The question here is upon the sufficiency of the pleas filed by the defendants, respectively, to the bill of complaint. The bill alleges that the complainant is a citizen of Wisconsin, and of this district, and the defendants, respectively, of New Jersey and Pennsylvania, and states the amount in controversy as \$25,000 and over. It alleges rights of complainant to the corpus of the estate of one Danelia S. Burson, as her niece, next of kin, and sole heir at law; that said Danelia S. Burson died testate, September 2, 1882, domiciled in Monroe county, Pa., and her will was duly probated in the orphans' court of said place of domicile; that by said will, which is set forth in full, Lewis M. Burson, her brother, was constituted devisee and legatee of the residue in question for life, and with provision therein to hold in trust (in the event, which here arose, of his leaving no children) as follows: "It is my will that my estate shall go to such of my blood relations as my said brother, Lewis M. Burson, trustee, as afore-

said, may in his will direct." The assets which came to said Lewis M. Burson hereunder are stated at \$29,500, mostly personal estate; and of this it is alleged that the trustee loaned out \$18,550 in Walworth county, Wis., upon notes or bonds secured by real-estate mortgages, and that all of these securities (enumerated in the bill) are in the hands of this complainant, "deposited with and intrusted" to her by said trustee. It is stated that Lewis M. Burson died October 21, 1892, domiciled in said Monroe county, Pa., leaving a will, there probated, which purports to make the defendant Eliza J. Stroud (a blood relative) appointee to take the estate so left by Danelia S. Burson, and named the defendant Mary E. Burson, his wife, executrix. The bill alleges fraud in this appointment, and states facts and circumstances leading up to the making of this will, and the terms of a will, made simultaneously by said appointee, in favor of the widow of said trustee, as showing the fraud. The blood relatives of said Danelia S. Burson are alleged to be "so numerous that it would be absolutely impossible to determine any considerable part of them," and impossible to have the said estate distributed among them. The prayer for relief is to have this attempted appointment set aside as fraudulent and void; to have it adjudged that complainant "is entitled to have distributed and assigned to her by the proper probate court, or by this court, all and singular the property and estate" of said Danelia S. Burson; and for injunction, receiver, etc. Service upon the defendants is claimed by publication, under an order of this court, pursuant to section 8, c. 137, Stat. 1875, (section 738, Rev. St.) The defendants appeared by attorneys so far as to obtain extensions of time to plead or answer, but ask at this hearing to have their appearance taken as special, to plead to the jurisdiction. They file separate pleas.

1. The plea of Eliza J. Stroud sets up several grounds attacking the jurisdiction, viz.: (1) That the securities stated as in the possession of the complainant and as trust estate of Danelia S. Burson were in fact individual property and assets of Lewis M. Burson; (2) that there is no property of the former estate within this jurisdiction; (3) that the legal situs of these securities was in Pennsylvania; (4, 5) that legal proceedings were pending in Pennsylvania, substantially as set forth in plea of Mrs. Burson; (6) that a large number of the blood relatives of Danelia S. Burson are equally interested with complainant, ought to be joined as co-plaintiffs, and many are citizens of same state with defendants, respectively.

Objection is made to this plea that it is bad for duplicity or multifariousness. It attempts to set up several distinct grounds of defense, going to the jurisdiction, but not tending to a single point, as required by well-settled rules of chancery practice. *Story, Eq. Pl. § 654; 1 Post. Fed. Pr. § 124; Rhode Island v. Massachusetts, 14 Pet. 210; Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534; United States v. California & O. Land Co., 148 U. S. 31, 13 Sup. Ct. 458.* I think this objection is well taken, and that the plea should be overruled for that cause.

It would be the right, and the duty of the court, at the first op-

portunity, to take notice of any matters which were patent impugning its jurisdiction, and without standing upon the form of presentation or plea; and to that end a defect for duplicity might, perhaps, be overlooked, or corrected by leave. I have, therefore, in this view, and because argument was had upon all the points, considered the several grounds here stated by way of plea, and, aside from that setting up proceedings pending in the courts of Pennsylvania,—which is considered hereafter in reference to the plea of Mrs. Burson,—it is my opinion that they would not prevent jurisdiction. If it be conceded for argument that the securities mentioned as in Wisconsin had no situs here to authorize a substituted service upon the defendants under section 738, I think their voluntary appearance has made that service good. The right to require suit to be brought in the district of their residence is a personal privilege, which can be waived, and is waived by such appearance. *Toland v. Sprague*, 12 Pet. 300; *Ex parte Schollenberger*, 96 U. S. 369; *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982. This want of situs is urged in behalf of the defendants to defeat the operation of section 738. That would only affect the question of service, as this statute confers no new jurisdiction of the subject-matter, but only provides a means for serving notice upon the defendant; and the inquiry, in that view, becomes immaterial after voluntary appearance. If it shall become material, I think it will depend upon circumstances not fully appearing at this stage, and that the actual domicile of the owner would not be the controlling inquiry. *Story, Conf. Laws*, § 550; *Green v. Van Buskirk*, 7 Wall. 139; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876. The question whether another court has obtained possession of the res may then be potent.

The allegation in the plea that the securities are not the property of the estate of Danelia S. Burson, but of Lewis M. Burson, cannot stand, for it is unsupported by answer; and the allegation of the bill must be taken as true. Rules 32, 39. The bill alleges the impossibility of naming or ascertaining all the blood relations. The plea affords no light, and raises no issue fairly, upon that point.

2. The plea of Mary E. Burson sets out that the will of Danelia S. Burson was probated in the office of register of wills for Monroe county, Pa., and letters testamentary issued to Lewis M. Burson. That upon his death, an account of the administration of said trust by Lewis M. was stated and filed by his executrix January 26, 1893, and confirmed by the orphans' court February 27, 1893. That exceptions thereto were filed; among others, by complainant, May 22, 1893. Said court, by consent of complainant among others appointed an auditor to examine and restate said trustee's account, and "make distribution to the parties entitled to said trust estate." That on November 11, 1892, said complainant also petitioned said court for "appointment of a trustee, and the investment of said estate of said Danelia S. Burson," and that proceedings thereupon were pending when this suit commenced. The following propositions must be taken as well settled by repeated decisions of the supreme court, viz.:

(1) The pendency of a prior suit, in another jurisdiction, is not a bar to a subsequent suit in a circuit court of the United States, even though the two suits were for the same cause of action. *Stanton v. Embrey*, 93 U. S. 548; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Crescent City Co. v. Butchers' Co.*, 12 Fed. 225.

(2) A circuit court of the United States has no jurisdiction to set aside a will or the probate thereof. *Broderick's Will*, 21 Wall. 503; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327.

(3) It has jurisdiction, through its chancery powers, as an incident to the enforcement of trusts, to compel an administrator to account and distribute assets wrongfully withheld. *Payne v. Hook*, 7 Wall. 425; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503.

(4) This jurisdiction cannot be taken where the assets of an estate are in the possession of another court of competent jurisdiction, through its administrator or other officer, to disturb or interfere with that possession, or complicate the obligations of that officer. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906; *Yonley v. Lavender*, 21 Wall. 276; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Williams v. Benedict*, 8 How. 112.

Testing the plea by these premises, it cannot be sustained upon the bare showing of the pendency of proceedings in Pennsylvania involving the same cause of action; and the bill does not attempt to set aside a will, as such, or its probate. The only question, therefore, is whether it clearly presents a case of interference under the fourth proposition, or whether it may leave a case for possible relief under the third. The rule prohibiting interference where the res is held by an administrator or other officer of a competent court—and hence possession, constructively, in that court—is of the utmost importance. It saves from the intolerable confusion and danger which might arise under conflicting decrees and duties. The court which first obtains jurisdiction and possession retains it for final disposition, and cannot be displaced by another of co-ordinate jurisdiction. If the allegations of this plea made clear showing of such prior possession of the res, and attempted interference by this bill, it should be allowed, to the end of obtaining speedy dismissal of the bill, if these allegations are conceded or sustained. But I do not find such showing clearly made upon the face of this plea. It is not apparent that the pendency of probate proceedings and accountings in the matter of the will of Lewis M. Burson can hold the trust estate alleged under the will of Danelia S. Burson; and there may be question as to the effect of the alleged proceedings on petition of this complainant for appointment of a trustee of the latter estate, and of attempted discontinuance thereof, which was conceded upon the argument. The plea alleges pendency "when this suit was brought," but not that it is still depending. *Story*, Eq. Pl. § 737; *Fost. Fed. Pr.* § 129. The plea must be strictly construed, and I think these allegations are not so clear and definite that they should be held conclusive against any equities in the bill, if proved literally. Its allowance would put upon the complainant the necessity either to reply, taking issue upon the facts,

or to submit to dismissal. By reply, the complainant might be held, under the chancery practice, to an admission "that, if the particular facts stated in the plea are true, they are sufficient in law to bar recovery; and, if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any facts stated in the bill." *Farley v. Kittson*, 120 U. S. 303, 314, 7 Sup. Ct. 534; *Rhode Island v. Massachusetts*, 14 Pet. 210. The course required in the *Rhode Island* case, of presentation of the important jurisdictional issues by answer, is applicable here, and will tend to expedite a final determination.

The pleas of both defendants are therefore overruled, but without prejudice to their right to set up any defenses therein by answer, and with leave to answer on or before the first Monday of January, 1894.

DAVID BRADLEY MANUF'G CO. v. EAGLE MANUF'G CO.

MOLINE PLOW CO. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. December 9, 1893.)

Nos. 22, 26.

RES JUDICATA—JUDGMENT IN EVIDENCE—PLEADING—WAIVER.

Where a decree in a former suit is introduced in evidence on stipulation without objection on the ground that it was not properly pleaded, full effect should be given to such decree as a bar to the second suit, even though it is not properly pleaded.

On petition for rehearing. For report of decision on former hearings of appeals, see 57 Fed. 980, 992.

Bond, Adams & Pickard, for appellant.

George H. Christy, for appellee.

JENKINS, Circuit Judge. The appellants present petitions for rehearing, principally upon the ground that we erred in holding that the former decree could be here considered. This proposition is predicated upon the ground that the former decree was not pleaded; and it is insisted that we have overlooked the rule that no decree can be made in favor of the complainant on grounds not stated in his bill.

The case of *Crocket v. Lee*, 7 Wheat. 522, is supposed by counsel to be decisive against our decision. There the case below turned principally on the question whether a certain location was too vague to be supported; and it was insisted upon appeal that the decree was erroneous, because the court should have disregarded the testimony in that respect, for the reason that neither its vagueness nor its certainty had been put in issue by the pleadings; and the court so held. But that court, recognizing the injustice of permitting parties to try and submit their cause in the court below upon an issue not raised by the pleadings, and to enter that objection for the first time upon appeal, while feeling bound to assert the rule, was very careful to find a ground upon which to reverse the cause, with direction to permit the parties to amend their pleadings. This case

was decided in 1822. It is within the knowledge of the profession that at that time, both in law and in equity, great stress was laid upon strict adherence to the issues presented by the pleadings, and to a technical conformity of proof to allegation. It was carried to the extreme of injustice. Since that time there has been evolution in the science of the law in respect of that subject. Parties are no longer turned out of court because their i's are not dotted, or their t's crossed; and courts are diligent rather to search for the substantial justice of a case, than to insist upon strict conformity to pleading. And, while the rule remains, courts at the present day are not inclined to permit parties, for the first time upon appeal, to assert the objection that the testimony, which has been taken without objection in the court below, supports an issue not comprehended within the allegations of the pleading.

The supreme court of the United States has asserted this principle in the late case of *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 298, 300, 13 Sup. Ct. 600, where a similar objection is disposed of upon the ground that the defendant did not object to the plaintiff's evidence as exhibiting a different case from that asserted in the bill, and that the supreme court of the territory from which the cause came justly held that the objection should have been raised in the trial court, where ample power existed to correct and amend pleadings; and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error for matter so waived. The doctrine of waiver is thus invoked to mitigate the hardship of the rule if it should be applied to cases where parties without objection have made the issue by their evidence.

The issue here was novelty of invention. The prior interlocutory decree was pleaded either as a bar or as matter more or less conclusive upon the question of novelty, or perhaps in invocation of the doctrine of comity. It is immaterial which. If as a bar, the pleading was defective upon the technical ground that the interlocutory decree had not ripened into a final decree, because the damages had not then been assessed. The validity of the patent had been determined, subject only to the power of the court to change its judgment before final decree. No objection was made to the sufficiency of the pleading when the final decree was stipulated in evidence. We are well satisfied that thereby the appellant waived the defective nature of the pleading, if the pleading is to be treated as a plea of *res adjudicata*.

Irrespective, however, of any question of pleading, we are of opinion that the former decree was properly before the court, and should be given full effect. The issue involved in this case was novelty of the invention claimed. The former decree was, as has been said, stipulated in evidence by the agreement of the parties, subject only to its materiality. A former decree may be good as a plea in bar, or may be available as evidence. It was said in the *Duchess of Kingston's Case*, 11 State Tr. 261, 2 Smith, Lead. Cas. (6th Amer. Ed.) 663, that such decree is "as a plea, a bar, or as evidence, conclusive." It may, perhaps, be somewhat questionable whether it is correct to say that a party is estopped by a judgment, any more than

that he is estopped by a contract. The former decree is not the act of the party, but the solemn adjudication of a judicial tribunal. So far as the party is concerned, he may be permitted to waive the former recovery in his own behalf; but the peace and good order of society are likewise concerned, that there shall be an end to litigation, and that the courts should not be twice vexed with the same controversy, when that controversy has once been solemnly adjudicated. *Marsh v. Pier*, 4 Rawle, 288; *Killeffer v. Herr*, 17 Serg. & R. 319.

However that may be, it is certainly true that, without respect to pleading, wherever a former recovery is properly in evidence—as here it was by agreement of the parties—full effect should be given to it, so far as it bears upon the issue presented. The issue here being novelty of invention, and that fact having been determined by the prior adjudication, the former decree becomes conclusive evidence of the validity of the patent as between the parties affected by such prior adjudication.

The petition for rehearing will be overruled.

MUTUAL BEN. LIFE INS. CO. v. ROBISON.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1893.)

No. 314.

1. LIFE INSURANCE—APPLICATION—WARRANTY—POWERS OF AGENTS.

The usual clause in applications for life insurance, to the effect that the applicant warrants his answers to be true, does not operate as a limitation or restriction upon the powers of the insurance company's agents. Their powers remain the same whether the application contains a warranty or only representations.

2. SAME—ESTOPPEL OF INSURER TO DISPUTE TRUTH OF ANSWER.

When an applicant for life insurance, in answer to a question, states the facts fully and truthfully, and the agent of the company, authorized to ask the question and write the answer, putting his own construction on such facts, deduces therefrom an erroneous answer, which he writes down, assuring the applicant that it is the proper answer upon the facts stated, and the one the insurer wants, the insured is not precluded by his warranty in the application from showing the facts and circumstances under which the answer was made, and when so shown the insurer is estopped from questioning the truth of the answer. 54 Fed. 580, affirmed.

3. SAME.

The same rule obtains where the applicant answers fully and truthfully, and the agent of the insurer, charged with the duty of asking the questions and writing the answers, abbreviates an answer, or omits part of it.

4. SAME—CONDITIONS IN POLICY—POWERS OF AGENTS.

A provision in a life insurance policy withholding from the agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance" does not limit the powers of the insurer's agents in preparing and accepting an application for insurance.

5. WITNESS—PRIVILEGED COMMUNICATION—FOLLOWING STATE LAW.

Code Iowa, § 3643, prohibiting physicians and others from testifying as to confidential communications made to them in a professional capacity, is binding upon a federal court sitting within that state, under Rev. St. U. S. § 858, which makes the laws of the state in which the court is held

rules of decision as to the competency of witnesses in the courts of the United States.

6. DEPOSITION—PLACE WHERE WITNESS "LIVES."

Under Rev. St. U. S. § 863, authorizing the taking of a deposition "when the witness lives a greater distance from the place of trial than 100 miles," a witness "lives" where he can be found, and is sojourning, residing, or abiding for his health, or any other lawful purpose.

7. EVIDENCE—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

A United States circuit court in Iowa may take judicial notice that Asheville, N. C., is distant more than 100 miles from Dubuque, Iowa.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

In Equity. Suit by the Mutual Benefit Life Insurance Company against Charles W. Robison to cancel insurance policies. Bill dismissed. 54 Fed. 580. Complainant appeals. Affirmed.

Francis B. Daniels, for appellant.

Nathan E. Utt, (Utt Bros. & Michel, on the brief,) for appellee.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This is a suit in equity commenced on the 23d of June, 1891, in the United States circuit court for the northern district of Iowa, by the appellant, the Mutual Benefit Life Insurance Company, hereafter called the "Company," against Charles W. Robison, the appellee, to cancel four policies of insurance on the life of the appellee of \$5,000 each, issued by the company to him March 17, 1890. The circuit court dismissed the bill for want of equity. The opinion of Judge Woolson is reported in 54 Fed. 580.

The application for the insurance was taken in Dubuque, Iowa, where the assured then resided, by the agents of the company in that state. The application consists of four parts: First, the application to be signed by the applicant for insurance; second, questions to be asked by the agent and answered by the applicant; third, questions to be asked by the medical examiner of the company and answered by the applicant, the answers to be written by the examiner; fourth, questions asked the examiner, to be answered by him. A clause of the application expressly provides that the answer to the question which the medical examiner is to ask "must be written by one of the company's examiners," who is instructed to "see that the answers are free from ambiguity, and that diseases are distinguished from mere symptoms," and referring to a long list of diseases, among which is "spitting of blood," he is directed to "ask concerning each and give particulars under head of remarks." The application signed by the assured contains this provision: "I agree that the answers given herewith to the questions of the agent and examiner, which I declare and warrant to be true, shall be the basis of my contract with the company;" and the policies contained this clause: "This policy does not take effect until the first premium shall have been actually paid, nor are agents authorized to make, alter, or discharge this or any other

contract in relation to the matter of this insurance, or to waive any forfeiture hereof. * * *

For about three years before the assured was examined, the local agent of the company, Charles J. Brayton, had been soliciting him to take out a policy in the appellant company. The assured finally consented to take out a policy for \$5,000, and by direction of the agent went to the office of Dr. G. M. Staples, the medical examiner of the company, to be examined. There he met Brayton, the local agent, T. F. McAvoy, the state agent, and Dr. G. M. Staples, the medical examiner, of the company. It is conceded that these gentlemen were the agents of the company, and there is nothing to show that they were not clothed with all the powers and authority which ordinarily pertain to insurance agents in their respective positions. Dr. Staples had been the medical examiner of the company at Dubuque for 25 years. He had also been the family physician of the assured for many years, and had known him from childhood.

The ground set up in the original bill for a cancellation of the policies was that the answer to the fifteenth question asked by the medical examiner was "untrue, false, and fraudulent." An amended bill was filed, alleging that the answer to the eleventh question asked by the medical examiner was false and fraudulent. That question was: "(a) For what have you sought medical advice during the past seven years? (b) Dates? (c) Duration? (d) Physicians consulted?" The answer to this question, as written by the medical examiner, was: "(a) Debility from overwork. (b) Feb., 1888. (c) 10 days. (d) G. M. Staples." The answer to this question, as given by the applicant, included the name of Dr. M. H. Waples as one of the physicians he had consulted. The fifteenth question was, "Have you ever had any of the following?" Here follow the names of 40 diseases, and among them "spitting of blood." To this question the applicant made this answer to the examiner:

"On October 17, 1887, when starting for my office, Dr. S. H. Guilbert, who was attending my wife in her approaching confinement, gave me directions that he would telephone me as soon as I was needed, and to hurry home, bringing with me a prescription of chloroform. I went to my office, buying the chloroform on the way. A little after 2 o'clock, the telephone came for [me] to come instantly. I went to the horse stall in the rear of my office, where I generally kept my horse, and found that some one was using it. I next hurried to the corner of Jones and Main streets, hoping to catch a street car, and thereby reach my home quickly. I was then living at 1468 Main street. Not finding a street car in sight, my only recourse was to get home as quickly as my legs would carry me; and I started up Main street, running for a square or two at a time, and then resting by walking for another square, and kept up that pace, coming up Main street on the west side of the street. Between Tenth and Eleventh, on Main street, I crossed the street by running, and about 50 feet from the corner of Eleventh I jumped across the curbstone. As I did so, I tripped on the curb, and fell. I had hardly picked myself up, and started again, when I noticed that I had expectorated a mouthful of blood. As this was the first time I had ever expectorated blood without knowing where it came from, I was very much shocked, and frightened beyond measure. I turned, and ran as fast as I could to the nearest doctor's office, which was Dr. Waples, a square down, and on the opposite side. I went in, found him there, and begged him to

tell me what was the matter. He said that I was very much excited; to sit down and try and compose myself; that the blood, probably, did not amount to much. He gave me a drink of water, and tried to soothe my agitation as much as possible. After staying there a short time, and finding that the bloody expectoration had stopped, I started to go home. * * * After narrating what I have just stated to Dr. Staples, in his office, on the 19th of October, 1887, he began an examination of my throat and lungs. He made what appeared to me a careful examination of my throat and lungs. He said he saw in my throat a dilapidated blood vessel, that looked as if it had bled away. I asked him if, in his opinion, there was any question but that this blood came from this blood vessel in my throat. He assured me that it did not amount to anything, and to go on about my business; that he had similar cases in his office every day,—of perfectly healthy men expectorating blood from their throat."

The applicant having made this answer, Dr. Staples, the medical examiner of the company, himself testifies that:

"I recollect that I told him that the question, 'spitting of blood,' had a definite significance; that it meant hemorrhage from the lungs or bronchial tubes; and that the spitting of blood, as described by him and as known by me, because I was consulted by him, was manifestly not hemorrhage. I explained to him that this question, 'spitting of blood,' was, in my judgment, as medical examiner of the company, it was put there for the purpose of determining whether there was any evidence of consumption; that the question could not be answered categorically. If you meant spitting of blood from the mouth, probably no person living but what has spit some blood on some occasion, when a tooth has been extracted, or after having the nose-bleed. Spitting of blood did not mean that. It meant as evidence of haemoptysis, or diseases of the pulmonary organs. I said that it was not necessary for him to state that he had had spitting of blood; that the question did not imply the spitting of blood, as he had reported it."

And the examiner thereupon directed his son, who was acting as his amanuensis, the examiner himself having pen paralysis, to write the word "No" as the answer to this question, assuring the applicant that that was the proper answer to be drawn from the facts which he had narrated, and which were known to the examiner himself to be true. The applicant at the same time narrated to the local and the state agents of the company all the facts connected with the incident of spitting of blood, as he had stated them to the medical examiner, and asked them if the answer which the examiner had directed him to make to this question was the proper one, and they assured him that it was. The assured, the medical examiner, and the two agents of the company are agreed in their testimony as to what took place. In answer to the question whether he examined the applicant's lungs at the time he examined him for insurance, Dr. Staples says:

"I did as thoroughly as possible; stripping him, and examining him by ear and by use of the stethoscope. I had been Mr. Robison's physician, and had examined him from time to time for various little troubles; and, when I came to examine him for life insurance, I made a most thorough examination of him. I made a more thorough examination of him than of any one. I took three days to satisfy myself about the case, and I positively believe there was no disease of the lungs, and I wanted to satisfy myself whether there was. After making this examination, I came to the conclusion that, so far as his lungs were concerned, they were sound."

So well satisfied were the agents of the company that the assured was a good risk that they pressed the examiner to report

him as a preferred risk, which, however, he declined to do; and they persuaded the assured to increase the insurance from \$5,000, as originally contemplated, to \$20,000.

The assured stated to the examiner and to the agents of the company every fact and circumstance connected with his spitting of blood. He concealed nothing. He added nothing. And the categorical answer to the question which was written down by the examiner was dictated by him, and approved by the two agents. There was no fraud on the part of any one connected with the transaction. The assured, the medical examiner, and the two agents were all acting honestly and in good faith, and the charge in the bill to the contrary is wholly unsupported by the evidence. But it is said, conceding this to be so, that the answer to the question was in fact untrue, and that the assured had no right to rely upon the assurance of the medical examiner and agents of the company that the answer written down by the examiner was a truthful and proper answer, upon the facts narrated by the assured. To support the contention that, upon the facts stated by the assured, the answer to the question was false, the company introduced as a witness its medical director, who testifies that the term "spitting of blood," as contained in the application, "means ejection of blood from the mouth, without reference to the cause or source." But the medical examiner of the company, who examined the applicant and dictated the answer to this question, gives a different definition to the term. Dr. Staples says:

"The phrase 'spitting of blood' is, and has been for many years, come to be regarded as synonymous of 'haemoptysis,' which term is applied to the raising of blood from the lungs,—that is, the bronchial tubes, lungs, or membrane of the lungs,—and not when it comes from any other source."

And, when asked the meaning of the term as used in the application for insurance in this case, he answered:

"Blood coming from the lungs or bronchial tubes."

In Quain's Dictionary of Medicine, the term is thus defined:

"Spitting of Blood. A proper synonym of 'haemoptysis.' See 'haemoptysis.'"
"Haemoptysis. Spitting of blood, having its source in pulmonary or bronchial hemorrhage. The restriction of the term 'haemoptysis,' as thus defined, has the sanction of long usage and convenience."

In the Century Dictionary the definition is:

"Spitting of Blood. Same as 'hemoptysis,' which see." "Hemopses. Hemoptysis. In pathol., spitting of blood, usually restricted to raising blood from the lungs."

And see Singleton v. Insurance Co., 66 Mo. 63.

It will be observed that the medical director and the medical examiner of the company differ as to the meaning of the term. It is not necessary for the court to determine which one of these agents of the company gives the right definition, or whether either is right. The fact that they differ shows that the term is ambiguous. It was the medical examiner's duty to ask this question and write down the answer. For this purpose he was the

agent of the company, and whatever he said or did in the discharge of this duty was the act of the company. In view of his instructions and the ambiguous character of the question, he was clearly acting within the line of his authority when he assumed to interpret and explain to the applicant the meaning of the question, and to interpret and dictate his answer thereto. His special knowledge of medicine and diseases qualified him to do this. The applicant could not have written the answer to the question, if he had desired to do so. Under the instructions of the company, the answer had to be written by the medical examiner. Upon these facts, the act of the medical examiner was the act of the company, and the answer to this question which he dictated and wrote down must be treated as the answer of the company. The answer which the medical examiner deduced from the facts stated by the applicant was probably the right one; but, assuming that it was not, and that he ought to have written "Yes" instead of "No," the fact remains that it was the answer of the company, and the company is estopped to question the truth of its own answers, notwithstanding the application warrants the answer to be true. The usual clause in an application for insurance to the effect that the applicant warrants his answers to be true does not operate as a limitation or restriction upon the powers of the company's agent. The difference between a warranty and a representation is that a warranty must be literally true, without regard to its materiality to the risk, while a representation must be true only so far as the representation is material to the risk. But this difference does not affect the powers of the company's agents. They remain the same whether the application contains a warranty or only representations; and when the assured, in answer to a question, states the facts fully and truthfully, and the agent of the company, authorized to ask the question and write the answer, putting his own construction upon such facts, deduces therefrom an erroneous answer, which he writes down, assuring the applicant that it is the proper answer upon the facts stated, and the one the company wants, the assured is not estopped by his warranty from showing these facts, and when they are proved they operate to estop the company from questioning the truth of the answer. The same rule obtains where the applicant answers fully and truthfully, and the agent charged with the duty of asking the question and writing down the answer abbreviates the answer or omits part of it, as happened in this case to the answer to the eleventh question. All of the agents agree that in answer to this question the applicant stated distinctly that he had consulted Dr. M. H. Waples and Dr. G. M. Staples. Any other rule would result in holding the applicant responsible for mistakes, oversights, blunders, or omissions of the company's own agent, who was, in the case at bar, indisputably, the full and complete representative of the company in all that was said or done in the medical examination of the applicant.

The application contains no limitation of the powers of the agents or the medical examiner. Their powers were coextensive with the business intrusted to them respectively. The clause in

the policy withholding from the agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance" is not a limitation of the powers of the agents in preparing and accepting the application for insurance. This provision of the policy does not take effect until the application is made and accepted, and the policy is issued. It has relation to the policy and other completed contracts concerning the insurance, and has no reference to the application, which precedes the policy, and which, until it is accepted and the policy issued, is a mere offer or proposition for a contract of insurance. *Crouse v. Insurance Co., (Mich.) 44 N. W. 497; Kausal v. Association, 31 Minn. 17, 16 N. W. 430.*

It is conceded that a breach of a warranty of the truth of the applicant's answer avoids the policy, without reference to the good faith of the applicant or the materiality of the answer. But it is a grave mistake to suppose that this rule can be extended so as to hold the applicant responsible for the truth of an answer which was the result of a mistake in judgment or an error or blunder of the company's agent, who was specially charged by the company with the preparation of the application, and who himself dictated the answers upon a full and truthful statement of the facts by the applicant. In such a case there is no difference between a warranty and a representation. Whether it is the one or the other, the company is estopped to take advantage of its own wrong or mistake, as the case may be. Intolerable injustice and wrong would result from any other rule. This case will serve to illustrate how extremely unjust and oppressive the rule contended for by the company would be. Its position is that "spitting of blood," in the language of its medical director, means "ejection of blood from the mouth, without reference to cause or source," and that, inasmuch as the assured did once spit blood from his mouth, his answer to the question should have been in the affirmative, and, that not being so, there is a breach of the warranty of the truth of the answer, and the policy is void, notwithstanding the medical examiner, whose duty it was to make the examination and write down the answers, assured the applicant, upon a full statement of all the facts, that he had not had "spitting of blood," in the sense of these words as used in the application, and directed the applicant to answer the question in the negative. If this is a sound position, it is equally true that if the applicant had, upon this same statement of the facts, by direction of the company's medical director, answered the question in the affirmative, the company could have claimed the answer was not a true answer, within the meaning of the question in the application, and proved its claim by calling its medical examiner, who has testified that the applicant never had "spitting of blood," in the sense of these words as used in the application, and that there was therefore a breach of the warranty of the truth of the answer, which avoided the policy. Such unreasonable claims and contentions are answered by the familiar and fundamental rule of the law of agency, that the principal is bound by the acts of his agent, in all matters within the

apparent scope of his agency, as fully and completely as if the act had been performed by the principal himself, and that in such cases the principal is as effectually estopped by the act of his agent as if he had performed it himself. The sound rule in this class of cases is clearly and forcibly stated in the case of *Insurance Co. v. Olmstead*, 21 Mich. 251. Judge Cooley, in delivering the opinion of the court in that case, said:

"It cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate the obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void. * * * When an agent, who at the time and place is the sole representative of the principal, assumes to know what his principal requires, and, after being furnished with all the facts, drafts a paper which he declares to be satisfactory, induces the other party to sign it, and receives the premium, and delivers the contract, which the other party is led to believe, and has a right to believe, gives him the indemnity for which he pays his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's carelessness, unskillfulness, or fraud."

We content ourselves with citing a few of the many well-considered cases which fully sustain the doctrine of this opinion: *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Trefz*, 104 U. S. 197; *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Baker*, 94 U. S. 610; *Eames v. Insurance Co.*, Id. 621; *Grattan v. Insurance Co.*, 80 N. Y. 281, 92 N. Y. 274; *Flynn v. Insurance Co.*, 78 N. Y. 568; *Pudritzky v. Lodge*, 76 Mich. 428, 43 N. W. 373; *Insurance Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621; *Insurance Co. v. Snowden*, 58 Fed. 342; *Sawyer v. Insurance Co.*, 42 Fed. 30. In many of these cases there were warranties. There is nothing in the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, contrary to the views we have expressed, or that qualifies the doctrine of the cases we have cited. In that case the powers of the agent were limited. The application provided that:

"No statements or representations made, or information given, to the persons soliciting or taking the application for the policy, should be binding on the company, or in any manner affect its rights, unless they were reduced to writing, and presented to the home office, in the application."

And this limitation was brought to the notice of the assured at the time the application was made. So far from overruling, the court reaffirms, the rule firmly established by its previous decisions, and says:

"Where such agents, not limited in their authority, prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the insured, should be regarded as the act of the company."

Dr. Waples, who was consulted by the assured at the time he spit blood, was called as a witness by the company, and asked to describe the spitting of blood, and explain the nature of it. The defendant objected to the question upon the ground that the information sought was privileged, the witness being the physician of

the defendant at the time. The court sustained the objection, and this ruling is assigned for error.

Section 3643 of the Code of Iowa reads as follows:

"No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to a case where the party in whose favor the same are made waives the rights conferred."

Section 858 of the Revised Statutes of the United States provides:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Construing this section, the supreme court of the United States, in *Potter v. Bank*, 102 U. S. 163, said: "The existing statute (Rev. St. § 858) seems too plain to require construction," and after pointing out that "the first clause of that section shows that there was in the mind of congress two classes of witnesses" that should never be excluded from testifying, added: "In all other respects, that is, in all cases not provided for by the statutes of the United States, the laws of the state in which the federal court sits constitute rules of decision as to the competency of witnesses in all actions at common law, in equity, or in admiralty."

The precise question we are considering was before that court in the case of *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119. The case was tried in New York, which state has a statute similar to the Iowa statute which we have quoted. The court said:

"Since it is for the state to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the circuit court of the United States is required by the statutes governing its proceedings to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative."

And, after referring to the state and federal statutes on the subject, the court said:

"For these reasons, it is clear that the circuit court properly refused to admit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity."

These cases contain the last, and therefore the authoritative, expression of the opinion of the supreme court on this question, and are controlling in this court. If the case of *Insurance Co. v. Schaefer*, 94 U. S. 457, on this point, conflicts with the later cases in that court, then, to that extent, it must be regarded as having been

overruled. In the case of *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381, this court referred to the rule announced in *Insurance Co. v. Schaffer*, supra. The later decisions of that court were not called to our attention, and not considered, and, as stated in the opinion, the correctness of the ruling of the trial court was "not dependent upon the question whether the state statute is applicable or not."

The overruling of a motion to suppress the deposition of the defendant was also assigned for error. The deposition was taken under section 863 of the Revised Statutes of the United States, which authorizes a deposition to be taken "when the witness lives a greater distance from the place of trial than one hundred miles." The ground of the motion was that there was nothing in the deposition showing that the witness lived at a greater distance from the place of trial than 100 miles. The place of trial was Dubuque, Iowa, and the deposition was taken at Asheville, N. C. The court will take judicial notice that the distance between these places is more than 100 miles. For the purpose of taking a deposition under this statute, a witness "lives" where he can be found, and is sojourning, residing, or abiding for any lawful purpose. The witness in this case had gone to Asheville for his health. The duration of his stay there was uncertain. It was not probable that he would return to his former place of residence, or come within the jurisdiction of the court, in time to take his deposition, and therefore the taking of it at Asheville was an eminently prudent and proper act. The company attended and cross-examined, and this was a waiver of all irregularities in the notice of taking the deposition. *Railroad Co. v. Stoner*, 2 C. C. A. 437, 51 Fed. 649.

The decree of the circuit court dismissing the bill for want of equity is affirmed.

INDUSTRIAL & MINING GUARANTY CO. v. ELECTRICAL SUPPLY
CO. et al.

(Circuit Court of Appeals, Sixth Circuit. September 20, 1893.)
No. 98.

1. MECHANICS' LIENS—RAILROADS.

Under Rev. St. Ohio, § 3208, relating to liens against railroads, and Act April 10, 1884, declaratory of the meaning thereof, the right to a lien is restricted to claims for labor performed or materials furnished for the construction of the road, depot buildings, and water tanks, and cannot be extended to a claim for furnishing an electric lighting plant to hotel premises at the instance of a railroad company.

2. SAME.

The general lien law of Ohio (Rev. St. § 3184, as amended by act of April 15, 1889) gives no right to a lien upon a railroad for materials used in and for its construction.

8. SAME—ELECTRIC LIGHTING PLANT.

Materials furnished for the construction of an electric lighting apparatus, railway, and power house are not within the provision of the general lien law of Ohio, giving a right to a lien for machinery or materials furnished for "erecting, repairing or removing a house * * * or other structure."

4. CIRCUIT COURTS—JURISDICTION—COLLUSIVE SUIT — CONTINUING INJUNCTION.

A suit in a United States circuit court, against a railway company and others, to foreclose a mechanic's lien claimed under a state statute for materials alleged to have been used by the company in the construction of its railway and other works, was brought by procurement of one of the defendants, to enable him to file a cross bill against his codefendants, residents of the state, to obtain an injunction against them, and to evade the effect of proceedings in the state courts; and it appeared that, under the state statutes, complainant was entitled to a lien for part of its claim only, much less than \$2,000. *Held*, that the circuit court had no jurisdiction, and its order continuing the injunction granted on the cross bill must be reversed.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

In Equity. Bill by the Electrical Supply Company against the Put-in-Bay Waterworks, Light & Railway Company, James K. Tillotson, the Industrial & Mining Guaranty Company, John P. Carrothers, H. H. Warner, and others to foreclose a lien for materials furnished. Defendant Tillotson filed a cross bill against the complainant and the other defendants, and procured a temporary injunction. A motion by the Industrial & Mining Guaranty Company to dissolve the injunction was overruled, and an order entered continuing the injunction. The Industrial & Mining Guaranty Company appeals. Reversed.

Statement by SWAN, District Judge:

This appeal was taken under section 7 of the act of March 3, 1891, establishing circuit courts of appeals, and enacting "that where upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act, * * * an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals." The interlocutory order or decree complained of issued upon the cross bill hereinafter mentioned, and continued an injunction granted September 10, 1892, without notice, restraining the appellant, and H. H. Warner, and John P. Carrothers, during the pendency of the suit, from selling, negotiating, or otherwise disposing of any or all of the bonds of the Put-in-Bay Waterworks, Light & Railway Company, then in control of said defendants, and received by them under a certain agreement specified in the order.

The material facts presented by the record are as follows: The original bill in the cause was filed by the Electrical Supply Company, a Connecticut corporation, against the Put-in-Bay Waterworks, Light & Railway Company, an Ohio corporation, James K. Tillotson, a citizen of Ohio, John P. Carrothers, a citizen of New York, the Industrial & Mining Guaranty Company, a New York corporation, H. H. Warner, a citizen of New York, and others. The relief ostensibly sought was the enforcement of an alleged mechanic's lien for the sum of \$2,787.04, for supplies and materials furnished by complainant under a contract with the railway company, and used by the latter, as the bill alleges, in the construction of its lighting apparatus and railway upon the following described premises, viz.: "The power-house building, situated on lots 471, 472, 473, 474, and 475, in Victory Park addition of Put-in-Bay island, and on and along poles, ties, track, and other structures of the said defendant upon Put-in-Bay or South Bass island, Ottawa county, Ohio, all of which premises are the property of said defendant." To the bill is attached an itemized and verified statement of the supplies and materials for which the lien is asserted, a copy of which was filed with the recorder of Ottawa county, September 7, 1892. The bill avers

that the defendants named, other than the railway company, claimed to have some interest in the premises upon which the lien is asserted, and prays that they may be required to appear and set up such claim or interest as they may have. It further prayed an accounting with the principal defendant, that a lien be decreed on its property for the sum found due, and for a sale of the property. This bill was signed by L. G. Richardson in his own name, as solicitor for plaintiff. He also verified it on the 9th of September, 1892. On that day a subpoena was issued thereon, returnable on the first Monday in November, with a memorandum or rule indorsed, requiring defendants to enter their appearance in the cause on or before the first Monday of October. No service of the subpoena was had upon either appellant, or Warner, or the Railway Company Equipment Company. It was served September 10th upon all the other defendants. On the same day, Tillotson filed his answer and a cross bill against the codefendants, the appellant, H. H. Warner, and John P. Carrothers, setting forth that he had procured the incorporation of the principal defendant, the Put-in-Bay Waterworks, Light & Railway Company, to construct and operate waterworks, lighting apparatus, and an electric railway on South Bass island, with a capital stock of \$150,000, in shares of \$100 each, of which the corporation retained all but 150 shares taken by Tillotson, and 5 shares necessarily distributed among a sufficient number of persons to organize the corporation, and fill the offices required by the statutes of Ohio, and that he (Tillotson) and said corporation were in effect one person and identical. That, to procure the means to construct the waterworks, light works, and railway, he had the corporation issue 125 bonds of \$1,000 each, dated July 16, 1892, secured by a first mortgage on all the real and personal property of the corporation on South Bass island, which mortgage ran to the Atlantic Trust Company, trustee. That on July 1, 1891, he contracted with the corporation to convey to it the right of way and property necessary for the construction of its railway, and to construct thereon a single track electric railway and power house, and all other structures and machinery necessary for the completion of the waterworks, electric works, and railway to be built by said corporation, for which the company was to pay him the remaining 1,345 shares of its stock, and the 125 bonds of \$1,000 each, which were to be delivered as Tillotson might call for them if he should need them for the construction of a plant. The bonds were delivered to him, as agreed, but he failed to raise the money on them required for his contract. That he subsequently was induced by Carrothers to place the bonds with the appellant and Warner for negotiation under a contract dated June 25, 1892, whereby they were to negotiate the securities, to pay a certain claim of the Central Thomson-Houston Company, amounting to \$23,500, to advance to Tillotson \$15,000 in three sight drafts, and to pay him July 20, 1892, \$10,000, and the same amount every 15 days thereafter until the total sum paid, inclusive of the Central Thomson-Houston Company's claim and the advance of \$15,000, should amount to \$118,750. The contract also provided that the \$100,000 of capital stock of the Put-in-Bay Waterworks, Light & Railway Company "becomes and is the absolute property of the said party of the second part."

The charge is that Carrothers, Warner, and the Industrial & Mining Guaranty Company wholly failed to carry out said contract, and to negotiate or sell any of the bonds, or to account for the same in any manner, and have failed to pay any of the moneys except the drafts for \$15,000, and that they refused to account for or return the bonds and stock to Tillotson, who is the owner and entitled to the possession thereof; alleging that Carrothers and Warner will sell, negotiate, or make way with the bonds and stock and their proceeds, and that Carrothers is a man of no pecuniary responsibility, and that the road has not yet been completed by Tillotson, because of the default of the appellant and Warner and Carrothers, and that such default "is a continuing damage to him, (Tillotson,) and that their default is causing him irreparable injury, and will so continue to do unless said defendants are restrained by the order of this court." The answer and cross bill pray an order against the appellant and Warner and Carrothers, restraining them from negotiating any of the said bonds or

stock, and a perpetual injunction to the same end; also, the appointment of a receiver to take charge of the railway property of which Carrothers had taken possession, with authority to the receiver to care for and operate the same under the order of the court in the interest of all concerned; and that, if plaintiff is found to have a lien, and a sale therefor be ordered, the rights of Tillotson in said bonds and stock may be fully protected. The record shows that July 25, 1892, after the transfer of the stock in question to appellant, defendant Carrothers was, with Tillotson's consent, duly elected president of the railway company and a new board of directors chosen, and that Tillotson was on that date displaced as vice president and general manager of the company; that Tillotson, claiming that appellant and Warner and Carrothers had not fulfilled their agreement for the negotiation of the bonds of the company, refused to surrender possession of the road to Carrothers and the new directorate, or to permit them to operate it, and he held possession thereof until September 3d, when the railroad company obtained possession thereof, except the books, papers, and certain personal property secreted by Tillotson, by virtue of a writ of replevin. It also appears without contradiction that upon the same ground, after the railway company had thus obtained possession of its road, Tillotson secreted the motor cranks of its cars, the pins used thereon connecting the same with the electric current, stopped the pump which supplied the water necessary to furnish power, and otherwise sought to prevent the operation of the railway, and that the court of common pleas of Ottawa county, upon the complaint of the company, enjoined Tillotson and his associates from interfering with the company's enjoyment of the possession and control of its property and business. The appellant, it is admitted, paid the \$15,000 in drafts as stipulated in its contract, and has assumed and agreed to pay the \$23,500 to the Central Thomson-Houston Company, mentioned in said contract, and the claim of the Westinghouse Electric Manufacturing Company, amounting to \$20,016.66, which was a lien upon the property, making about \$59,000, in all, of payments made and obligations incurred by appellant, but it declined to make further payments under said contract until the road should be completed and the incumbrances thereon removed, and a perfect title to the property be made. Appellant claims that by reason of the defective title of the railway company to its right of way and property, and the incumbrances thereon, appellant would be liable to the holders and owners of the bonds and stock disposed of by it. Appellant further claims that Tillotson represented the property of the railway company as clear and unincumbered, whereas it was largely involved. Although Tillotson denies making these representations, the sworn answer of the appellant and the affidavits of Carrothers, Warner, Earl, and Footner positively affirm that he did, while Tillotson's denial is not corroborated. Appellant professes its readiness to fulfill its contract when the railroad is completed and the title to the property is perfect and unincumbered.

September 10, 1892, a temporary restraining order was issued on this answer and cross bill as prayed, and L. S. Baumgartner was appointed receiver of the property, with authority to take possession thereof forthwith. Baumgartner gave bonds on the same day as such receiver in the sum of \$5,000. On the same day a subpoena returnable on the first Monday of November was issued on this cross bill, on which was indorsed a memorandum requiring defendants to enter their appearance on the first Monday of October; otherwise, the cross bill would be taken pro confesso. This subpoena was served upon Carrothers on the day of its issue, but was returned not found as to Warner and the appellant. The injunction complained of was issued on this cross bill against appellant, Warner, and Carrothers. This was served on Carrothers on the same day, but as to the other defendants was returned September 16th, "Not found." On the 15th of October following, the receiver, stating that it would be necessary for him to store during the winter the four trailing cars and four motor cars of the railway company, and to care for its engines, dynamos, motors, and other apparatus and machinery, and to erect a building and employ labor for that purpose, and to pay freight on said cars, filed his petition praying authority for that purpose to borrow money and issue interest-bearing receiver's certificates

therefor in the sum of \$5,000, as the needs of the property might demand. On the same day the issue of these certificates was authorized, and they were made a first lien on the railway. They have been issued and negotiated. Meanwhile, and on September 26th, the railway company, Carrothers, and the appellant filed their answers to the cross bill, denying every material allegation therein on which the claim to relief was predicated, and on October 29th the appellant, upon its answer, and upon affidavits, moved for a dissolution of the injunction, and the railway company moved for the discharge of the receiver. Both motions were founded on the ground that no notice had been given to those defendants of the application for an injunction and for the appointment of a receiver, and upon the denial of the allegations of the cross bill. These motions were denied December 22, 1892, as was also a motion to modify the order appointing the receiver, and the order was made that day that appellant, Carrothers, and Warner deliver to the clerk of the court the 125 bonds and the \$100,000 of stock of the Put-in-Bay Waterworks, Light & Railway Company on or before January 5, 1893, to be by the clerk retained "for the care and preservation of the same, and for the purpose of preserving the interests of all parties therein, as may be determined upon the further hearing of this suit." On the same day, on the petition of the receiver, another issue of certificates amounting to \$5,000 was authorized and made a first lien upon the property of the railroad, "the proceeds to be used in the care and preservation of the property." No service of process was ever made on defendant H. H. Warner, nor has his appearance been entered in the case. From the order of the court, made December 22, 1892, refusing to dissolve the injunction of September 10th, and continuing the same in force, the Industrial & Mining Guaranty Company took and perfected this appeal.

In support of the motion for the dissolution of the injunction and the discharge of the receiver, among other affidavits filed was that of Franklin S. Terry, the manager and attorney in fact of the complainant, the Electrical Supply Company, who states that on or about September 6, 1892, the plaintiff corporation was approached by Mr. Richardson, who represented himself to be an attorney, and that he was "familiar with the affairs of the Put-in-Bay Waterworks, Light & Railway Company," and advised the plaintiff corporation to file a lien against the Put-in-Bay Waterworks, Light & Railway Company for the amount of its claim, \$2,787.04, and to authorize him to commence a suit against the Put-in-Bay Waterworks, Light & Railway Company in behalf of the Electrical Supply Company, and to bring suit in the federal court asking foreclosure of said lien and for an accounting; that the object of said suit was for the purpose of enabling the defendant J. K. Tillotson to file thereon his cross petition for the purpose of having a receiver appointed. Relative to the amount and nature of the claim for which the complainant's bill was filed, Terry's affidavit further states "that this plaintiff corporation was induced to include all sums due for material furnished for the use of the Hotel Victory Company in our account against said railroad; that the material actually used in the construction of the Put-in-Bay Waterworks, Light & Railway Company amounted to \$861.23; that the balance of said material, to the amount of \$1,925.81, was used inside said Hotel Victory; * * * that all of said material was ordered by said defendant J. K. Tillotson, as vice president of said corporation; that it was shipped to the said defendant corporation, and was charged on the books of the plaintiff corporation to the said Put-in-Bay Waterworks, Light & Railway Company. This affiant further says that the allegation in its said petition, wherein the said plaintiff corporation is made to allege that it furnished said material to said J. K. Tillotson, either as an individual or contractor, is untrue, and was known to be untrue by said Tillotson and said attorney, L. G. Richardson; that said Richardson prepared the lien said plaintiff's petition filed in this action, and advised the plaintiff's representative, as its attorney, that said lien and said allegation of said petition were proper ones for this plaintiff to verify, and in accordance with his advice said petition was verified by the representative of this plaintiff corporation." The statements of this affidavit are not controverted in any particular, nor is there of record here any attempt to explain or qualify them.

J. B. Foraker, for appellant.
 Doyle, Scott & Lewis, for J. K. Tillotson.
 L. G. Richardson, for complainant.

Before TAFT and LURTON, Circuit Judges, and SWAN, District Judge.

SWAN, District Judge, (after stating the facts.)¹ 1. The appellant insists that as the temporary injunction was granted by the district judge September 10, 1892, at the June term, under the provisions of section 719 of the Revised Statutes of the United States it could not "continue longer than to the circuit court next ensuing, unless so ordered by the circuit court;" that the next term was the December term, 1892, at which no order was made by the circuit court continuing the injunction, and therefore it became inoperative. This contention is founded on a misconception of the powers of the district judge, and fails to give proper effect to his action in refusing to dissolve the injunction at the December term. The circuit court may be held by the associate justice allotted to the circuit, by either circuit judge, by the district judge, or by any two of these. This is the express provision of the statute. Rev. St. U. S. § 609; *Insurance Co. v. Dunham*, 11 Wall. 22; *Gray v. Railroad Co.*, 100 U. S. 63; *Vulcanite Co. v. Folsom*, 3 Fed. Rep. 509; *Robinson v. Satterlee*, 3 Sawy. 134, 140. The district judge holding the circuit court has all the authority conferred by law upon either of the judges empowered to hold that court. His action, therefore, while holding the circuit court, in refusing to dissolve the injunction granted by himself at the previous term, was as effectual to continue it in force as if the court had been held by a full bench. *Parker v. The Judges*, 12 Wheat. 561. This objection to the injunction therefore fails.

2. A more serious objection, however, is that the injunction was granted without notice, in violation of general equity rule 55, which declares that "special injunctions shall be grantable upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte if the adverse party does not appear at the time and place ordered." This rule was evidently founded on section 5 of the judiciary act of 1793, (1 Stat. p. 334,) forbidding the granting of a writ of injunction "in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." It is held in *Yuengling v. Johnson*, 1 Hughes, 607, 610, that the omission of this clause from the Revised Statutes operated to repeal it by the provision of Rev. St. § 5596, and that it was also impliedly repealed by section 7 of the act of June 1, 1872, (17 Stat. 197.) Section 7, above referred to,

¹Note by the Clerk. The circuit judges, regarding the question of the jurisdiction of the circuit court as the only point presented by the record necessary to be determined, limit their concurrence in this opinion to what is said on that point.

stands as section 718 of the Revised Statutes, and reads as follows:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security in the discretion of a court or judge."

While this provision obviously enlarges the power of the court, it certainly preserves the principle of the repealed act of 1793, and of general equity rule 55. The issue of a restraining order, which may be granted *ex parte*, is by the express language of this section made dependent upon the existence of two conditions,—the giving of notice of a motion for an injunction, and an apparent danger of irreparable injury from delay. The first of these conditions is not met by the fact that the cross bill prays an injunction as ancillary to the relief sought, but notice of a motion for that remedy must have been given or be served simultaneously with the notice of motion for an injunction. No such motion was made, or notice given, in this case. Whether the cross bill makes a case of "irreparable injury from delay," within the statute, may well be doubted, for, upon the facts stated in the cross bill, Tillotson has a legal right of action for any breach of the agreement made with appellant, and his cross bill shows no impediment to the recovery of damages at law, nor any reason why such damages will not afford him full redress. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249. The fair and necessary implication from the language of section 718, considered in connection with the practice which obtains in the federal courts, and that of the high court of chancery of England, on which it is founded, is that, as before the statute, so now, the extraordinary remedy of injunction—including restraining orders—requires for its exercise a clear case of threatened injury reasonably to be apprehended, and which can only be thus averted, and for the redress of which the recovery of damages would not give adequate compensation. The only purpose of such an order is to preserve the status of litigants for such time as may be necessary, according to the practice of the court, to bring the matter in issue to a hearing upon motion in the regular way, in order that both sides may be heard. When such a hearing has been had, the court may grant or refuse the injunction. The fact that the statute makes the two conditions mentioned indispensable to the granting of a restraining order for a limited time shows indisputably that it was never intended to clothe the courts with power to enjoin a defendant indefinitely or embarrass his business *ex parte*, and without notice, except where notice of the application would itself be productive of the mischief apprehended by inducing the defendant to accelerate the completion of the act sought to be enjoined before process could be served. No such case appears in the cross bill, and both the restraining order and the injunction of September 10th were therefore improvidently granted. *Fost. Fed. Pr.* § 231. The refusal to dissolve the injunction was also erroneous. Upon the

case made by the cross bill, the stock of the railway company, by the express terms of the contract, became the absolute property of appellant. The equities of the cross bill are denied by the answers of the Put-in-Bay Waterworks, Light & Railway Company, John P. Carrothers, and the appellant, and by the affidavits of Earl, Footner, Baruch, and Warner. Opposed to these are the affidavits of Tillotson and L. G. Richardson, the latter the solicitor of record for complainant, who also had acted as Tillotson's counsel up to the time of the filing of the bill. The affidavit of Mr. Lewis, also one of Tillotson's counsel, fails to confirm Tillotson's denial of the representations as to the title of the property. Without detailing the matters alleged in these affidavits, it is sufficient to say that, conceding to each affiant equal credibility and means of knowledge, the weight of evidence is clearly in favor of the appellant. The burden of proof was upon Tillotson to sustain the allegations of irreparable injury upon which the restraining order and injunction were granted. This he failed to do, and the injunction should have been dissolved, even if there had been only an equipoise of testimony.

3. The important question in the case is whether the amount involved is within the jurisdiction of the court, and whether, for reasons hereinafter stated, the court ought not to have dismissed the cross bill *sua sponte*. The affidavit of Terry positively avers that the material actually used in the construction of the Put-in-Bay Waterworks, Light & Railway Company amounted to but \$861.23, and that the balance of the material, amounting to \$1,925.81, was used inside the Hotel Victory. The act of March 3, 1887, confers upon circuit courts of the United States original cognizance of all suits of a civil nature at common law, or in equity, in which there shall be a controversy between the citizens of different states; where the matter in dispute exceeds, exclusively of interest and costs, the sum or value of \$2,000. The statement in Terry's affidavit, just referred to is not denied, and there is nothing on the record to discredit its admission that the material for which the lien is asserted amounted in value to but \$861.23. Its effect, therefore, is clearly to deprive this court of jurisdiction of complainant's claim. *Williams v. Nottawa*, 104 U. S. 209; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. Rep. 252. It is urged in reply to this, however, that the Put-in-Bay Waterworks, Light & Railway Company is organized not only to build a railroad, but an electric plant and a waterworks plant, and that the property of the company subject to a lien is described in the railroad lien law of Ohio, (Rev. St. § 3208,) and the general mechanic's lien law of that state, (Rev. St. Ohio, amended section 3184;) that the plant of the company consists, not only of all of its railroad, but all the appliances in the hotel for the purpose of lighting the hotel and grounds, and this consisted, not only of a railroad, but of an electric light plant, which it put in the hotel, grounds, and buildings, under contract with the hotel, for the purpose of lighting.

By section 3208 of the Revised Statutes of Ohio it is provided that "a person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water tanks, or any

part thereof, to a contractor or subcontractor * * * shall have a lien for the payment of the same upon such railroad. * * *” In order to perfect such lien, the person furnishing the materials shall, within 40 days after he ceased furnishing the same, file with the recorder of the county where the materials were furnished an affidavit containing an itemized statement of the kind and amount of materials furnished, the time when the contractor or subcontractor for whom, and the section and place where on the line of the road, the materials were furnished, and the amounts due therefor, after crediting all payments and set-offs. Claimant must also, within 10 days after filing such affidavit, serve a notice on the secretary or other officer or representative of the railway company, by delivering or leaving a copy thereof at his usual place of residence or of doing business, or, if that cannot be served in the county, the recorder may serve the same by mail. This notice must state the fact of filing the affidavit, the county wherein filed, the amount claimed, and whether for labor, materials, or board furnished, and the contractor or subcontractor for whom rendered. Its further provision is that “any person failing to file his affidavit aforesaid, and serving the notice aforesaid within the time prescribed, shall be deemed and held to have waived all claims under this section against the railroad company.” This statute gives a lien upon the railroad only for materials furnished a contractor or subcontractor, or in the constructing of such “railroad, depot buildings, and water tanks, or any part thereof.” For whatever other structures materials may be furnished, no lien is given under this act. The act of April 10, 1884, (volume 81, Laws Ohio, 126,) declaratory of the meaning of section 3208, above cited, enlarges the list of those entitled to a lien by enacting “that the true intent and meaning” of those sections is that “any person or persons who perform labor or furnish material or boarding under contract, express or implied, with such railroad company, or any of its authorized agents, for the construction of such railroad, or any part thereof, is entitled to a lien for the payment of the same upon such railroad, as provided in section 3208 of the above-recited act.” The only effect and purpose of this latter act was to give a lien under section 3208 as well as to persons furnishing materials directly to or performing labor under contract with a railroad company, as to those who dealt with contractors or subcontractors, who were protected by section 3208. Neither act, however, purports to give a lien upon a railroad for anything not used in its construction as a railroad, or that of its depot buildings or water tanks. Whatever materials complainant furnished to, or were used by, the railroad company in providing the Hotel Victory with an electric lighting plant, are clearly neither within the intent nor the language of section 3208, which confines the lien to material furnished for the construction of the railroad, depot buildings, and water tanks. If section 3208, as amended in 1883, (volume 80, Laws Ohio, p. 99,) was still in force when the affidavit was filed, September 7, 1892, (Exhibit D of the original bill,) and the last of the materials were furnished within 40 days before that date, of which there is no evidence in the record, as Terry’s affidavit fails to designate the nature of the ma-

materials furnished to the railroad company and the dates when the same were furnished, as distinguished from those used inside the Hotel Victory, it may be that the affidavit of lien (Exhibit D) was seasonably filed. But there is nothing to show when complainant ceased to furnish material for the construction of the road, or that notice of this affidavit was given, as required by the statute.

Coming, now, to the contention that the validity of the lien may be rested upon section 3184 of the Revised Statutes of Ohio, we find that that section, though amended by the act of April 15, 1889, (volume 86, Ohio Laws, 373,) has not been changed in any particular material to the inquiry here. As it stood prior to this amendment in Williams' Revised Statutes of Ohio, (pages 643, 644,) it was construed by the supreme court of that state in Rutherford v. Railroad Co., 35 Ohio St. 559, and held not to confer a lien upon a railroad. This is also the construction given by the supreme court of the United States to the mechanic's lien law of North Carolina, the language of which is even broader than that of the Ohio statute. *Buncombe County Com'rs v. Tommey*, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186. With reference to the argument that it confers a lien upon the electric lighting plant, it is only necessary to quote its language so far as material to repel that contention. It enacts that "a person who performs labor, or furnishes machinery or material, * * * for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure * * * by virtue of a contract with the owner, or his authorized agent, shall have a lien to secure the payment of the same, upon * * * such house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure, * * * and upon the material and machinery so furnished, and upon the interest of the owner in the lot or land on which the same may stand, or to which it may be removed." It would be an exceedingly strained construction of this language to hold that the material for which the lien is claimed was furnished for "erecting, altering, repairing, or removing" a house or other structure mentioned in the statute, and that, too, in the face of the averment of the bill that the materials "were used in the construction of the lighting apparatus and railway of the defendant," and in a power house already erected.

The lien here prayed is upon the railroad as an entirety, and that is the theory of the bill. The premises and property against which it is asserted is the railroad, its motive and lighting apparatus and appliances, poles, ties, track, and other structure, including that part thereof located in the power house, the cost of which is not stated. The language of the section, and the considerations stated in *Rutherford v. Railroad Co.*, cited *supra*, forbid the application of this statute. It results, therefore, from the concession of the complainant limiting its claim to the sum of \$861.04, that the circuit court had no jurisdiction of the subject-matter, and should have dismissed the bill.

This conclusion equally disposes of Tillotson's "cross bill," so called. If it be a cross bill, it is a mere auxiliary and a dependency.

of the original, and the dissolution of the original bill necessitates the same disposition of its incident. *Cross v. De Valle*, 1 Wall. 1, 14; *Dows v. City of Chicago*, 11 Wall. 108, 112. But it would be a misnomer to call this bill a cross bill. Beyond the fact that it names the complainant as a party, it has but a nominal relation to the subject-matter of the original bill. It tenders no defense to its averments, and makes no issue with complainant respecting the matters charged therein, but seeks to introduce a new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the bill. In *Ayres v. Carver*, 17 How. 591, the original bill of complaint sought to enforce an alleged title to several tracts of land claimed by different defendants. Two of the defendants, after answering, filed a cross bill against complainant and the other defendants, setting forth the substance of the original bill, and then charging that they had obtained a title to the several tracts in controversy, or portions of them, long prior to the title claimed by their codefendants, prayed that their cross bill might be heard at the same time with the original bill, and that any claim that complainant might set up to the several tracts of land claimed by them in the cross bill might be set aside and annulled. Of this pleading the court says:

"As it respects the cross bill, it may be proper to observe that the matters sought to be brought into the controversy between the complainants in that and the codefendants do not seem to have any connection with the matters in controversy with the complainant in the original bill. Nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross bill set up a title to the lands in dispute which they insist is paramount to that of their codefendants, and seek to obtain a decree to that effect, and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainant in the original bill should not be embarrassed or the record incumbered. * * * It [the cross bill] should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject matter of an original and independent suit."

In the light of this authority, the so-called "cross bill" in this cause is an original bill brought by Tillotson, a citizen of Ohio, against Carrothers and the railway company, also citizens of Ohio, and appellant and Warner, citizens of New York. Of this suit the federal court has no jurisdiction, because of the citizenship of the parties. Its plain purpose was to enable Tillotson to litigate in that court his differences with some of his codefendants, which no more affected the litigation of the principal suit than would any other controversy between them as to lands, stocks, or other property. It was therefore an original, and not a cross, cause. *Rubber Co. v. Goodyear*, 9 Wall. 809, 810. That this was its object is evidenced not only by the undisputed affidavit of Terry that Richardson procured complainant to file its bill in the federal court, and informed him that the object of the original suit was for the purpose of enabling Tillotson to file thereon a cross petition for the purpose of having a receiver appointed, but also by the promptitude with which Tillotson filed his so-called "cross bill,"—the next day after the filing of the original bill. Richardson makes two affidavits appearing in the record. In neither does he contradict any statement

contained in the affidavit of Terry, nor does Tillotson. Tillotson must therefore be regarded as confessing the truth of its statements, particularly that which charges that the material used in the construction of the railway amounted in value to but \$861.23. If Tillotson and his attorney knew that fact, (and the former must have known it, as he ordered and used the material,) the original suit which they induced complainant to bring for their own ends was flagrantly collusive,—a mere sham and pretense to create “a fictitious ground of federal jurisdiction;” and under the act of March 3, 1875, it was the duty of the court to have dismissed it as not really and substantially involving a dispute or controversy properly within its jurisdiction, and because the parties were improperly and collusively made and joined for the purpose of creating a case cognizable under the act. *Hawes v. Oakland*, 104 U. S. 450; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. Rep. 807; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. Rep. 32; *Robinson v. Anderson*, 121 U. S. 522, 7 Sup. Ct. Rep. 1011. As has been said in *Bernards Tp. v. Stebbins*, 109 U. S. 353, 3 Sup. Ct. Rep. 252:

“In the matter of the jurisdiction of the federal courts, the discrimination between suits between citizens of the same state and suits between citizens of different states, is established by the constitution and laws of the United States; and it has been the constant effort of congress and of this court to prevent this discrimination from being evaded by bringing into the federal court controversies between citizens of the same state.”

That the complainant was culpable in lending the use of his name to promote Tillotson's fraud upon the jurisdiction of the court, with knowledge of his purpose, and was responsible for the negligence (to use no stronger term) of its assistant manager in making oath to the amount of materials used in the construction of the railroad, is undeniable. But this may, perhaps, be palliated in some degree by the fact that it was done under the advice of its attorney, who, it was known, however, was acting in Tillotson's interest. The agreement, nevertheless, was “to obtain an object forbidden by law,” and therefore fills the definition of “collusion,” which, as is said in *Jessop v. Jessop*, 2 Swab. & T. 301, “may be, among other things, by keeping back evidence of what would be a good answer, or by agreeing to set up a false case.” The real and responsible offenders against the act of congress are Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of the suit in equity in the state courts, in the latter of which, as the record shows, Tillotson was still under injunction from interfering with the operation of the railroad, to the control of which he asserted substantially the same rights as those pleaded in his cross bill here. That litigation appears to be still pending, and constitutes an insuperable obstacle to the jurisdiction of the circuit court of the United States to appoint a receiver of the railroad, or otherwise interfere with the possession required by the action of replevin, or with the effect of the injunction, or in any manner to nullify its action in the equitable suit. Every issue presented by the cross bill as to the respective rights of Tillotson, appellant, Carrothers,

and Warner, was open to contest, in either the action of replevin or the suit in equity in the state court, if not in both. *Taylor v. Carryl*, 20 How. 594; *Buck v. Colbath*, 3 Wall. 341; *Society v. Hinman*, 13 Fed. Rep. 161. For these reasons it is obvious that the circuit court had no jurisdiction of this suit or its dependency, the cross bill, and its orders awarding the injunction, and its refusal to dissolve the same, were erroneous, and must be vacated and set aside, and the original and cross bills should be dismissed without prejudice, and with costs of the circuit court and of this court to appellant, against Tillotson on the cross bill, and against complainant on the original bill.

While it is the general rule that, where a cause is dismissed for want of jurisdiction, costs are not awarded to the prevailing party, nevertheless, by section 5 of the act of March 3, 1875, (18 Stat. 472,) the circuit court is required, in cases coming within that section improperly brought in or removed to that court, "to make such order as to costs as shall be just." This was manifestly designed to avoid the application of the general rule above referred to. *Railroad Co. v. Swan*, 111 U. S. 387, 388, 4 Sup. Ct. Rep. 510. As this court has jurisdiction of the order appealed from, appellant is also entitled to costs of this court under the authority last cited.

With reference to the receiver's certificates, issued under the order of the circuit court, so far as the same have been negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of liens thereon and indebtedness owing by the Put-in-Bay Company for labor which had accrued before this suit, all just and reasonable expenditures should be allowed to the receiver, as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purposes for which, the persons to whom, and the dates when the same were made, and referring it to a master to examine and report upon said accounting; the appellant and the Put-in-Bay Waterworks, Light & Railway Company, Warner, and Carrothers to be notified by the master of the times and places of examination, and to be permitted to appear and submit testimony, and cross-examine the witnesses produced by the receiver. The compensation of the receiver should be borne by Tillotson, at whose instance he was appointed, and would seem to be recoverable from the obligors of the injunction bond.

The decree of the circuit court continuing the injunction is therefore reversed, and a decree will be entered in accordance with this opinion, dismissing the original and cross bills for want of jurisdiction, with costs, as herein directed.

TAFT, Circuit Judge, (concurring.) The order appealed from should be reversed, and the injunction dissolved. But \$861.23 of the claim for \$2,787.04 set up in the complainant's bill was for articles furnished and work done in the construction of the electric railway of the defendant railway company. The remainder of the claim was for material furnished and work done in and upon

the Hotel Victory, which did not belong to the railway company. These facts are not now denied. It follows that, under the statutes of Ohio, cited by Judge SWAN, complainant was entitled to a lien upon the railway only for \$861.23. The averment that more than \$2,000 in work and material was furnished in the construction of the railway was falsely made, and for the collusive purpose of invoking the equitable jurisdiction of the federal court. The whole object of the bill was to enable Tillotson, a defendant, a citizen of Ohio, to file a cross bill against codefendants named in the bill, citizens of Ohio and other states, and thus obtain in the federal court an adjudication of a controversy ordinarily cognizable only in the state courts. It was clearly a case where the jurisdiction of the federal court had been collusively sought. This appeared at the hearing upon the motion to continue the injunction, and should have led the circuit court to dissolve the injunction. It is said that the jurisdictional question involved ought to have been regularly raised upon the record, by plea or otherwise. We are not concerned with that question of procedure here. The issue before the circuit court was whether an order enjoining the defendants from selling certain bonds should be continued pending the trial of issues raised upon bill and answer and cross bill and answer. The circuit court was made to know that its equitable jurisdiction had been collusively and improperly invoked. It then became its duty not to continue the injunction. This is the sole ground upon which I vote for a reversal of the order appealed from. I do not see how the question of the preliminaries necessary to the issue *ex parte* of an injunction has any place in this discussion. The order appealed from was one continuing an injunction. The appellant and Carrothers, the only two defendants against whom the injunction had any operation, had full notice of the hearing upon the motion to continue the injunction, and were present by attorneys. It is immaterial whether the original order of injunction was issued without proper notice or not, if, upon the merits, the injunction was a proper, equitable remedy to preserve the status quo. To hold otherwise would be to make substantial justice yield to a shadowy technicality. Nor can I agree that, the question of collusion aside, the cross bill of Tillotson was not germane to the action as brought in the bill. The bill prayed for a foreclosure of the lien, a sale of the railway, and, as incident and necessary to such reliefs, a marshaling of all other liens upon the property, and a distribution of the proceeds among the lienholders and others interested. It was proper for each defendant to set up his right in the property or its proceeds. Tillotson claimed a mortgage lien on the property to secure certain bonds, his title to which had been disputed by another codefendant. The complainant was entitled to have both claimants brought in, so that the property might be sold free from the lien of the claim in dispute between them. Being in court, their rights to the proceeds of the sale to be decreed under the prayer of the complainant must necessarily be determined before a distribution could be made, and this would, of course, involve the settlement of the entire dispute as to title between them. I am

not prepared to say that Tillotson's cross bill did not, on its face, state a good case for equitable relief. It is not necessary now to decide the question. We have only jurisdiction on this appeal to reverse the order of injunction. We have no power to direct a dismissal of the bill, or the vacation of an order appointing a receiver. Those are matters which, by the terms of section 7 of the court of appeals act, remain within the cognizance of the circuit court until a final decree is entered and appealed from. While I fully concur in the view that the circuit court, before dismissing the bill for want of jurisdiction, may require payment of the reasonable expenses incurred in the case, and preservation of the property taken within its custody, I do not think we can make any order on this appeal touching the matter. Our only action should be to reverse the order continuing the injunction, at the costs of the appellee.

LURTON, Circuit Judge, (concurring.) I do not think it necessary to decide more than that the jurisdiction had been obtained by collusion, and the injunction should have been dissolved. The appeal gives this court jurisdiction to determine no other question. The cause should be remanded for further proceedings.

YARDLEY v. PHILLER et al.

(Circuit Court, E. D. Pennsylvania. November 23, 1893.)

No. 44.

1. NATIONAL BANKS—INSOLVENCY—PREFERENCES—CLEARING HOUSE BALANCES.

By a special agreement, a national bank, instead of making the usual deposit of securities as collateral for the payment of its daily balances to the clearing house, each day left with the clearing house manager all the checks drawn upon it, received from other banks, to be held until its balance for the day was paid, and then surrendered. The bank was closed for insolvency while a package of checks was so held, and thereupon the clearing house collected the whole amount thereof from the other banks, and, after applying the necessary sum to the liquidation of the bank's balance for that day, used the surplus in paying indebtedness of the bank to other banks, and in canceling certain clearing house certificates. *Held*, that this disposition of the surplus was not warranted by the agreement, and therefore operated to give a preference, contrary to the provisions of the national banking law.

2. SAME.

The clearing house association, having made an unauthorized disposition of the surplus, was directly liable therefor to the receiver of the bank, and he was not required to sue the banks to whom the money was distributed.

3. EQUITY—PARTIES—CLEARING HOUSE ASSOCIATION—HOW SUED.

A clearing house association is properly sued in the names of the committee who have entire control of its business, funds, and securities.

In Equity. Bill by Robert M. Yardley, receiver, against George Philler and others. Decree for plaintiff.

Read and Pettit, for plaintiff.

Angelo T. Freedley and John G. Johnson, for defendants.

DALLAS, Circuit Judge. The bill in this suit was filed by the receiver of the Keystone National Bank against seven persons, who are designated as "being the clearing house committee of the Clearing House Association of the Banks of Philadelphia." It prays that said Clearing House Association be decreed to deliver to the plaintiff certain railway company bonds, and also certain checks, or, as to the latter, to pay to him the amount collected thereon. The claim with respect to the bonds is not insisted upon, and therefore the case, as actually presented, relates only to the checks and the transactions connected with them. The defendants filed a joint answer. The evidence has been taken, and the cause, having been fully argued, is now for decision upon the pleadings and proofs.

Upon the morning of March 20, 1891, at the time appointed by the constitution of the Clearing House Association, a clerk of the Keystone Bank, duly acting on its behalf, took to the clearing house checks which had been deposited with that bank, and for which it had credited the respective depositors. These checks had been drawn on other banks, members of the association, and amounted in the aggregate to the sum of \$70,005.46. They were not put up in a single package, nor were they delivered to the Clearing House Association, or to any representatives of that body. They were inclosed in several sealed envelopes, each of which contained only the checks drawn on one particular bank, and to the agent of each bank, there present for the purpose of receiving such packages, the envelope containing the checks drawn on that bank was delivered. At the same time and place, and in the same way, certain banks, members of the association, severally delivered to the Keystone Bank checks drawn upon it, and which had been deposited with said other banks, respectively, to the aggregate amount of \$117,035.21. In no case was satisfaction then made for the checks thus delivered either by or to the Keystone Bank. This was to be accomplished through the system of exchanges provided for by the Clearing House Association, which was created for the express purpose of effecting "at one place the daily exchanges between the several associated banks, * * * and the payment, at the same place, of the balances resulting from such exchanges," but at a later hour. The Keystone Bank, upon the day in question, having, as has been stated, delivered checks to the amount of \$70,005.46, and having received checks to the amount of \$117,035.21, there resulted a balance of \$47,029.75 against the Keystone Bank arising from the exchanges of that day. If the only function of the Clearing House Association had been to provide a time and place for making these exchanges, its connection with the business would have ceased at this point, and the situation of the Keystone Bank would have been simply that of debtor to each of the banks from which it had received checks to an amount greater than the amount of those which it had delivered to the same bank, and the amount of its indebtedness in each instance would have been the difference between the sum of the checks delivered by it and of the checks which it received. But the connection of the Clearing

House Association with the matter did not end here. Under the constitution of that association, the debtor banks were required to pay the whole amount of the balance against them, respectively, not to the several creditor banks, but to the manager of the clearing house, an agent of the association, and he, not the debtor banks, was to pay to the creditor banks the respective balances due them. Provision is also made (Const. art. 17) for securing these daily settlements by the requirement that "each bank, member of the Clearing House Association, shall deposit securities with the clearing house committee, as collateral for their daily settlements." In the case of the Keystone Bank, however, this last provision had been made inoperative by a special agreement, which permitted and required it, in lieu of the deposit of securities as collateral for its daily settlements, to leave the check packages which it received upon any day with the manager of the clearing house, to be held by him until the balance appearing against that bank upon the settlement of the same day should be paid. This agreement had been made several months prior to the 20th of March, 1891. It had been previously continuously acted upon, and the course prescribed by it was pursued on that day. The packages received by the clerk of the Keystone Bank were placed in the possession of the manager of the clearing house, to be retained by him until the balance of \$47,029.75 against the Keystone Bank should be paid to him, and were then to be returned to that bank. Thus far, it must be conceded, everything was done in conformity with the terms of the fundamental instrument of the Clearing House Association, by which the Keystone Bank, as a member thereof, was bound, except as that instrument had been superseded by a subsequent separate agreement, to which the Keystone Bank was a party, and as to the particular matter to which that separate agreement related it was precisely complied with. All this had been done, too, in good faith, without knowledge of the impending insolvency of the Keystone Bank. Soon after its packages had been left with the manager of the clearing house, however, that bank was placed in the custody of an examiner, and of this the manager of the clearing house was immediately informed. He at once consulted the clearing house committee, and was instructed by it to call upon the banks which had delivered to the Keystone Bank the checks which the latter had left in his possession, to make them good. He acted upon this instruction, and, upon receiving the full amount thereof, he handed over the checks to the banks from which the Keystone Bank had received them. Thus he disposed of all the checks which had been put in his possession by the Keystone Bank, and received the sum of \$117,035.21 as the proceeds of such disposition of them. He received their full value, and therefore no question is made upon that score. He had held them, unquestionably, as security for the payment, through the clearing house, of the balance due by the Keystone Bank as per the settlement of exchanges made on that day, and therefore to the liquidation of that balance from the fund which they produced the complainant has made no objection. But, after this had been done,

there still remained in the possession of the Clearing House Association a surplus of \$70,005.46, and, upon an account of this last-mentioned sum being demanded, it is stated (the details appear in the evidence) that it was all applied to the payment of certain other indebtedness of the Keystone Bank to other banks, and in cancellation of a certain separate and distinct indebtedness to the Clearing House Association "on loan certificates previously issued to the said Keystone Bank." Now, if the Keystone Bank itself would not, because of its insolvency, have been permitted to make this use of this surplus, then certainly the Clearing House Association, with knowledge of the insolvency, could not lawfully so apply it. "Undoubtedly, any disposition by a national bank, being insolvent, or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden," (Scott v. Armstrong, 13 Sup. Ct. 148;) and nothing could be more plain than that the effect, and indeed the evident intent, of the disposition which was made of this sum of \$70,005.46 was to prefer those among whom it was distributed. It is true that the assets of a bank existing at the time of its insolvency do not include all its property, without regard to any existing liens thereon or set-offs thereto, and that liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, and not created in contemplation of insolvency, are not invalidated, (Scott v. Armstrong, supra;) but no such rights, set-offs, or liens, as to any part of the surplus of \$70,005.46, have been shown to affect this case. Article 17 of the constitution of the Clearing House Association, which requires that "each bank * * * shall deposit securities, * * * as collateral for their daily settlements," does also provide that "the committee shall apply the deposit of any defaulting bank to the payment of the balance due by such bank at the clearing house, * * * and the surplus, if any, shall be held as collateral security for other indebtedness to members of this association." But the deposit of these checks with the manager of the clearing house was not made under that article. It was made under the special agreement which obliged the Keystone Bank to leave with the manager the checks it received from the other banks, but entitled it to receive them again immediately upon payment of its balance, as shown by the settlement of that day, without performance of any other condition. They had not been subjected to, or pledged for, any other claim whatever. It is impossible to doubt, upon the evidence, that if the Keystone Bank had not failed, and had, within the prescribed time, paid its daily balance, these checks would have been thereupon delivered to it without hesitation, or question of its right to receive them, or pretense of title to hold them for any further or additional object. The manager of the association testified as follows:

"They were left until the balance should be paid,—until the balance arising from that exchange should be paid. That agreement was applicable [only] to the Keystone Bank, and, for the debt in the morning, the check packages

were to be held until the balances were paid in the clearing house. They were left in a satchel, in the custody of myself, until the amount of the balance, \$47,029.75, should be paid. Question. Was that done in pursuance of an agreement made by the Keystone Bank? Answer. It was. Q. I understand that these packages of checks, alleged and supposed to amount to \$117,035.21, were left with you, to be handed over on payment of \$47,029.75? A. That is correct. Q. Had it [the special agreement] been acted upon every day during these two months that the Keystone Bank was a debtor bank? A. It had."

Here we have positive proof of what the agreement was, that it had been uniformly acted upon, and that it would have been followed upon the 20th of March, 1891, but for the fact that the bank was closed upon that day. The following conclusions inevitably result: The disposition which was made of the surplus of \$70,005.46 was not warranted by the agreement or by the practice and course of dealing of the parties. The checks from which that surplus was realized were deposited for a single special purpose, and, therefore, for no other object was there, or could there be, any right, set-off, equity, or lien attached to them; and the application of any part of their proceeds to the payment of any indebtedness of the Keystone Bank, other than the balance of \$47,029.75, was violative of law, in that it was a disposition of assets of an insolvent bank, so as to work a preference, and with the manifest intention of producing that result.

The objection which has been urged, that the bill does not name the proper persons as parties defendant, may be briefly disposed of. It is alleged in the bill and admitted by the answer that the defendants named "form and constitute the clearing house committee of the Clearing House Association of the Banks of Philadelphia, and sue and are sued as such, and, under the articles of association adopted by and governing said association, are given and intrusted with the entire charge, care, management, and control of the clearing house affairs and transactions, and the custody and control of the funds and securities belonging to or deposited with it." This is, in itself, sufficient to support a suit against them as representative of the whole body, and therefore it is not necessary to consider whether the present bill might not be sustained under the familiar general rule of equity pleading that "where there are many persons defendants, belonging to a voluntary association, against whom the suit is brought, * * * it is sufficient that such a number of the proprietors are brought before the court as may fairly represent the interests of all, where those interests are of a common character and responsibility." Story, Eq. Pl. § 116 et seq. The further contention that "this suit should be against the parties who received the \$70,005.46,—that is to say, against those to whom the Clearing House Association paid the money,—is, in my opinion, palpably unsound. That association was placed in possession of property of the Keystone Bank. They disposed of it. They received the proceeds, and they applied them. To the extent that this application was unlawful, they must answer for it. The receiver of the Keystone Bank demands that the Clearing House Association shall turn over assets of that

bank to him. They reply that they have disposed of them, and have used the money thereby obtained; and, having failed to show that they lawfully used it, he is clearly entitled to hold them responsible. He cannot be required to look to those to whom the Clearing House Association has, in violation of the statute, transferred assets of the insolvent bank.

A decree for the plaintiff, in accordance with this opinion, may be prepared and submitted.

CITY OF MADISON v. DALEY.

(Circuit Court, D. Indiana. November 29, 1893.)

No. 8,913.

1. EMINENT DOMAIN—CONDEMNATION—STATUTORY REQUISITES.

The provision of Rev. St. Ind. § 3167, that city councils, before referring any matter of condemnation to the city commissioners, shall first refer it to an appropriate committee, to examine and report thereon, is mandatory, and failure to comply therewith is fatal.

2. SAME—IMPLIED POWER—MUNICIPAL CORPORATIONS.

Statutory power in a city to construct wharves, docks, piers, etc., (Rev. St. Ind. § 3106,) does not imply power to condemn for public use an existing private wharf.

3. SAME—REQUISITES.

The filing of a map and profile of the work to be done as a preliminary to the condemnation of lands for the construction of harbors, etc., is made jurisdictional by Rev. St. Ind. § 3134, and failure therein renders the proceedings void.

At Law. These were proceedings by the city of Madison to condemn and appropriate the defendant's wharf property on the Ohio river in the city of Madison for the use of said city as a public wharf. Appealed from the city council, which sustained the condemnation proceedings, to the circuit court of Jefferson county, Ind. Removed into this court by the defendant on the ground of diverse citizenship. The cause came on to be heard on objections filed by the defendant pursuant to the practice provided for in the act under which the proceedings were carried on. Objections sustained, and judgment for the defendant.

Perry E. Bear and Sulzer & Bear, for plaintiff.

C. A. Korbly and W. O. Ford, for defendant,

Cited the following authorities: Allen v. Jones, 47 Ind. 438; Waterworks v. Burkhart, 41 Ind. 364; Dyckman v. City of New York, 5 N. Y. 434; Payne v. Railroad Co., 46 Fed. 559; City of Anderson v. Bain, 120 Ind. 254, 22 N. E. 323; Cooley, Const. Lim. (5th Ed.) p. 653; 2 Dill. Mun. Corp. (4th Ed.) §§ 603-605.

BAKER, District Judge, (orally.) The common council of the city of Madison, on the 4th day of January, 1893, adopted a motion "that the committee on wharves instruct the city commissioners to condemn the property known as the 'Daley Wharf Property,' to be used for city wharf purposes." Without further action by the common council, the city commissioners were convened, made an exam-

ination of the premises, and decided in favor of condemning the wharf property for the purposes stated, and they awarded \$1,500 compensation to the owners of the wharf. On the 20th day of April, 1893, the city commissioners made their written report of their action to the common council of the city of Madison in proper form. At this session of the common council the following action was taken:

"Mr. Johnson moved that the action of the commissioners be concurred in and spread on record, and the city clerk be instructed to draw an order on the treasurer for the amount as set by the city commissioners, when ordered by them and the city attorney to do so. The yeas and nays were called, and the motion carried by the following vote: Yea: Tuttle, Bishop, Williams, Johnson, Torrance, Page, and Klein,—seven. Nay: Bartram,—one."

On the 4th day of May, 1893, at another meeting of the council, the following further proceedings in reference to this matter were had:

"The following resolution offered by Sol J. Bear was read, and on motion of Mr. Thomas adopted: 'Resolved, that the common council, now in session, accept the report of the city commissioners wherein they met on the 12th and 13th of April, 1893, to hear testimony touching the value of the property to be appropriated known as the "Daley Wharf," and belonging to Daley and unknown owners, and assessed a valuation on said property of \$1,500, to be paid to Daley and unknown owners.' Passed May 4th, 1893."

On the 13th of May, 1893, the defendant, George H. Daley, the owner of the wharf, took an appeal from the order of the city council condemning and appropriating it for public uses, to the circuit court, and perfected his appeal by filing a bond and a transcript of the record of said court in accordance with the statute. At the proper time the defendant, Daley, removed the cause into this court on the ground of diverse citizenship. After the appeal had been perfected, to wit, on the 20th day of July, 1893, the city council undertook to correct the record of its proceedings of the 4th day of May, 1893, by adopting a resolution which recited the former resolution, and then proceeded as follows:

"Now, therefore, be it resolved by the common council, now in session, that that part of the record referring to passage of said resolution, to wit, 'Passed May 4th, 1893,' be corrected to read as it should have read, and in accordance with the facts, as follows: 'Passed May 4th, 1893, by an unanimous vote of all the members of the common council; that is, twelve of the twelve members thereof voting "Aye."'"

In this court the defendant has filed exceptions denominated by the statute (Rev. St. 1881, § 3180) "a written statement of his objections to the proceedings of the common council and commissioners." These objections are substantially as follows: (1) That the city council did not refer the matter of said proposed appropriation of defendant's real estate to a proper committee to examine said matter; and no report of any such committee in favor of the expediency of referring the said proposal to condemn said real estate to said city commissioners was made before the reference thereof to them. (2) That the said council did not within 28 days after the filing of the report of the said commissioners, in which they de-

terminated to condemn said property and award \$1,500 compensation to its owners, by a vote of two-thirds of said city council, on a yea and nay vote, by a resolution determine to accept said report, and make said appropriation of the defendant's property. (3) That the statute under which the city of Madison is incorporated does not, nor does any other statute of the state of Indiana, confer upon said city any statutory power to condemn and appropriate the real estate of a private citizen for a public wharf, against his consent. And the defendant has not consented to said proceedings. I will consider these objections in their order.

First. Section 3167 of the Revised Statutes of Indiana, under which the plaintiff attempted to proceed, is as follows:

"Before any matter of the opening, laying out, or altering of any street, alley, highway or water course, or of the vacation thereof, shall be referred to the city commissioners, the common council shall refer the matter to an appropriate committee, who shall examine the matter, and report at the next meeting of the common council upon the expediency of so referring; and if the common council shall determine, by a two-thirds vote, to submit the said matter to the commissioners, it shall be so ordered, and shall thereupon be referred to said commissioners, as hereinbefore provided; but no such matter shall be submitted unless so ordered by a two-thirds vote of such common council."

Now, it is not claimed that this requirement of the statute was complied with by the common council of the plaintiff before referring the matter of the condemnation of the defendant's wharf to the city commissioners. It is contended by the counsel for the defendant that this provision of the law is mandatory, and that the preliminary reference therein required is jurisdictional. The object of this statutory requirement is twofold: (1) In order that the common council may, by the careful and deliberate investigation of one of its committees, acquire a full knowledge of all the facts and circumstances surrounding the proposed acquisition of property by the exercise of the power of eminent domain. (2) For the protection of the rights of the owner of the property which it is proposed to condemn; for the law is jealous of the rights of property holders, and adopts these formalities of procedure for their protection. With these objects in view, I will consider the language of section 3167, *supra*. It is that: "Before any matter of the opening," etc., "shall be referred to the city commissioners, the common council shall refer the matter to an appropriate committee," etc. "Shall" will be construed "may" where no public or private right is impaired by such construction; but where the public are interested, or where the public or third persons have a claim de jure that the act shall be done, it is imperative, and will be construed to mean "must." The right of eminent domain—that of taking the property of a private citizen without his consent, and devoting it to the use of the general public—is an exercise of the highest act of sovereignty. It can only be called into existence by the authority of the legislature, and must be exercised in the mode and by the tribunal provided by law. This statute prescribes the mode, and I have no doubt whatever that it is mandatory. The failure of the city council to comply with it is fatal.

Second. The next objection to these proceedings is that the common council did not comply with the requirement of the statute in accepting the report of the city commissioners and making the appropriation. The statute on this subject is as follows:

"If the common council, within twenty-eight days after the filing of said report, shall, by a vote of two-thirds of the members thereof, determine to make the appropriation of the real estate for such improvement, they shall enact a resolution accepting said report, and requiring the city clerk to deliver a certified copy of so much thereof," etc., "to the city treasurer." Section 3174, Rev. St. 1881.

"On the passage or adoption of any by-law, ordinance or resolution, the yeas and nays shall be taken and entered on the record." Section 3099, *Id.*

It appears from an inspection of the record that the action of the common council on the 20th day of April, 1893, was nugatory for two reasons: (1) Its action was on motion, and not by resolution; (2) there were but seven votes in favor of the motion, while the statute requires two-thirds. Seemingly to remedy this defect, on the 4th day of May, 1893, at a subsequent meeting of the common council a resolution to accept the report of the city commissioners was introduced, and it was adopted by a viva voce vote. This was evidently insufficient, because the statute requires the yeas and nays to be taken, and entered upon the record. At a still later meeting of the common council, on the 20th day of July, 1893, an entry nunc pro tunc as of May 4, 1893, was ordered to be made, which contained a recital of what was done with reference to this resolution in the following words: "Passed May 4th, 1893, by an unanimous vote of all the members of the common council; that is, twelve of the twelve members thereof voting aye." Did this help the matter? The statute (section 3174) required the council to enact a resolution accepting the report, and on the passage of any resolution the statute (section 3099) required the yeas and nays to be taken, and entered upon the record. The recital of the clerk that the resolution passed by an unanimous vote of all the members of the common council who voted "Aye" was not in terms taking the ayes and noes, and entering them upon the record. To take the ayes and noes means to call the roll, and to enter upon the record the names of the members voting for and against the resolution. The question turns upon the construction to be given to the statute requiring a yea and nay vote. Is it mandatory or directory? The authorities are not uniform. In Indiana it has been held to be mandatory. *City of Logansport v. Crockett*, 64 Ind. 319; *City of Delphi v. Evans*, 36 Ind. 100. See, also, in Colorado, *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736. And see, also, in North Dakota, *O'Neil v. Tyler*, 53 N. W. 434. The contrary rule obtains in New York. *Striker v. Kelly*, 7 Hill, 9; 1 Beach, Pub. Corp. 494. While I am inclined to the opinion that the proper construction is to hold the requirement to be mandatory, and that the recital that all of the members of the common council voted "Aye" is not equivalent to entering the ayes and noes on the record, yet, as the question is not entirely free from doubt, and its solution is not necessary to the decision in this case, I will not pass upon it.

Third. The main question in this cause, however, which underlies all the others, is, has the city of Madison the power to condemn private property for its use as a public wharf? It is conceded that the statute does not, in express terms, confer this power upon the city. It is not necessary, however, that it should have been conferred in express words; it is sufficient if conferred by a necessary or reasonable implication in the grant of other powers. When is one power implied in the grant of another? It is when the latter cannot be exercised or carried into effect without the exercise of the implied power. Anything within the manifest intention of the makers of the statute is as much within the statute as if it were within the letter. *Stowel v. Zouch*, 1 Plow. 366; *U. S. v. Freeman*, 3 How. 565. Implied powers are such as are necessary to carry into effect those which are expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant. 1 Beach, Pub. Corp. 637. If the legislature were to grant charters to two railroad companies, authorizing each to build a railroad through a narrow canon from point A to point B, and the nature of the passage was such that at one or more points there would be room for one railroad track only, then, although one of these corporations had entered the canon first to build its road over these places, the other would have an undoubted right, under the legislative grant, to occupy the same places for its track, because this must, from the necessity of the case, have been in the legislative mind when it granted both charters to construct the two roads over the same identical ground. Now, it is claimed by counsel for the city that the thirty-fourth subdivision of section 3106 of the Revised Statutes of 1881 contains the implied power to condemn the defendant's wharf. This clause of the statute confers power on the city to establish and construct wharves, docks, piers, etc. How establish and construct a wharf? Not by taking the defendant's wharf, which is already established. There is nothing in this record to show that there is an imperative necessity to take this wharf. The court knows the city has power to buy the land necessary for a wharf. For aught that appears here, it could have bought this identical wharf from the defendant for a fair and reasonable price. The power to establish and construct a wharf is susceptible of execution without the exercise of the power of eminent domain. Nor does the statute referred to in the argument, in reference to harbors, confer the power attempted to be exercised in this case. This statute is as follows:

"Sec. 3131. Any incorporated city in this state, situated upon or adjoining any harbor connected with a navigable stream or lake, or upon any natural water course which, by dredging or otherwise, may be made into a harbor, is hereby authorized to construct an entirely new harbor, or may extend, widen, deepen, repair, or otherwise improve any harbor now made, partially made, or in process of construction."

And section 3135 confers power on such cities to appropriate so much of the land of any person or persons, abutting on or adjoining any natural water course which it is proposed to make into a harbor, necessary to the construction and completion thereof; and

the land which is appropriated shall be particularly described on the plat and profile thereof. The previous section (3134) requires the common council to cause the city engineer to make a map and profile of the work to be done, and an estimate of the cost thereof, and to file them in the office of the city clerk; and section 3136 provides that the appropriation shall be deemed to be made as soon as such plat and profile are filed in such clerk's office; and that thereafter, if the city and landowners affected thereby shall be unable to agree upon the value of the land taken and damages sustained or benefits arising therefrom, the city may condemn the land thus appropriated in the same manner as lands are now condemned by cities for streets and alleys.

Even if the word "harbor" could be wrenched or tortured into meaning "wharf," the plaintiff must fail, because the statute just referred to makes the condemnation of the defendant's land depend upon the making and filing of a map and profile of the harbor in the office of the city clerk, describing the land by metes and bounds, so that a surveyor could identify and locate it. This is commonly called the "instrument of appropriation," which must set forth the facts prescribed by the statute. The filing of this instrument is jurisdictional, without which the proceedings are null and void. The construction contended for by plaintiff is not only liberal, but is too lax to be tolerated. It would subvert every canon of statutory interpretation to hold that this statute would authorize the proceedings of the plaintiff. The exercise of the right of eminent domain is one of the attributes of sovereignty, and can only be employed in the mode and by the persons authorized by the lawmaking power of the state. The private citizen cannot be deprived of the ownership of his property, even for a public use, except under statutory authority, strictly pursued, and upon just compensation made.

In this case the common council of the city acted without statutory authority, and for this reason the defendant's exceptions must be sustained. Judgment accordingly.

NORTHERN PAC. COAL CO. v. RICHMOND.¹

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 104.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

In an action against a mining corporation, it appeared that plaintiff, a boy of 14, was directed by defendant's superintendent to assist in a service outside his regular duties, of an extremely dangerous character for one of his age, and, while so assisting, stumbled over a piece of coal lying on a track, which he had previously seen there lying, and sustained the injuries complained of. *Held*, that the evidence was sufficient to justify the jury in finding defendant guilty of negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT.

Notwithstanding plaintiff's knowledge that the coal over which he stumbled lay upon the track, the jury might properly consider and decide whether plaintiff had reached such maturity as to understand the danger to which he was exposed by its presence. *Railway Co. v. Mealer*, 1

¹ Rehearing pending.

C. C. A. 633, 50 Fed. 725, 6 U. S. App. 86, distinguished. Railroad Co. v. Fort, 17 Wall. 553, followed.

8. SAME—NEGLIGENCE OF VICE PRINCIPAL—FELLOW SERVANTS.

The jury were justified in finding that plaintiff's acts were in consequence of the superintendent's instructions, notwithstanding that at the time of the injury plaintiff was under the immediate supervision of a fellow servant; the superintendent, in that connection, being a representative of the employer, and not a fellow servant of plaintiff.

In Error to the Circuit Court of the United States for the District of Washington.

At Law. Action by Thomas J. Richmond, by William Richmond, his guardian, against the Northern Pacific Coal Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

McBride & Allen, for plaintiff in error.

Forster & Wakefield, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Thomas J. Richmond, by his guardian, as plaintiff, brought an action against the Northern Pacific Coal Company, defendant, to recover for injuries suffered by plaintiff while in the service of the defendant, engaged in the mining of coal at Roslyn, in the state of Washington. The plaintiff alleges that through the negligence of the defendant, its agents and servants, he was thrown upon the track of the defendant's tramroad, used for hauling coal out of its mine, and a loaded car passed over his arm, and crushed it, so that amputation was required, whereby his arm was lost. The defendant denied these allegations, and alleged that the injury was caused by the plaintiff's carelessness or negligence. A judgment was rendered for the plaintiff for the sum of \$8,000.

The facts are substantially as follows: The plaintiff was 14 years and 2 months old. He and his father and a brother were all in the employment of the defendant in its coal mine. The plaintiff was employed as a "trapper." There were two stations, with doors, in the tunnel which led into the workings of the interior of the mine. At these stations boys were employed to open and close the doors for the passage of the coal cars as they were drawn in and out of the mine by mules. These boys were called "trappers." The train usually consisted of three or four cars, and there were three or four trains running in the mine at the time of the accident. There was a driver to each train, who had charge of the mules and the running of the train. The plaintiff had been in the employment of the mine for several months, and was paid a fixed rate of wages. It was not uncommon for the "trappers," when a loaded train went out of the mine, to ride out on the cars, and return with the train; there being no duty to perform at the trap in the mean time. In a few instances the plaintiff had taken the place of the driver of the train, and had received driver's pay therefor. It appears that the plaintiff was a boy of or-

dinary intelligence, and understood the working of the trains. The driver in charge of the train which caused the injury had been employed in that capacity for some weeks. The plaintiff testified that on the morning of the day when the accident occurred, the boss told the "trappers" that he wanted them to help the drivers that day, as he wanted to get out a big run of coal; that he said to them: "Rush the drivers, and help all you can." He had so instructed them upon some previous occasions. There was along the track in the tunnel a place called the "swamp," not because it contained water, but because it was a low place. It was the custom, when the loaded train reached the point of descending the "swamp," to urge the teams down as fast as possible, in order that the momentum acquired might help the cars on the up grade after passing the "swamp." At the time of the accident, the driver and the two "trappers" were all riding on the rear end of the last car when the train began to descend into the "swamp." The plaintiff, of his own accord, jumped off the car, and ran forward, and alongside, to throw off the brake. The driver called to him, "Get there, Tommy." It was the purpose of the plaintiff to get to the brake on the second car, and, as soon as he should reach the "swamp," to throw it off. This was ordinarily done by the driver. To reach the brake it was necessary for the plaintiff to run forward by the gangway at the left of the train, mount the platform or bumpers between the cars, and cross thereby to the right of the train, where the brake was. A large lump of coal had fallen from a previous train in passing out, and, as the plaintiff was running alongside, and had about reached the point where he would pass between the cars, he stumbled on the piece of coal, and fell, his right arm falling between the cars, where it was run over and crushed. The plaintiff testified that he knew that this lump of coal was lying there, and that he had noticed it on a previous trip that day, about 10 minutes before.

There are several errors assigned, but the argument of counsel for plaintiff in error is confined principally to the consideration of the whole testimony offered on behalf of plaintiff, and to the discussion of the question whether or not the refusal of the court to direct the jury to find a verdict for the defendant was error.

This assignment of error raises the question whether or not there was any evidence to go to the jury. It is claimed on behalf of the plaintiff in error that there was no evidence whatever of negligence upon the part of the corporation; that in assisting the driver on that day the plaintiff was acting in the scope of his regular employment; that he confessedly knew the risks of his employment; that he was a fellow servant with the driver of the train; that, if the accident occurred either through his own or through the driver's negligence, the defendant is not liable.

Briefly summing up the evidence presented in the bill of exceptions, it appears that, while the testimony was conflicting concerning the material issues in the case, there was evidence which went to the jury that the superintendent in charge of the mine, and of the operatives at work therein, directed the plaintiff on the day of

the accident to rush the drivers, and to help them all he could; that the plaintiff, in consequence of such instructions, went with the driver upon the trip upon which the accident occurred, and was in the act of assisting the driver when he was injured; that his parents had no knowledge that he at any time rendered such service, or any service other than that of "trapper;" that the plaintiff was 14 years of age, and small for his age; that the employment of aiding the driver in setting and removing the brakes was an "extremely dangerous" one for a boy of his age; that it was a service outside the duties of his regular employment. In view of this evidence, we cannot say that the jury should have been instructed to return a verdict for the defendant. From these facts the law does not deduce the conclusion that there was no negligence on the part of the defendant, or that there was contributory negligence by the plaintiff.

In *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, the court said:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

It is argued on behalf of the plaintiff in error that since the plaintiff in the action had knowledge that the piece of coal lay upon the track, and since his injury was caused solely by his stumbling over the same, this injury was the result of his own negligence, and he cannot recover. The decision of the United States circuit court of appeals in the case of *Railway Co. v. Mealer*, 6 U. S. App. 86, 1 C. C. A. 633, 50 Fed. 725, is cited in support of that view. In that case the plaintiff was a switchman 22 years of age, engaged in the discharge of his regular duties. In coupling some cars in the yard of the railroad company, he stumbled over a piece of coke that had fallen from one of the cars he was coupling, and his arm was thrown between the cars, and injured. The court held that the jury should have been instructed to return a verdict for the defendant, upon the ground that the plaintiff was well aware of the risks of his occupation, and knew that coke and coal were liable to fall beside the track at any time, and that, if there were any neglect in not removing the piece of coke that caused him to stumble, it was the negligence of his fellow servants. That case lacks two of the essential features presented in the case before the court,—the immature age of the plaintiff, and the fact that the superintendent of the mine had taken him from his regular employment, and had placed him in a service which he himself admitted was "extremely dangerous" for a boy of 14. The plaintiff, it is true, had seen the piece of coal over which he stumbled lying upon the gangway, but it does not follow, as a conclusion of law, that his judgment had reached such maturity that he was apprised of the danger of running alongside the track, or of setting or removing the brakes, under such circumstances. A piece of coal was liable to fall from the cars upon any trip, and the danger of falling over such an ob-

struction may have been one of the perils which, in the mind of the superintendent, made that employment extremely dangerous to a boy of 14. The superintendent of the mine represented and stood in the place of the defendant in the action, and was not a fellow servant with the plaintiff, and the jury may have believed from the evidence that all the acts of the plaintiff were done in consequence of the superintendent's instructions, notwithstanding the fact that the plaintiff was at the time of the injury under the immediate supervision of the driver, who was his fellow servant. The plaintiff, in entering the employment of the defendant, took upon himself the risks incident to the service which he engaged to perform, but he did not assume the risk of service other than those he contracted to render, and which neither he nor his father would have reason to believe he would be required to encounter.

We think the principles involved in this case are fully covered by the decision of the supreme court in *Railroad Co. v. Fort*, 17 Wall. 553. In that case a boy of 16 was engaged as helper in a machine shop. His duties were to receive and carry away moldings as they came from the molding machine. He was directed to ascend a ladder to a considerable height, among dangerous machinery, and adjust a belt which was out of place. In so doing, he lost his arm. The court held it to be immaterial whether the boy was acquainted with the danger of the undertaking, and that, in view of the tender years of the boy, the fact that the injury did not occur in the discharge of the duties his father had engaged he should do, and the peril of the unusual service he was required to render, all of which facts were found in a special verdict, the railroad company was liable for the injury.

The judgment is affirmed, with costs to the defendant in error.

ATLANTIC & PAC. R. CO. v. LAIRD.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 140.

1. PLEADING—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

The complaint in an action against two railroad companies charged negligence of both, causing personal injury to plaintiff, a passenger on a railroad alleged to have been operated by both defendants. Amendment being allowed, plaintiff set forth the same injury from the same occurrence, but charged that the railroad was operated by one of the original defendants, and that its negligence caused the injury, corrected a mistake as to the incorporation of such defendant, and struck out the other defendant as a party. *Held*, that the amended complaint did not set out a new cause of action.

2. CARRIERS—INJURIES TO PASSENGERS—ACTION EX DELICTO—JOINT LIABILITY.

An action against two railroad companies for personal injuries to a passenger from their negligence causing derailment of a train is an action ex delicto, notwithstanding an allegation in the complaint that plaintiff held a ticket for transportation on the railroad, and the right to recover against one is not affected by the fact that plaintiff fails to sustain the action against the other.

8. SAME—REQUISITES OF COMPLAINT.

To charge a railroad company with liability for personal injuries sustained by a passenger by reason of the derailment of a train, it is unnecessary to allege that defendant is a common carrier, or that it owed a duty to plaintiff.

In Error to the Circuit Court of the United States for the Southern District of California.

At Law. Action by Mary J. Laird against the Atlantic & Pacific Railroad Company to recover damages for a personal injury caused by negligence in suffering a train upon which she was a passenger to be derailed. Judgment for plaintiff. Defendant brings error. Affirmed.

C. N. Sterry, for plaintiff in error.

Frank H. Short and Edwin A. Meserve, for defendant in error.

Before McKENNA, Circuit Judge, and HANFORD, District Judge.

HANFORD, District Judge. This action was originally against the Atchison, Topeka & Santa Fe Railroad Company and the plaintiff in error; the complaint charging that, at the time of the accident in which she was injured, the railroad upon which it occurred was being operated by the two corporations jointly, and that both were negligent, and responsible for her injury. The first trial of the case resulted in a verdict and judgment in favor of the Atchison, Topeka & Santa Fe Railroad Company, and against the plaintiff in error for \$8,000. After vacating said verdict and judgment against the plaintiff in error, the circuit court permitted a second amended complaint to be filed, which sets forth as the cause of action the same injury resulting from the same accident, but corrects a mistake in the original complaint as to the manner in which the plaintiff in error became incorporated, and charges that said railroad was being operated by the plaintiff in error, and that its negligence caused said injury. Numerous exceptions were taken to the rulings of the circuit court upon various motions and proceedings, by which the plaintiff in error claimed exemption on the ground that the second amended complaint substituted a cause of action entirely different from the one originally sued on, after it had become barred by the statute of limitations. A second trial resulted in a verdict and judgment against the plaintiff in error for \$3,000.

Although the assignment of errors in the record contains nine specifications, counsel was careful to inform this court that a new trial is not desired, and that the only grounds relied upon for reversing the judgment are errors of law in permitting the second amended complaint to be filed, and in refusing to strike it from the files, and in allowing the plaintiff to recover upon the cause of action set forth therein. In the brief of counsel for the plaintiff in error he claims that when the second amended complaint was filed, "for the first time in the history of the case, the plaintiff in error was alleged to be a corporation incorporated under the laws of the United States as a common carrier of passengers, and that the plaintiff in error, as a common carrier of passengers, was carrying the plaintiff below in one of its cars on a ticket which entitled her to

ride at the time of her injury, and it was alleged for the first time that the plaintiff in error was by itself operating the railroad at the point where plaintiff was injured, and that it was through its carelessness, and the carelessness of its servants, that the injury occurred."

The argument is that the action is *ex contractu*; that the original complaint alleged a joint contract and liability of the two original defendants; that the second amended complaint describes a different contract, because the Atchison, Topeka & Santa Fe Company is not a party to it, and therefore a distinct and new cause of action has been substituted for the one originally sued on. There is no contract specifically pleaded, but the action is said to arise *ex contractu*, because the allegation that the plaintiff was a passenger holding a ticket entitling her to transportation on the railroad presupposes a contract, and it is said that unless the action is based upon a contract the complaint does not state facts sufficient to constitute a cause of action. Counsel contends that an actionable tort is not sufficiently alleged, because there is no specification of any particular duty which the defendant owed to the plaintiff. The original complaint is also criticised because it contains no averment that the defendant is a common carrier.

We consider all the positions assumed by counsel for the plaintiff in error to be untenable. In the first place, the last complaint manifestly states the same cause of action as the one attempted to be set forth in the original complaint; the injury, and the time, place, and manner of its occurrence, according to the last complaint, being the same as at first alleged. Instead of substituting a different cause of action, the amended pleading only corrects the mistakes of the first. Even under the common-law system of practice, since the statute of jeofails, in actions *ex contractu* the courts have power to allow amendments of this nature. In Dicey, Parties, p. 506, the rule applicable to such cases is stated thus: "In an action on contract, * * * misjoinder of defendants is, unless amended, fatal." The Code of California is equally liberal. It expressly provides that "the court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." Code Civil Proc. Cal. § 473.

Secondly, we hold that the injury and the wrong complained of constitute the gravamen of this action. It is therefore to be classed as an action *ex delicto*, and the right of the plaintiff to recover damages from a party legally liable is in no way affected by her failure to substantiate her claim against another party sued as a joint tortfeasor. The supposed defect in the complaint, for want of any specification of the duty of the defendant in the premises, does not exist. Facts amounting to a breach of duty are distinctly alleged. This is sufficient. The law imposes upon all railroad corporations engaged in running trains the duty of exercising due care to prevent the same from being derailed, and to avoid all accidents whereby the lives of passengers may be endangered. An allegation to this

effect would not tender an issue. It would be a mere legal conclusion, and therefore both unnecessary and improper in a complaint. And it was equally unnecessary to allege that the plaintiff in error is a common carrier. Railroads are quasi public highways, and all railroad corporations actively engaged in operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers of passengers. We find no error in the record. The judgment should be affirmed, and it is so ordered.

UNITED STATES v. SAUL.

(District Court, W. D. North Carolina. November 10, 1893.)

1. CARRIERS OF PASSENGERS—TRANSPORTATION OF EXPLOSIVES—DYNAMITE.

The prohibition in Rev. St. § 5353, against transporting nitroglycerin upon vehicles engaged in interstate passenger traffic, extends also to dynamite, which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient.

2. SAME—WHAT ARE PASSENGER TRAINS.

A freight train may be regarded as a passenger train, within the meaning of this section, when passengers are conveyed thereby for compensation, in any kind of cars, by authority of the railway company.

Indictment of W. S. Saul under section 5353, Rev. St. U. S., for transporting nitroglycerin on a railway train employed in conveying passengers from the state of Georgia into the state of North Carolina.

R. B. Glenn, U. S. Atty., and D. A. Covington, Asst. U. S. Atty.
G. F. Bason and R. L. Leatherwood, for defendant.

DICK, District Judge, (charging jury.) This is the first time that my judicial duty has required me to construe and apply the provisions of the statute upon which this indictment is founded. The manifest design of the statute is the security and preservation of passengers when traveling upon public conveyances employed in transporting them from one state into another. The statute was enacted by congress in exercising the power to regulate interstate commerce. In another section, (Rev. St. U. S. § 4280,) relating to the same subject, express provision is made that the preceding sections shall not be so construed as to prevent a state or a municipal corporation from passing laws or ordinances regulating to some extent the traffic and transportation of the dangerous explosive articles and substances mentioned in the statute. Railway companies are invested with charter privileges for the purpose of transporting passengers and freight, which is a commercial business, and involves intercourse, and interchange of commodities; and they are properly regarded as commercial corporations intended in many respects for public convenience and benefit. Though penal laws and criminal proceedings are, as a general rule, to be strictly construed and observed, yet the obvious intent of the legislature must not be defeated by a narrow and technical construction and application. The manifest design of the statute

must be accomplished by a fair and reasonable construction of the words expressing the object and policy of the legislative will.

The indictment charges the defendant with the offense of causing nitroglycerin to be transported on a railway passenger train from Atlanta, in the state of Georgia, to Murphy, in the state of North Carolina. The evidence tends to show that he caused dynamite to be transported from and to the places mentioned in the indictment. At the close of the evidence on the part of the prosecution the counsel for the defendant asked the court to instruct the jury to return a verdict of "not guilty," as there was a material and fatal variance between the allegations in the indictment and the proof. I declined to give such instruction, and the defendant introduced testimony in his defense.

The substance known in commerce as dynamite is not expressly mentioned in the statute, but it more nearly corresponds with nitroglycerin than any other substance enumerated. The evidence shows that dynamite is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient. Nitroglycerin is usually employed in the form of dynamite, and the terms of description may well be regarded as synonymous. Such construction of the statute and evidence cannot prejudice the defendant, and deprive him of any substantial defense. It is in accordance with the real merits of the case, with the general design and purport of the statute, and is in furtherance of justice and public policy.

The counsel of defendant has requested me to instruct you that there is not sufficient evidence to show beyond a reasonable doubt that the defendant caused dynamite to be transported on a railway passenger train. From the evidence it appears that the Marietta & North Georgia Railroad Company usually carried on the business of transportation from Georgia to Murphy, in this state, by means of a mixed train of passenger and freight cars. There is some evidence that freight trains were occasionally employed. A freight train may be regarded as a passenger train when passengers are conveyed for compensation in any kind of cars by authority of the railway company. You must be satisfied beyond a reasonable doubt that the dynamite which the defendant caused to be conveyed into this state was transported by a passenger train, before you can find a verdict of guilty. Provision is made in a subsequent section of the statute to guard against the dangers of explosion, when the substances mentioned are transported by freight trains. The doubt which you may properly entertain and act upon must not be a mere supposition of a possibility, but must be a doubt, arising from the evidence, and founded in reason and probability. You must be able to give a good reason for such doubt, or it will be unreasonable, and insufficient to control your verdict. The evidence clearly shows that the defendant caused a box containing dynamite to be transported from Asheville to Bryson City,—places within the limits of this state. I charge you that this well-established fact is not, of itself, sufficient evidence for a verdict of guilty. The cars on that railway do not, in that direction, convey passengers

beyond the limits of this state, as the railway has no close connection at its terminus with the narrow-guage railway that conveys passengers into Georgia. The evidence referred to may be considered in connection with the declarations of defendant as to his former transportation of dynamite made in explanation and reply to the charges of the conductor as to the deception and falsehood of defendant in regard to the contents of the box transported.

It is insisted by the counsel for the prosecution that the manifest design of the statute is to protect passengers in transit from one state to another, and that the interstate transportation of the dangerous substances is not required to constitute the offense; that the railway from Asheville to Murphy is a branch of the Western North Carolina Railway, and is included in a general railway connection and system of interstate transit of large extent, under the control of the Richmond & Danville Railway Company; and its cars are employed in conveying passengers who are coming from and going to other states. In this case I will not give the statute such a broad construction, for the reasons and the circumstances which I have already stated to you; and, moreover, such questions of law are not presented by the definite and specific charges contained in the indictment.

The evidence shows that dynamite was transported from Atlanta to Murphy, in this state, and was received, carried off, and used by defendant. If this dynamite was transported on a passenger train, the person sending the same violated the statute, and the defendant, by receiving the article, became guilty of such offense. As there are no accessories in misdemeanors, all persons participating are regarded in law as principals. I will not repeat the evidence, as it has been so fully recapitulated and commented on in the argument of counsel. You may now take the case, and, with the aid of the instructions given you on questions of law by the court, determine whether or not the defendant is guilty in the manner and form charged in the indictment.

Verdict, "Guilty."

UNITED STATES v. MARTHINSON.

(District Court, E. D. South Carolina. November 28, 1893.)

NAVIGABLE WATERS—OBSTRUCTIONS—CRIMINAL OFFENSE.

The provision of the river and harbor appropriation act of September 19, 1890, making it an offense to obstruct a navigable stream, is directed against casting into or constructing upon the beds thereof anything creating obstructions more or less permanent in character, and does not apply to the floating of logs or rafts which may temporarily obstruct the surface of the stream.

At Law. Indictment of Charles Marthinson for obstructing a navigable stream. On motion to instruct the jury to find defendant not guilty. Granted.

W. Perry Murphy, U. S. Dist. Atty.

W. J. Montgomery, for defendant.

SIMONTON, District Judge. This indictment is brought under the sixth section of the act of congress approved September 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors," (1 Supp. Rev. St. 801.) The evidence in the case is that the defendant is a dealer in timber on the Great Pedee river, in South Carolina, a navigable water of the United States; that he made up his rafts in the upper part of the river, and floated them down the stream to market; that in several instances the rafts so made up were seen floating down the stream with no hands on them, and with no means of governing or directing their movement; that in this navigable river there were often sailing craft and steam vessels, and that the presence of these unguarded rafts was very dangerous to navigation, especially at night, the rafts frequently having no lights. It is also in evidence that at times a raft would break up, and that its debris would lodge on the bank of the river, obstructing the current; and also that a part of a raft had lodged in the stream, and had made an obstruction. The only evidence as to the manner in which the rafts left the place at which they were made up came from the defendant and his witnesses. They say that they were always provided with a crew, ropes, and oars. It was admitted, however, that on several occasions the crew had deserted rafts on their passage.

The act of congress on which this indictment was framed is directed against the casting into or constructing upon the beds of navigable streams anything which may create obstructions more or less permanent in character, diminishing the navigable capacity of the streams. It is not directed against the floating of logs or rafts thereon, which may obstruct the surface of the streams, but which necessarily are temporary in their effect. Rafts are included in the general term "vessels." Navigable streams are as much dedicated to their use as to the use of other vessels. If this privilege of use be abused, the persons so abusing the use are liable civilly for damages they may occasion. This act of congress does not make them liable criminally.

The jury will find the defendant not guilty.

WOODRUFF v. UNITED STATES.

(Circuit Court, D. Kansas. November 29, 1893.)

1. POST OFFICE—MONEY-ORDER FUNDS.

Post-office money-order funds are part of the public moneys of the United States.

2. TRIAL—INSTRUCTIONS—COMMENTS ON EVIDENCE.

A federal judge is authorized, in criminal as well as civil cases, to express his opinion on the questions of fact which he submits to the jury, when he further tells them that they are the sole judges of the weight of the evidence and the credibility of the witnesses.

3. CRIMINAL LAW—SENTENCE—EMBEZZLEMENT OF POST-OFFICE FUNDS.

Under Rev. St. § 4046, declaring the embezzlement of post-office money-order funds a crime, and providing that one convicted thereof shall "be imprisoned * * * and fined in a sum equal to the amount embezzled," a sentence of imprisonment, without any fine, is invalid.

At Law. On writ of error to the district court. Trial of indictment against Frank Woodruff for embezzlement of postal-order funds. Judgment reversed.

J. G. Waters and S. R. Riggs, for plaintiff in error.

J. W. Ady and P. L. Soper, for defendant in error.

Before CALDWELL, Circuit Judge.

CALDWELL, Circuit Judge. The plaintiff in error was assistant postmaster of the United States at Lawrence, Kan. He was indicted, tried, and convicted in the district court of the United States for the district of Kansas for embezzling money-order funds in violation of section 4046 of the Revised Statutes of the United States, which reads as follows:

"Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money-order office who converts to his own use, in any way whatever, or loans, or deposits in any bank, except as authorized by this title, or exchanges for other funds, any portion of the money-order funds, shall be deemed guilty of embezzlement; and any such person, as well as every other person advising or participating therein, shall for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled. * * *

The first count in the indictment charged him with the embezzlement of \$5,066.88 of the public moneys of the United States, the same being a portion of the money-order funds of the United States. The jury returned the following verdict: "We, the jury impaneled and sworn in the above-entitled cause, upon our oaths, do find the defendant guilty as charged in the first count of the indictment." The sentence of the court was that the defendant "be imprisoned in the Kansas state penitentiary for one year and one day."

Post-office money-order funds are part of the public moneys of the United States, and the contention to the contrary is not tenable.

It is assigned for error that the jury could not fail to draw the conclusion from the instructions that the judge thought the defendant was guilty. Conceding this to be so, it was not error. The judge told the jury that they were "the sole judges of the weight of evidence and the credibility of the witnesses;" and he said to them, "It is the province of the court to declare to you the law applicable to the facts of the case, but you are to ascertain and determine what the facts are, and to make your own conclusions and inferences from the facts and circumstances in evidence. * * *". Having told the jury that it was their province to determine the facts from the evidence, it was perfectly competent for the judge to indicate to the jury his opinion upon the facts. It is well settled that a judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist a jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination. *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171.

It will be observed that the act under which the defendant was indicted declares that one convicted of the offense therein charged

shall "be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled." The sentence in this case was one of imprisonment only, and not imprisonment and fine, as required by the statute. In the courts of the United States the rule is well settled that a judgment in a criminal case must conform to the requirements of the statute, and that any variation therefrom, either in the character or extent of the punishment inflicted, avoids the judgment. *Ex parte Karsendick*, 93 U. S. 396; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. 363; *Ex parte Lange*, 18 Wall. 163; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762; *In re Johnson*, 46 Fed. 477; *Harman v. U. S.*, 50 Fed. 921; *In re Pridgeon*, 57 Fed. 200.

This court, sitting as a court of review, is not, on this record, called upon to point out the proper practice for the purpose of ascertaining the amount embezzled, with a view to the imposition of the fine which the statute requires shall be imposed. The question was not agitated in the lower court, and it will be time enough for this court to express an opinion upon it after it has been raised and decided by that court, and its ruling thereon brought up for review. As bearing somewhat on that question, see *Reynolds v. U. S.*, 98 U. S. 145, note pp. 168, 169; *Roberts v. State*, (Fla. 1892,) 11 South. 536.

The judgment of the district court of the United States for the district of Kansas is reversed, and the cause remanded to that court "for further proceedings" therein according to law.

UNITED STATES v. WILSON.

(District Court, N. D. California. November 28, 1893.)

No. 2,978.

1. POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene, private, sealed letter is not within the prohibition of Rev. St. § 3893, as amended September 26, 1888, by the insertion of the word "letter," for all the words of enumeration are limited in character by the concluding words, "or other publication." *U. S. v. Chase*, 10 Sup. Ct. 756, 135 U. S. 255, applied; *U. S. v. Martin*, 50 Fed. 918, disapproved.

2. STATUTES—CONSTRUCTION—VIEWS OF LEGISLATORS IN DEBATE.

While the courts cannot recur to the views expressed by individual members in debate, for the purpose of ascertaining the intention of congress, they may yet advert to statements made by such members, as part of the history of the times, and for the purpose of meeting an objection that a word used could have no operation at all, if it were not given a certain meaning contended for.

At Law. Indictment of F. L. Wilson for mailing an obscene letter inclosed in a sealed envelope in violation of section 3893, Rev. St., as amended. Heard on demurrer and motion to quash. Demurrer sustained and indictment quashed.

Charles A. Garter, U. S. Atty.
Lorenzo S. B. Sawyer, for defendant.

MORROW, District Judge. This is an indictment for "depositing," etc., "in a post office of the United States, a certain lascivious, obscene, and indecent letter, inclosed in a sealed envelope," found under section 3893 of the Revised Statutes, as amended by act of September 26, 1888. To this indictment the defendant demurs on the ground that it states no offense against the laws of the United States. It is contended on behalf of the defendant that a strictly private, sealed letter is not included among the inhibitions of section 3893, Rev. St., as amended.

The United States attorney opposes this view, and maintains that the congress, when it amended this section in 1888 by inserting the word "letters," intended to and did cover just such a case as this. The offense charged is statutory, and the determination of this question depends upon the construction to be given to the statute upon which the indictment is based. It will be necessary, therefore, to refer to the legislation upon the subject. The act of March 3, 1865, (section 16,) provided that "no obscene book, pamphlet, picture, print or other publication of a vulgar and indecent character shall be admitted to the mails," and punishment was provided for the violation of this section. The act of June 8, 1872, (section 148,) added to the prohibited matter "any letter upon the envelope of which, or postal card upon which, scurrilous epithets may have been written or printed," and prescribed a penalty for the deposit of any "such obscene publications." In the act of March 3, 1873, the words "paper" and "writing" first appear. The title of this act was "An act for the suppression of trade in, and circulation of obscene literature and articles of immoral use." The second section of this act provides that "no obscene book, pamphlet, picture, paper, print, or other publication," etc., "shall be mailable." This section was revised by the act of July 12, 1876, and the word "writing" inserted in the list of nonmailable publications. In incorporating this act into the Revised Statutes, its several sections were separated and classified. Section 1 became section 5389; section 2, section 3893; section 3, section 2491; section 4, section 1785; and section 5, section 2492,—of the Revised Statutes. These separated sections serve to explain the meaning of the original statute. In the original act, section 1 alone contained a full list of the prohibited articles, the other sections referring to it. The repetition of the words in the separate section, therefore, did not render non-mailable anything not made so by the original act. On September 26, 1888, congress amended section 3893 by inserting the word "letter" between the words "paper" and "writing," leaving the words "or other publications" as they stood. Before this last amendment the decisions of the United States circuit and district courts were about equally divided upon the proper construction of the statute.

In the following cases it was held that a message or communication in writing from one person to another, of the character known as a "letter," was a "writing," within the meaning of the statute; U. S. v. Gaylord, 17 Fed. 438; U. S. v. Hanover, Id. 444; U. S. v. Britton, Id. 731; U. S. v. Morris, 18 Fed. 900; U. S. v. Thomas, 27

Fed. 682. In the following cases the courts held that a private letter did not come within the prohibition of the statute: *U. S. v. Williams*, 3 Fed. 484; *U. S. v. Loftis*, 12 Fed. 671; *U. S. v. Comerford*, 25 Fed. 902; *U. S. v. Mathias*, 36 Fed. 892; *U. S. v. Huggett*, 40 Fed. 636. The question was settled by the supreme court of the United States in *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756. This case arose under the act of 1876, but was decided April 28, 1890, or more than a year after the amendment of September 26, 1888. The opinion expressly refers to that amendment, and, while only deciding the case at bar, lays down the rule of construction that must govern this court in construing the amendment of 1888. "In the statute under consideration," says the supreme court in this case, "the word 'writing' is used as one of a group or class of words,—book, pamphlet, picture, paper, writing, print,—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written. * * * The statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed."

This decision declares clearly and distinctly two rules of construction for this statute: First, the phrase "or other publication" applies to and qualifies all the preceding enumerated articles; second, the statute prohibits the conveyance of mail matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed.

These rules appear to be as applicable to the statute as amended by the insertion of the word "letter" as before. Indeed, the amendment was before the court, and is referred to in the decision. It is not, therefore, a case where congress has amended a statute to cure a defect pointed out by the supreme court, but where the court has rendered a decision prescribing rules of construction for an original statute with an amendment before it that would come within such rules. In the case of *U. S. v. Clark*, 43 Fed. 574, these rules were accordingly construed as applicable to the amended statute as they were to the statute before amended. On the other hand, in the case of *In re Wahll*, 42 Fed. 822, it was held that congress had by the amendment clearly expressed its intention to exclude obscene letters, whether private and sealed or unsealed; but the letter in that case is described as "written on four several sheets or pieces of paper, on each of which were illuminated, comical pictures, commonly known as and called 'comic valentines,' and then and there containing and consisting of indecent, obscene, lewd, and lascivious delineations, epithets, terms, words, and writing." This letter appears to have been a publication before it was deposited in the

mails as a private letter, and therefore within the express terms of the statute. This last case was followed in *U. S. v. Martin*, 50 Fed. 918, where the letter was unquestionably a private letter.

I do not feel authorized in following these last decisions, in view of the grounds upon which the supreme court placed its decision in *U. S. v. Chase*, *supra*, and the well-known rules of interpretation prescribed for criminal statutes, and so clearly stated by Judge Dillon in *U. S. v. Whittier*, 5 Dill. 35. "Statutes creating crimes," says that learned judge, "will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. *U. S. v. Morris*, 14 Pet. 464; *U. S. v. Wiltberger*, 5 Wheat. 76; *U. S. v. Sheldon*, 2 Wheat. 119; *U. S. v. Clayton*, 2 Dill. 219." The case of *U. S. v. Chase* may again be referred to as applying this rule to the statute under consideration. The court there says:

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of the language in them which is ambiguous, and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

The district attorney urges, however, that if the word "letter," as it now stands in the statute, does not include all private communications of an objectionable character, then there is nothing for it to operate upon, since all other mail matter is reached by the other enumerated articles described in the statute before the amendment. In reply to this objection, it may be said that, at the time the amendment was under consideration in the senate, Senator Vest, who had charge of the bill, stated that it was intended to reach a certain class of objectionable publications. He said, among other things:

"The present law does not reach the case of written publications. It only applies to print. These scoundrels went to work, and used the new stylograph process frequently used by public men now, giving a facsimile imitation of your letter and your signature. They took these awful publications, which I shall not name here, and stylographed them from one end to the other, and put them in the mail, and they are being sent forth all over the country to young people."

From these remarks, and like statements made in the debate, it appears that there were publications inclosed and mailed as private letters which this statute was intended to reach. This reference to the debate in congress is only made for the purpose of suggesting a possible answer to the objection so earnestly urged by the district attorney, and must be considered subject to the well-known rule declared by the supreme court in *U. S. v. Union Pac. R. Co.*, 91 U. S. 79, that:

"In construing an act of congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 120."

The letter set forth in the present indictment is a private, personal letter, containing nothing of the character of a publication, unless we assume that it became a publication by the act of mailing, and this we cannot do under the law as interpreted by the supreme court.

It follows, therefore, that the letter is not within the inhibition of the statute, and the demurrer must be sustained, and it is so ordered.

HIRZEL et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—CRUDE COCAINE.

Crude cocaine, extracted from the leaves of the coca plant by the aid of diluted alcohol, is dutiable at 25 per cent. ad valorem, as a chemical compound or alkaloid, under the tariff act of October 1, 1890, Schedule A, par. 76, and not at 50 cents per pound, as a medicinal preparation in the preparation of which alcohol is used, under paragraph 74. Its occasional use upon the surface of the skin for surgical or dental purposes does not constitute it a medicinal preparation. 53 Fed. 1006, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by Hirzel, Feltman & Co. for review of a decision of the board of general appraisers concerning certain importations of crude cocaine by them. The circuit court affirmed the decision of the board of general appraisers. The importers appeal. Affirmed.

Edwin B. Smith, for appellants.

Edward Mitchell, U. S. Atty., and Jas. T. Van Rensselaer, Asst. U. S. Atty., for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Hirzel, Feltman & Co., in the year 1891, imported into the port of New York sundry invoices of crude cocaine, upon which the collector assessed a duty of 25 per cent. ad valorem, under the provisions of paragraph 76 of the tariff act of October 1, 1890. The paragraph is as follows:

"Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem."

The importers duly protested against this classification, upon the ground that the merchandise was a medicinal preparation, in the

preparation of which alcohol was used, and dutiable at 50 cents per pound, under the provisions of paragraph 74 of the same act. The paragraph is as follows:

"All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, 50 cents per pound."

The board of general appraisers sustained the decision of the collector, upon the ground that the article was not a medicinal preparation; and upon appeal the circuit court for the southern district of New York affirmed the decision of the board. From the latter decision the importers appealed to this court.

It is conceded that crude cocaine is an alkaloid, which is extracted from the leaves of the plant coca, which grows in South America in large quantities. The article which is now being imported is first prepared, as a rule, by extraction from the leaves by the aid of diluted alcohol. It is a crude article, and is used in a very small degree for medicinal purposes. It is not employed in filling prescriptions, but is mainly used in the manufacture of cocaine wines, which are generally proprietary preparations, and of oleates. It is also used for medical purposes when refined. Its common use in its impure condition is for the manufacture of the pure or advanced forms in which cocaine becomes known as a medical article, and which may properly be called medicinal preparations. Its occasional use, for the sake of economy, upon the surface of the skin for surgical purposes or for dental purposes, does not constitute it a medicinal preparation.

The conclusion of the board of appraisers and of the circuit court was amply justified by the evidence, and the decision of the latter is affirmed.

MCCORMICK HARVESTING MACH. CO. v. C. AULTMAN & CO. et al.

SAME v. AULTMAN, MILLER & CO. et al.

(Circuit Court, N. D. Ohio, E. D. June 27, 1893.)

Nos. 4,484, 4,485.

1. PATENTS FOR INVENTIONS—REISSUE PROCEEDINGS—REJECTION OF ORIGINAL CLAIMS.

Where a patentee voluntarily resubmits his patent to the examination and revision of the patent office, and then acquiesces in the rejection of claims, or in a construction which narrows or restricts them, the same principles apply as in the case of acquiescence in rejection on original proceedings.

2. SAME—RESTRICTION OF CLAIMS—REFERENCE LETTERS.

Where the elements which go to make up the combination of a claim are mentioned specifically and by reference letters, such specific reference operates to restrict the claim to the particular devices described.

3. SAME—SUBSEQUENT APPLICATION FOR SIMILAR DEVICE.

Where a claim alleged to be infringed describes a specific device, the fact that the patentee subsequently procured another patent for a different device, which defendant's device resembles, must be considered as at least a recognition on the part of the patentee and of the patent office

that there is a patentable difference between the two, which may fairly be invoked to limit the claim to the specific device.

4. **SAME—INVENTION—ANTICIPATION—GRAIN BINDERS.**

Reissued letters patent No. 10,106, granted May 9, 1882, to William R. Baker, for a grain binder having the "combination, with the grain receptacle and supporting bar which carries the tripping fingers of locking mechanism which holds said bar positively against movement away from the receptacle until the tripping fingers have started the binding mechanism," are void for want of invention, and because the specific locking device was anticipated by the patent to John F. Appleby of June 1, 1869, and the S. D. Locke patent of December 7, 1869.

5. **SAME—REISSUES.**

Claims 3, 10, 11, 25, and 26 of letters patent No. 159,506, issued February 9, 1875, to M. L. Gorham, for a grain binder, are void, because, having been embodied substantially in a subsequent application for a reissue, together with certain broader claims, they were rejected by the examiner on reference to various prior patents, and no appeal was taken therefrom, but the rejection was acquiesced in by the patentee, who subsequently obtained a return of the original patent, leaving the decision of the examiner in full force.

6. **SAME—RESTRICTION OF CLAIMS—REISSUE PROCEEDINGS.**

Even if the said claims survived the revisory action and rejection by the patent office under the reissue application, still, the unsuccessful attempt made to broaden them must be held to so limit and restrict their construction as to exclude what was thus rejected, and to confine them to the specific devices and combinations therein described.

7. **SAME.**

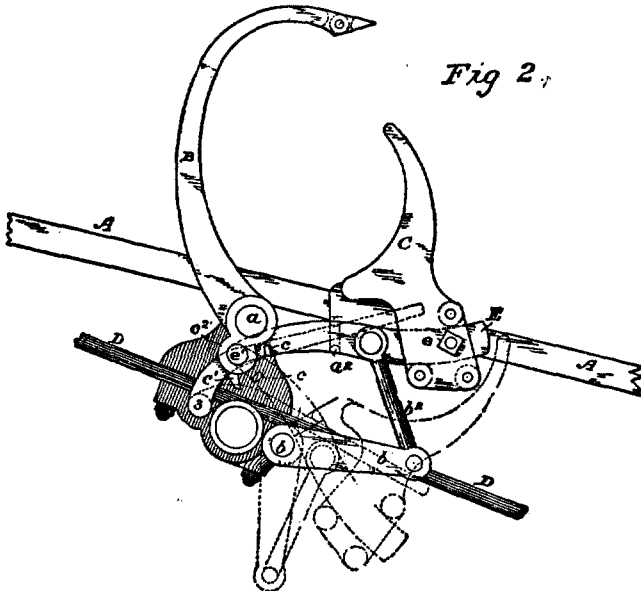
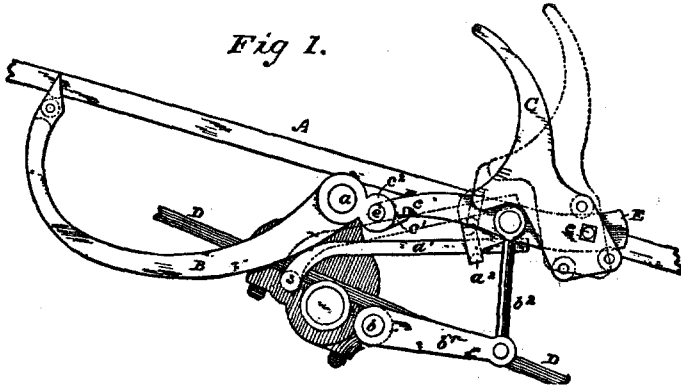
Aside from the limitation placed upon them by the proceedings on the reissue application, claims 3, 10, 11, 25, and 26 of the Gorham patent for a grain binder are limited by their terms, and by the prior art, to the specific devices therein described.

In Equity. These were suits for the infringement of reissued letters patent No. 10,106, granted May 9, 1882, to W. R. Baker, for a "harvester binder," and original letters patent No. 159,506, issued February 9, 1875, to Marquis L. Gorham, for an "improvement in grain binders." Bills dismissed.

The material parts of the Baker specifications were as follows:

"The invention relates to that class of binders in which the gavel is automatically seized and bound, and more particularly to the type represented, for example, in letters patent of the United States to John F. Appleby dated February 18, 1879, (No. 212,420.) In this special type, packing arms or fingers are arranged usually below the chute board, and operate through slots therein to pack or compress the grain into a receptacle preparatory to binding. At the bottom of the receptacle the grain is received, and partially supported upon pivoted fingers or bars, against which it is pressed by the packers in the formation of the bundle; and, when sufficient grain is so compressed to form the bundle, the force against the fingers causes them to rock or move backward a short distance. In making this backward movement, the fingers are arranged to trip and set in motion the machinery which operates the binding arm, and also, in some cases, to stop the packers while the bundle is being bound and discharged. Said fingers are carried upon or near the free end of a hinged bar or rod, which swings or yields downward beneath the table or chute board to withdraw the fingers from the path of the sheaf at the conclusion of the binding operation, and permit it to be discharged. My invention has reference to the mode of supporting this bar or rod to which the tripping fingers opposing the packers are pivoted; and it consists in the provision of means whereby said bar is rigidly locked against downward play or yielding until the binding mechanism has been tripped by the action of the fingers, and in the special combinations herein-after pointed out and claimed. In the drawings, Fig. 1 is a longitudinal sec-

tion of the chute board, through the slot in which the binding arm operates, showing a side view of the binding arm and one of the supporting fingers in the position which these parts occupy when the packers are in operation. The dotted lines show the backward position of the fingers, and the elevation of the trip lever. Fig. 2 is a view on the same section as Fig. 1, with the parts shown in the operation of binding and discharging the bundle, the dotted lines showing the position of the fingers when the bundle is being discharged. * * *



"A designates the chute board; B, the binding arm; C, the tripping fingers, which stand in the machine opposite to the packers, which are not shown. D is a portion of the supporting frame of the machine. The chute board is arranged upon the harvester at an incline of about twenty degrees (more or less) from a horizontal, with its elevated end next to the grain elevator of the harvester, so that the grain, as it falls, will be caught thereon, and will slide down towards the tripping fingers, and be stopped by them. E designates

the bar or rod to which the tripping fingers are pivoted by a pivot, e. This bar is hinged to a heel extension of the binding arm by an eye, c', on said arm, and a pin, e', fixed on the bar, and passing through the eye. The bar is supported in the position shown in Fig. 1 by a spring, b', acting through shaft, b, and cranks, b', and pitman rod, b', against the body of the arm. The machinery is tripped by the grain pressing the finger, C, back to the position shown in dotted lines, Fig. 1. In doing this the finger rocks on pivot, e, and elevates the projecting lug, a', on the bottom of the finger, which raises the tripping lever, a', attached to shaft, 3. The binding arm is operated by a rock shaft, a, set in motion, as is the remainder of the intermediate binding mechanism, by the tripping of the clutch through these instrumentalities.

"All of the parts, as thus illustrated and described, are not materially different from those well known in the class of machines to which reference is made. In all machines of this class, the bar or rod, E, which carries the fingers which cause the tripping of the machine, is supported by a spring support similar to that shown in Fig. 4; and it not unfrequently happens, when the grain is damp or green, and from other causes, that the pressure of the grain against the bottom of the tripping fingers will cause the spring support to yield before the pressure at the top of the fingers is sufficient to cause their backward or rocking movement upon their pivot. The yielding of the spring in this manner allows that end of the bar, E, to which the fingers are pivoted to be borne down and lowered in its position, so that the backward movement of the fingers, taking place after such lowering, will not elevate the trip lever, and hence the binding mechanism will not be started, nor, where the packers are to be stopped, will they be thrown out of action, and the machine will clog. To avoid this difficulty, and remedy the defect, I lock the supporting bar positively against descent until the tripping movement of the fingers takes place, for this purpose making the hinge between the binding arm or its rock shaft, and the finger support, E, such as to support this bar in the position shown in Fig. 1, irrespective of the spring support; that is, the hinge is made entirely rigid at this point, so that it will not allow the other end of the bar to drop any lower, whether it has or has not other support. This rigidity of the hinge at the point desired is best secured by means of a pin or lug, c, upon the bar, E, and a lip or projection, c', upon the eye, c', arranged to meet at the point desired, and prevent any further turning of the hinge. This affords a reliable support to said bar, and insures the tripping of the mechanism under all circumstances. As soon as the fingers have operated the trip, the binding arm starts upon its upward movement, thus breaking the lock by carrying the lip, c', away from the pin, c, and the bar is free thereafter to be lowered at the proper moment to allow the discharge of the bound bundle. The return of the binding arm to its first position renews the lock at the moment the clutch is thrown out, and the parts will be again ready for a fresh binding operation.

"I claim as my invention: (1) In a grain binder, the combination with the grain receptacle and supporting bar, which carries the tripping fingers, of locking mechanism, which holds said bar positively against movement away from the receptacle until the tripping fingers have started the binding mechanism. (2) In a grain binder, the combination with the trip lever, the yielding tripping fingers, and the spring-supported bar which carries said fingers, of locking mechanism which positively stops the arm from yielding against the stress of the spring until the trip lever has been actuated by the fingers. (3) In a grain binder, the combination with the vibrating binding arm, the tripping finger or fingers, and the supporting bar which carries the latter, of a hinge connection between said binding arm and supporting bar rigid in one direction, whereby the bar is locked against yielding or sagging when the binding arm is down. (4) In a grain binder, the combination of the trip lever, the tripping fingers, the supporting bar which carries the latter, the vibrating binding arm, and a hinge connection between said binding arm and supporting bar adapted to lock the latter against yielding away from the grain receptacle until the trip lever has been actuated, and the binding mechanism started. (5) In a grain binder, a support, E, for the compressing and tripping fingers, C, hinged to the binding arm, in combination with a pin, c, on sup-

port, E, and a lip, c', on the binding arm, all arranged to operate substantially as and for the purpose specified."

Parkinson & Parkinson, for complainant.

Banning & Banning & Payson, U. L. Marvin, and Edmund Wetmore, for defendants.

JACKSON, Circuit Judge. In these causes, heard together, the court, after careful examination of the evidence, and full consideration of the questions presented, (which it is not deemed necessary to set out or review in detail,) has reached the following conclusions, viz.:

First, that complainant is entitled to no relief on the William R. Baker reissue patent, No. 10,106, dated May 9, 1882, because the invention sought to be covered by said patent, both original and reissue, is void for want of patentable novelty; because the specific locking device of the pin, c, on the compressor bar, and the lip, c', on the extended end of the binding arm, which constitutes the alleged invention, was anticipated by the locking devices found in the John F. Appleby patent of June 1, 1869, and the S. D. Locke patent of December 7, 1869; and because said reissue patent, if valid to any extent, is not infringed by the defendants' locking device, which is substantially the same as that of the Appleby 1869 patent. All that Baker did was to put a pin on the compressor bar, and a lip on the binding arm, so as to lock the two pivoted arms at a certain desired position, or degree of openness. This involved no invention. Long before the Baker patent, pivoted arms had been locked in substantially the same way. One of the complainant's experts is compelled to admit that this locking contrivance was old. When a device has been employed for one purpose, it is not invention to apply it to another analogous purpose. This is well settled. *Roberts v. Ryer*, 91 U. S. 157, and *Blake v. City and County of San Francisco*, 113 U. S. 682, 5 Sup. Ct. Rep. 692.

If the Baker patent had any validity, it could not be so construed as to cover defendants' locking device without being met by the Appleby and Locke patents as anticipating devices. Claims 1, 2, 3, and 4 of the Baker reissue are manifestly void, unless construed to mean the same thing as claim 5, which is a repetition of the single claim of the original patent. This was recognized by the complainant's experts, who were driven to place upon said claims the same construction as that given to the fifth claim. The reissue is valid for the old claim, only. *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819. But, as already stated, the device covered by that claim is wanting in patentable novelty, was anticipated by the prior art, and is not infringed by the defendants; so that no case for relief is made by complainant on said Baker reissued patent.

Secondly, that complainant is entitled to no relief on the Marquis L. Gorham patent, No. 159,506, for improvements in grain binders, issued February 9, 1875, for various reasons, which will be briefly outlined. The claims of this patent, which are relied on and

alleged to have been infringed, are the 3d, 10th, 11th, 25th, and 26th. It is shown by the record that the owners of the Gorham patent, in 1881, before its transfer and assignment to the complainant, filed an application in the patent office for a reissue thereof, which contained claims substantially, if not identically, the same as said original claims here involved, together with other claims which sought to broaden and enlarge the scope and bearing of said original claims. In acting upon this application, the patent office not only denied the broader claims sought to be secured, but rejected the claims which were either a literal or substantial repetition of said claims, 3, 10, 11, 25, and 26 of the original patent, on which the present suit is based. This rejection was rested or predicated by the examiner on reference to various prior patents. The owner of the Gorham patent took no appeal from this decision or adverse action of the patent office, but acquiesced in the same, and thereafter requested and obtained a return of the original letters patent; leaving the decision of the examiner, rejecting both said original claims, and the new claims presented to broaden the same, in full force and operation.

Now, what is the legal effect of this proceeding, and of the adverse action or decision of the department thereunder, upon said claims 3, 10, 11, 25, and 26? In withdrawing or securing a return of the original letters patent after an adverse decision by the patent office on said claims, is the patentee, or his successor in right and interest, entitled to assert the validity of said claims, or insist upon the benefit thereof, unaffected by the reissue proceeding and such adverse action? We think not. It is well settled that the rejection of such claims on an original application, and acquiescence in such rejection, would conclude the patentee in respect thereto. *Sutter v. Robinson*, 119 U. S. 541, 7 Sup. Ct. Rep. 376; *Shepard v. Carrigan*, 116 U. S. 597, 6 Sup. Ct. Rep. 493. The same principle should apply in a case like the present, where a party voluntarily resubmits his patent to the examination and revision of the patent office, and acquiesces in a rejection of certain claims thereof, or in a construction placed thereon which operates to restrict or narrow the patent. There is no distinction, in principle, between an acquiescence in an adverse decision in order to secure a patent in the first instance, and a like acquiescence in the rejection of claims reopened and resubmitted to the jurisdiction of the patent office under reissue applications. In each case the patentee is entitled to only what the office allows. By section 8 of the patent act of 1837, it was provided that, whenever a patent should be returned for reissue, the claims thereof should be subject to revision and restriction in the same manner as were original applications for patents. This provision was substantially repeated in section 53 of the patent act of 1870, which is re-enacted in section 4916, Rev. St. While it is provided by this section that "the surrender shall take effect upon the issue of the amended patent," it is also further provided that on application for reissue "the specification and claim, in every such case, shall be subject to revision and restriction in the same manner as

original applications are." These two provisions of said section were under consideration in *Peck v. Collins*, 103 U. S. 665, and in respect to the former the supreme court left open the question whether, in cases where a reissue is refused on some formal or other ground which did not affect the original claim, an applicant could have a return to his original patent, while, in respect to the latter provision, making the specifications and claims subject to revision and restriction in the same manner as original applications, the court said:

"But if his [the patentee's] title to the invention is disputed, and adjudged against him, it would still seem that the effect of such a decision should be as fatal to his original patent as to his right to a reissue."

The original claims 3, 10, 11, 25, and 26, having been voluntarily resubmitted to the revising jurisdiction of the patent office by the application for reissue, which repeated them literally or in substance, and having been rejected or adjudged against the patentee, not on formal grounds, but for reasons and on reference to prior patented devices which went to his right and title to such claims, and no appeal having been prosecuted from that decision, as the applicant could have done under sections 4909-4911, etc., of the Revised Statutes, the effect of such adverse decision by the patent office should be regarded as fatal to said claims, to the same extent as their rejection upon the original application would have been. If, as seems clear, the reissue application placed these claims within the jurisdiction and power of the patent office to revise or restrict, and the office, while possessed and in the exercise of such jurisdiction, decided against the patentee's right and title to such claims, he had two courses open to him: He could seek a reversal of the examiner's action, or acquiesce in the rejection. If he elected the latter course, and took back the original letters patent, with such adverse decision remaining in force, his action, in legal effect, operated to exclude the rejected claims as parts of the patent. The return of the letters patent, under such circumstances, could not restore validity to said claims, or reinstate them to the same position or status they occupied before the reissue application was filed. The withdrawal of the letters patent after adverse action on the claims presented should be treated as an amendment thereof, to the extent of the original claims rejected. The language of the statute conferring jurisdiction upon the patent office to revise and restrict the claims presented in such cases; the decisions of the supreme court upon the effect of acquiescence on the part of the applicants in adverse decisions and rulings of the patent office; sound principle and good policy,—support this view of the subject. Patentees should not be allowed to experiment and take chances in attempts either to secure reissues, or to extend, enlarge, or broaden their inventions, without taking the risk, and subjecting themselves to the same rules and principles which apply and govern in original applications. Our conclusion is that the adverse action of the department upon said claims, with the patentee's acquiescence therein, operated to invalidate the same.

But if said claims survived the revisory action and rejection

thereof by the patent office under the reissue application, still the unsuccessful attempt made in that proceeding to broaden or expand said claims must, upon well-settled principles, be held to so limit and restrict their construction as to exclude what was thus rejected, and to confine them to the specific devices and combinations therein described. Said claims must also be read and construed in the light of the prior art, which, as disclosed by the record, was such as to render Gorham simply an improver, rather than an original and primary inventor. Assuming the validity of the several claims relied on, and applying thereto the tests and principles indicated, the court is clearly of the opinion that complainant is not entitled to the relief sought thereon. The third claim is for "the reciprocating segments, C⁴, having the feed teeth, C⁶, in combination with the guides, D, as and for the purposes specified." This language is too plain to admit of doubt, or leave any room for construction, even if there had been no reissue application seeking to give it broader scope. The arrangement and organization of the Gorham machine was such as to require or necessitate the adoption of this or some similar device for moving the grain from the receiving chamber through the machine towards the binding or bundling chamber, and the device described as applied to that machine had its special or peculiar advantages. There is nothing in either the claim or the specification to support complainant's theory that the device or mechanism described in the claim covered or embraced what is alleged to have been Gorham's real invention, viz. the packing of the grain in small quantities, or wisp by wisp, at the waist or middle portion of the gavel or bundle, together with the self-sizing thereof as it reached the binding receptacle. The claim, by its very terms, includes only the elements of the reciprocating segments having the feed teeth pivoted thereto, and the guides along the passageway through the machine; and the purpose or function intended to be accomplished or performed by the combination was not the central packing of the grain, or the self-sizing of the bundle, but merely the movement or transportation of the grain from the receiving chamber through the machine, without regard to packing it wisp by wisp, and without reference to any binding receptacle at the end of the passageway traversed by the grain. The reciprocating segments, with the feed teeth pivoted thereto or thereon, performed the simple function of carriers from the receiving chamber across the machine, and without which it would have been inoperative. Aside from the unsuccessful attempt in the reissue proceeding to expand this claim, the state of the art, as shown by the prior patents of Low & Adams, Glover, Gordon, the Whitneys, and others, limits and restricts the patentable novelty of said claim to the use of literal reciprocating segments, with their pivoted teeth. Again, the several elements which go to make up the combination of this third claim, as of the other claims relied on, are mentioned specifically and by reference letters. Such specific reference operates to confine and restrict the claim to the particular device described. *Weir v. Morden*, 125 U. S. 106, 8 Sup. Ct. Rep. 869, and *Hendy v. Iron Works*, 127 U. S. 375, 8 Sup. Ct. Rep. 1275.

The third claim of the patent, being confined and limited to the literal reciprocating segments arranged upon pivotal points independent of the actuating crank shafts, and carrying the pivoted feed teeth upon them, is not infringed by the defendants' device, which presents an entirely different structure or mechanism, performs a different function, and could not be made to serve the purpose, or to accomplish the same results. The defendants' device would not operate on a horizontal deck or platform like that of the Gorham machine. It has no segments and no feeding teeth pivoted thereon. It is not pivoted on points separate from the crank shaft which actuates it, but is mounted on the actuating crank shaft. In the defendants' device, there is no mechanism which performs the function of moving or carrying the grain from the receiving chamber through the machine into the chamber or receptacle in which the bundle is formed and bound. The differences between the two devices are too wide and radical to involve infringement, in view of the prior art. If said third claim could be construed to cover the defendants' device, it would itself be anticipated by the Gordon patent, No. 157,967, and other prior devices referred to in the evidence. The third claim, if valid, is not infringed.

The tenth and eleventh claims read as follows, viz.:

(10) "The flexible strap, g, arranged in receptacle, G, to operate the trip lever, H, in the manner substantially as and for the purpose described." (11) "The combination of the binding strap and cord, g, with the bundle receptacle, G, and toothed feeding segments, C', substantially as and for the purposes described."

These two claims, as explained by the experts on both sides, are substantially the same, each having the same elements in combination. The elements specially described and covered by said claims are (1) the reciprocating segments provided with pivotal feeding teeth; (2) the flexible strap lying in the bundling or binding receptacle; and (3) the cord fastened to the end of said strap, and so arranged as to operate the trip lever, or draw it back to such extent as to throw the proper clutches into engagement, and start the binding mechanism. The same reasons and considerations stated above for limiting the third claim to the specific device described therein apply with equal force to the device covered by or embraced in the tenth and eleventh claims. The elements which go to make up the combination of said claims are so clearly stated as to admit of no doubt as to the proper construction of the claims. They are mentioned specifically and by reference letters, leaving no room to question what was intended. 125 U. S. 106, 8 Sup. Ct. Rep. 869, and 127 U. S. 375, 8 Sup. Ct. Rep. 1275. The owner of the patent in the reissue application recognized that said claims were limited to a flexible strap arranged in the bundle chamber. The claims were so construed as not to include a metallic arm or finger, which was sought to be secured under new and broader claims, calling generally for "a yielding mechanism capable of expanding under the pressure of the infed grain." The patent office held, in substance, that a "flexible strap" was, in view of the state of the art, something different from

a yielding metallic arm, and denied the claims which sought to cover "yielding mechanism" such as defendants employ. Complainant cannot, in view of the specific description of the claims, and of this action of the department, invoke in behalf of said claims the doctrine of equivalents, so as to extend them beyond the particular devices described.

Again, the Spaulding patent of 1870 disclosed the idea of self-sizing the bundles, and the automatic setting of the binding devices into operation through the instrumentality of a yielding metallic finger or fingers. In his specifications he stated, among other things, that "this invention consists, principally, in a mechanism that binds the gavel in the same movement that scrapes it from the binding table; also, in a mechanism that always produces gavels of the same size; also, in an automatic device for giving motion to the binding apparatus that receives its motion from the accumulation of grain." This Spaulding specification further says:

"As soon as the quantity of cut grain beneath the compressing fingers becomes too great for them to restrain, it lifts them, such lifting up being effected in every instance by precisely the same amount of grain."

The complainant has made a vigorous attack upon this Spaulding patent, and claims that a machine constructed in conformity therewith would not operate. The proof does not establish this proposition, and complainant's own acts and representations, as the owner and licensee of said patent, are inconsistent with the present attempt to impeach its validity. In respect to the features under consideration,—those relating to the self-sizing of the bundles; the employment of yielding metallic arms or fingers, against which the grain is pressed to thereby automatically impart motion to the binding apparatus,—the Spaulding machine was operative, as the evidence in the record clearly establishes. This prior Spaulding device seems to restrict the Gorham device covered by said claims to the specific and particular means described therein. Complainant cannot be allowed to invoke for said claims the doctrine of equivalents, so as to have them construed to cover what was clearly disclosed in the Spaulding patent.

Again, it is shown that in July, 1878, Gorham applied for, and on October 12, 1880, obtained, a patent, No. 233,089, in which he secured claims for a yielding metallic arm in place of the flexible strap. It further appears that, in the application for the second patent, it was urged that there was a difference between the flexible strap of the first patent, here sued on, and a yielding metallic arm. This alleged difference was presented as a reason for granting the second patent. This action on the part of the patentee and the patent office was at least a recognition that there was a patentable difference between a flexible strap and a yielding metallic arm, and may fairly be invoked to limit complainant to the special means described in said claims, under the doctrine of *McClain v. Ortmyer*, 141 U. S. 423, 12 Sup. Ct. Rep. 76.

Said tenth and eleventh claims, being restricted to the reciprocating segments with pivoted teeth and flexible strap, and cord connected therewith, and the binding apparatus, the device employed

by the defendants does not infringe the same, because the defendants' mechanism has neither the reciprocating segments with pivoted teeth, nor flexible strap or cord. They have a different feeding device, and, instead of a flexible strap and cord, they employ yielding metallic fingers, like those of the Spaulding patent of 1870. Said tenth and eleventh claims, if valid, are not infringed by defendants.

The twenty-fifth and twenty-sixth claims of the patent, without introducing the tying bill as an element of the combination described therein, refer only to the mechanism by which the cord, after it is tied around the completed bundle, is cut and removed from the tying bill. They read as follows:

"(25) The combination of arm, Q, on shaft, K², with arm, R¹, and bent arm, R², on rock shaft, R, and carrying the projecting cord arm, V², to force the cord from the knot-tying device, substantially as described. (26) The combination of arm, Q, on shaft, K², with arm, R¹, and bent arm, R², on rock shaft, R, carrying the knife, V¹, for cutting the cord, and arm, V², for forcing the cord off the hook, substantially as described."

The knife being read into the twenty-fifth claim, as it should be, these two claims are substantially alike; and for the reasons already stated in reference to the third, tenth, and eleventh claims, are limited to combinations in which an arm is mounted upon and rotated with the shaft, which rotates the knotter bill to move the cord cutter and stripper. It described a special mechanism for cutting and stripping the cord immediately after the knot has been tied. Devices of various kinds were in use, long prior to Gorham, for cutting the cord, and stripping it from the knotter hook. Means for actuating such cutters and strippers were also old in the art. The prior method for moving the cutter and stripper from the tying bill was by means which operated separately or independently of the knotter shaft, or shaft which rotated the knotter bill. These prior devices are disclosed in the Hickey, 1860, patent, and the Greenhut, 1868, patent. The prior state of the art, and the rulings of the patent office on the reissue application, particularly on claims 57 and 59 thereof, which were rejected on the Burson patent of 1860, and the McPherson, 1870, patent, operate to restrict said claims 25 and 26, or the combination therein described, to an arm for moving the cutter and stripper, that is mounted upon and rotated by and with the knotter shaft. In view of the prior art, and of the proceedings had in the patent office, the particular arrangement described constituted the only novelty of said claims. Again, the defendants do not infringe said twenty-fifth and twenty-sixth claims, for the reason that their device for moving or actuating their cutters and strippers is not mounted upon, or rotated by or with, the knotter shaft, but by means of a mechanism that is extraneous to, and operated independently of, the knotter shaft. Defendants' actuating means for cutting and stripping the cord from the tying bill corresponds, substantially and in principle, with the devices shown in the prior patents of Hickey, Sherwood, Holly, and others. That these former devices were connected with wire binders, and that the cutting apparatus had to deal with wire instead of cord, involves

no distinction in principle, but rather tends to support the view that the novelty disclosed by the twenty-fifth and twenty-sixth claims is confined to the special and particular arrangement therein described, which defendants do not adopt. There is no infringement of said claims by the defendants.

The conclusion of the court, upon the whole case, is that complainant is not entitled to any relief on either of the patents sued on, or upon any claim or claims thereof, and that in both cases its suit or bill should be dismissed, with costs in each cause to be taxed against it, and it is accordingly so ordered and decreed.

CURTIS v. OVERMAN WHEEL CO. et al.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

1. PATENTS—INVENTION—VELOCIPEDE PEDALS.

The mere substitution, in velocipede pedals, for the pre-existing double rotary bars, round and fluted, of bars having wide working faces, thereby giving greater leverage to the foot, and preventing slipping, does not involve invention. 53 Fed. 247, reversed.

2. SAME—INFRINGEMENT—PRIOR ADJUDICATION

On appeal from an order enjoining infringement of a patent *pendente lite*, where the question of invention is presented with approximate accuracy upon the face of the patent, and does not depend upon controverted questions of fact, the circuit court of appeals, giving due weight to a prior adjudication sustaining the patent, may re-examine such former adjudication, and dispose of the question in accordance with its own conviction. *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229, followed.

3. SAME.

The first and second claims of the Overman patent, No. 329,851, for an improvement in velocipede pedals, are void, as not covering a patentable invention. 53 Fed. 247, reversed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

In Equity. Bill by the Overman Wheel Company and the Pope Manufacturing Company against Henry J. Curtis for infringement of a patent. Plaintiffs move for a preliminary injunction. Granted. 53 Fed. 247. Defendant appeals. Reversed.

C. K. Offield, for appellant.

Edward S. White, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from an order of the circuit court of the United States for the district of Connecticut, which, upon the complainants' motion, enjoined, *pendente lite*, the defendant against the infringement of the first and second claims of letters patent No. 329,851, dated November 3, 1885, to Albert H. Overman, for an improved pedal for velocipedes. The order was based upon the adjudication in *Manufacturing Co. v. Clark*, by the circuit court for the district of Maryland, which sustained these claims. 46 Fed. 789.

The invention consisted—First, “in a pedal having bars located upon opposite sides of a central working bearing, and provided with wide working faces, and arranged to turn to incline their upper or exposed faces toward each other;” second, “in a pedal having the same arrangement of rectangular bars upon opposite sides of a central bearing;” and, third, “in a pedal having bars, each composed of a light core of wood or equivalent material, and an envelope of rubber inclosing the same, and bearings passing through the core of each bar.” The three claims are respectively for these three improvements. The pedals of the defendant’s machines infringe the first and second claims. The defendant presented various defenses, the most important being that the improvement was not patentable for want of novelty, and that, if novel, it was merely an improvement and not an invention.

The history of the art at the date of the alleged invention is stated in the specification as follows:

“Heretofore pedals for velocipedes have been provided with a single, turning, polygonal bar composed of an envelope of rubber inclosing a skeleton frame bearing at each end upon the spindle of the pedal. Pedals for velocipedes have also been provided with two essentially round and sometimes fluted bars of fluted solid rubber, located upon opposite sides of the working bearing of the pedal, and arranged to be turned, so that when one portion has become worn another may be exposed for wear.”

The defect in pedals of the second type, which is corrected by the pedals described in the first and second claims, is thus stated:

“While the bars are engaged with the sole of the boot at separated points thereupon, the area of contact upon an essentially round bar is necessarily small; and, the surfaces in contact being in the same horizontal plane, the boot is prevented from slipping only by friction, and, this being insufficient to retain it in place, it often slips.”

The full record and numerous exhibits presented by the defendant show that this description of the state of the art of pedal manufacture at the time of the patented invention is substantially complete, and cannot be amended, if it is understood that the pre-existing double fluted pedals were not merely arranged so as to be capable of turning, but were actually rotary, and free to turn. Pedals are shown in the English patent to Robert James Rae of September 11, 1878, which were double corrugated or fluted rollers, having their upper surfaces turned towards each other. The whole question of patentable invention is thus presented upon the face of the Overman patent, and is whether—single, polygonal, rotary bar pedals, and double, substantially round, but fluted, rotary bar pedals, being old—it was the work of an inventor to substitute the wide working faces or the wide rectangular faces of the bars of the patent for the pre-existing round and fluted bars.

The gist of the improvement was to make pedal bars having faces or bearings of sufficient permanent width “to satisfy the leverage required to give the boot sole complete control over them,” because the old occasionally flat faces did not meet the necessary requirement of width. The advance made by Overman is stated by his expert as strongly and as attractively as it can be to consist

in producing "a double bar pedal, having rotatable bars constructed with working faces, made wide enough to secure the leverage required to make them turn and respond to the ever-changing inclination of the sole of the rider's boot, for which they together form a depressed grip or hold." This advance was an improvement, inasmuch as, the wide faces being inclined towards each other, the sole of the boot is let down between them, and a depressed foothold is formed; but when the partial foothold upon the fluted or corrugated round rubber pedal was known, and the rider wanted a better support for the foot, it was a matter of simple and mechanical suggestion to make the working faces wider, and produce the polygonal or the rectangular faces of the patented invention. After the use of the old fluted or corrugated double rotary pedals, with their narrow and partially rounded faces, which were not wide enough to secure the proper leverage, the broadening or widening of the working surfaces was a suggestion which was most natural, and did not rise to the dignity of invention.

The vital question in this case is presented with approximate accuracy upon the face of the patent, and does not depend upon controverted questions of fact. This court has, therefore, been at liberty, in accordance with its statement of the weight to be given to a prior adjudication upon an appealed order for a preliminary injunction, (*American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229,) to re-examine the former adjudication, and dispose of the question in accordance with its own convictions.

The order of the circuit court is reversed, with costs.

CARY MANUF'G CO. v. DE HAVEN.

(Circuit Court, E. D. New York. December 7, 1893.)

1. PATENTS—INVENTION—ANTICIPATION—BOX STRAPS.

The Cary patent, No. 403,178, for a box strap, composed of a metal band having a series of bosses of the same shape, raised in the band on each side, equidistant from each other, so that in splicing those on the under piece will fit into those on the upper piece, and strengthen the joint, shows invention, and was not anticipated.

2. SAME—PRELIMINARY INJUNCTION.

A prior adjudication sustaining the patent is not an absolute prerequisite to granting a preliminary injunction; and while the right thereto should be clear, it may be made to appear otherwise than by a judgment or decree.

In Equity. Bill by the Cary Manufacturing Company against Hugh De Haven for infringement of a patent. On motion for preliminary injunction. Granted.

A. G. N. Vermilya, for plaintiff.

W. C. Hauff, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 403,178, dated May 14, 1889, and granted to Spencer C. Cary

for a box strap, composed of a metal band having a series of bosses of the same shape raised in the band on each side, equidistant from each other each way, so that, in splicing, those on the under piece will fit into those of the upper piece, and strengthen the joint; and has been heard on a motion for a preliminary injunction. The defendant admits making and selling box straps which clearly contain Cary's patented invention, although the bosses are shaped differently from those shown in the drawings, but brings forward patent No. 59,097, dated October 23, 1866, and granted to Henry C. Tweddle, for barrel hoops, with bosses to prevent them from slipping off; No. 171,882, dated January 4, 1876, and granted to Robert Stokes for a stud fastening for busks, having a head raised in the metal; No. 349,150, dated September 14, 1866, and granted to Ira S. Elkins, for a box strap having bosses with a depression in the center for the nail head; and No. 367,892, dated August 9, 1889, and granted to John K. Chase, for a box strap having single bosses fitting together to help make a joint; and various manufactures having raised bosses for various purposes, made before Cary's invention, against the validity of the plaintiff's patent.

While several of these things point in the direction of Cary's invention, none of them has his arrangement of a series of bosses in the metal equidistant from each other, so as to interlock whenever necessary in forming a joint; and his patent appears to have been acquiesced in by others engaged in that manufacture and trade until the defendant infringed.

The defendant insists, however, that a preliminary injunction should not be granted until the plaintiff's patent has been established by an adjudication. But this is not absolutely necessary; the right should be clear, but it may be made to appear so otherwise than by a judgment or decree. *Blount v. Societe, etc.*, 3 C. C. A. 455, 53 Fed. 98. This invention is not great, but the right to it, such as it is, and the infringement, seem to be clear. An injunction will not deprive the defendant of anything else.

Motion granted.

COLUMBIA CHEMICAL WORKS v. RUTHERFORD et al.

(Circuit Court, E. D. New York. December 6, 1893.)

1. PATENTS—LIMITATION—INFRINGEMENT—AMMONIACAL DETERGENTS.

The fundamental idea of the Parsons patent, No. 267,455, for ammoniacal detergent compounds, is a thorough drying of the ammoniacal salts and of all other ingredients before they are mixed, so that no chemical action can take place whereby the ammonia will be set free; and there is no infringement if the ingredients are mixed in their ordinary state.

2. SAME—LIMITATION—DISCLAIMER.

The Parsons patent, No. 382,322, is limited by specific disclaimer to an ammoniacal detergent containing ammoniacal salts, saponaceous bodies, and alkali additional thereto, and is not infringed by a detergent which contains no additional alkali.

3. SAME—INVENTION.

The discovery of a method of utilizing the detergent properties of ammonia in a successful commercial compound,—a result long vainly sought

by practical and scientific men,—the same being accomplished by the isolation of the ammoniacal salts from the alkaline bodies by a coating of protecting material, which prevents chemical action, constitutes invention.

4. SAME.

Patent No. 382,323, issued May 8, 1888, to Charles C. Parsons, for an ammoniacal detergent compound, is valid as to the first and third claims.

In Equity. Bill by the Columbia Chemical Works against James Rutherford and Almon W. Barnes for infringement of patents. Decree for complainant.

Edmund Wetmore and Edward Goldschmidt, for complainant.
Rowland Cox, for defendants.

COXE, District Judge. This is an equity suit for infringement of three letters patent for ammoniacal detergent compounds and the process of making the same. These patents are numbered, respectively, 267,455, 382,322 and 382,323. They were all granted to Charles C. Parsons and are now owned by the complainant. Parsons sought to make a commercial detergent of which ammonia should be a component part. Ammonia, as is well known, is exceedingly volatile. Attempts had previously been made to use it for soap but without success. The difficulty was to make the ammonia stay. It was this problem which Parsons solved.

No. 267,455. In this patent, which is dated November 14, 1882, the patentee states, in substance, that in the known methods of preparing detergents, of which ammonia was a part, there were serious defects. The liquid compounds were expensive and bulky, and the loss of a considerable part of the ammonia always took place. In the solid detergents there was sufficient water to dissolve the salts of ammonia and thus produce a reaction between it and the alkali of the soap thus causing the ammonia to evaporate. These were the obstacles in the path of a successful ammoniacal detergent when Parsons commenced his experiments. His process, in brief, is to dry thoroughly, both the ammoniacal salt and the other substances with which it is to be compounded before mixing and to keep them entirely free from water during the process of mixing and until ready for use. As soon as this compound is brought into contact with water as a detergent it at once gives up its ammonia.

The claims alleged to be infringed are the third, fourth and fifth. They are as follows:

"(3) The process of preparing a permanent mixture of an ammoniacal salt with any caustic or carbonated alkali or alkaline earth, or any mixture of two or more of them, and a soap or other cleansing body, by making all the component parts of the mixture so free from water that no chemical action can take place between them until water is applied, substantially as set forth. (4) The above-described detergent compound, consisting of any carbonate or caustic alkali or alkaline earth, or any mixture of two or more of these, and an ammoniacal salt, the whole being so free from water that no chemical action will take place between the component parts until water is applied, substantially as set forth. (5) The combination of the above-described ammoniacal detergent compound with soap or any other cleansing body, the

whole being so free from water that no chemical action will take place between the component parts until water is applied, substantially as set forth."

The other two patents are for improvements upon the first.

No. 382,322. This patent is dated May 8, 1888. The patentee explains that the difficulty with the former process was, first, that the ingredients were too expensive for ordinary use, and, second, if the mixture were exposed to a damp atmosphere for any considerable time the ammonia was lost through a decomposition of the ammoniacal salt. These objections are obviated and the preliminary dehydration of the ingredients is dispensed with by interposing between the grains of the ammoniacal salt and the alkali some protecting material to prevent or lessen contact between them. In this way chemical action and decomposition with resultant waste of ammonia is prevented. The protecting substance must be of such a nature that while on the one hand it will protect the ammoniacal salt during ordinary exposure it will on the other permit the ammonia to be set free during use. It may be applied directly, as a coating, either to the particles of salt or to the alkaline bodies, or to both. Heavy paraffine oil, resin oil, resinous varnish, glue, etc., are mentioned as suitable protecting substances. A satisfactory way of applying them is to reduce the protecting material to a liquid and stir the salt or the decomposing body, as the case may be, into the liquid until thoroughly coated. It is then taken out and dried.

The essential feature of the invention "is the isolation of the ammoniacal salt from the alkaline bodies in a soap by the use of a protecting coating applied as above described, by which means I secure the permanency of the ammonia in the detergent."

The claims of this patent which are involved are the second and fourth. They are:

"(2) A detergent compound containing an ammoniacal salt, one or more saponaceous bodies, and sufficient additional alkaline or equivalent substance or substances to set free the ammonia, in which compound the loss or waste of ammonia is prevented during manufacture and until use by a coating of protecting material placed between the granules or particles of the ammoniacal salt and the alkaline or other ingredients of the compound which might cause decomposition of said salt, substantially as set forth." "(4) A detergent compound containing a soap powder and ammoniacal salt and sufficient additional alkaline or equivalent substance or substances to set free the ammonia, in which compound the loss of ammonia is prevented during manufacture and until use by a coating of protecting material placed between the granules or particles of the ammoniacal salt and the alkaline or other ingredient of the compound which might cause decomposition of said salt, substantially as set forth."

No. 382,323. In the prior patent (No. 382,322) appears the following statement:

"I do not herein claim that part of my invention above described which relates to the production of a saponaceous detergent without additional alkali and embodying my invention."

Under the rulings of the patent office the patentee was required to file another application for the above-described feature and No. 382,323 was granted, May 8, 1888, covering this part of the invention only. The claims involved are the first and third. They are:

"(1) A detergent compound containing an ammoniacal salt and one or more saponaceous bodies, in which compound the loss of ammonia is prevented during manufacture and until use by a coating of protecting material placed between the granules or particles of the ammoniacal salt and the saponaceous bodies, substantially as set forth." "(3) A detergent compound containing a soap powder and an ammoniacal salt, in which compound the loss of ammonia is prevented during manufacture and until use by a coating of protecting material placed between the granules or particles of the ammoniacal salt and the alkaline or other ingredients of the compound, which might cause decomposition of said salt, substantially as set forth."

The defenses are lack of novelty and invention, noninfringement and uncertainty of description.

Infringement of No. 267,455. Is this patent infringed? This question is surrounded with unusual embarrassment for the reason that after a careful study of the briefs I am unable to determine with exactness the position of counsel pro and con upon the subject. In the complainant's brief the infringement of the other two patents is treated under a separate head, but the infringement of this patent is not discussed except in a general way. It is true the brief contains the statement that the defendants admit infringement, but the references to the proof hardly sustain the assertion. The complainant's expert clearly states his opinion upon this subject in his preliminary statement, but it was based upon an assumed method of manufacture as he believed it to exist after an examination of the defendants' compound. When called in rebuttal, after the defendants' process had been elaborately described, he reiterated his former conclusion in a general way, but his attention was directed mainly to the other patents. I am unable to find anywhere in the record as clear an exposition of this subject as the other matters in controversy have received. In these circumstances it is not unlikely that in dealing with an abstruse and unfamiliar art the court may fall into error. It would certainly seem improbable, after the conceded defects in the method of the 1882 patent, that it should be adopted by any one in 1888. The patentee abandoned its use after a short and unsatisfactory trial. His reasons for doing this are plainly set out in the later patents. In brief, the process would not accomplish what he needed, it would not make a commercially successful ammoniacal detergent. Starting with this presumption we come to a more careful examination of the patent. The description is not entirely clear, but, if I understand it at all, the fundamental idea of the patent is the use of well-dried ingredients. Not one, or two, but all of the ingredients must be dried. One who mixes these substances in the condition in which they ordinarily exist does not use the process of the patent. It must be the ordinary condition plus the thorough drying. The language of the specification seems very clear on this point. The patentee says: "I avoid these objections by carefully and thoroughly drying both the ammoniacal salts and the other substances with which it is to be compounded, before mixing them." The description almost invariably alludes to the various substances as "well dried" or "thoroughly dried" and the claims speak of all the component parts as being so free

from water that no chemical action can take place. That the dehydration of all the substances previous to mixing was an essential feature of this patent is fully recognized in the later patents. It is there specifically stated that this previous dehydration was a defect and was not necessary in the improved process. That it was necessary in the old process seems plain. It is also plain that the claims are not infringed unless all of the ingredients of the detergent are previously dried. If there is a failure to dry one of the ingredients there is no infringement.

Turning now to the proof we find the witness who is best acquainted with defendants' methods testifying as follows:

"Q. Do you dry or desiccate any of the ingredients you employ before using them? A. We do not dry any of them. Q. How about the ammoniacal salt, the muriate of ammonia: do you dry it by artificial means before using it? A. No, sir. We use it in exactly the same condition in which we get it."

The same thing, substantially, is sworn to by two other witnesses and it is not contradicted. I do not lose sight of the fact that it elsewhere appears that defendants' soap is prepared by a process which makes it thoroughly dry and that ammonia as now sold in the market is drier than in 1882; but, convinced as I am, that a broad construction is inadmissible, I am not satisfied that this patent has been infringed.

Infringement of 382,322. The disclaimer before quoted limits the claims of this patent to detergents other than saponaceous detergents. The latter are fully provided for in No. 382,323, but not in No. 382,322. It is manifest that the latter patent deals with a compound in which additional alkali is supplied as a separate ingredient. The claims do not cover, therefore, a saponaceous detergent to which no additional alkali has been supplied. As the defendants use only the alkali contained in their soap and do not use any additional alkali it is clear that they do not infringe the claims of No. 382,322.

The foregoing considerations leave to be considered only the validity and infringement of No. 382,323. The prior art shows two facts which can hardly be questioned. First. For years prior to this patent a large number of practical and scientific men had sought to utilize the detergent properties of ammonia in a successful commercial compound. Second. Parsons was the first to make such a compound. That the soap powder produced by Parsons was novel does not seem to be disputed, and in view of the repeated failures which preceded, it can hardly be said that its production did not involve invention. True, the component parts of this compound were all known, but this is true of many combinations. The prior art nowhere shows the ingredients of the patented detergent assembled as in the Parsons combination. He was the first to prevent the escape of ammonia from a detergent by interposing a coating between it and the other decomposing ingredients. To this extent he accomplished a new result and he did it in a manner never attempted before.

Do the defendants infringe? In the first place their ammonia

stays. What makes it stay? Upon the evidence in this cause is there any possible answer to this question except one—the use of a coating? Do the defendants suggest any other? According to their testimony, as before stated, they do not use the process of drying the ingredients pointed out in the 1882 patent. Even if they had done so it would not have prevented the escape of the ammonia. In these circumstances would not a chemist expect to find precisely what Prof. Chandler testifies, in unqualified terms, he did find, viz. a protecting coating? If the defendants' account of their method is entirely correct it appears that Prof. Chandler, basing his opinion solely upon his analysis, was mistaken as to the precise stage when the oily substance was applied. He thought it was before the ammoniacal salt was mixed with the soap; but whether before or at the same time can make no difference so long as the fact remains that the coating exists. I cannot doubt this fact without doubting Prof. Chandler's word supported as it seems to me by a strong presumption.

It follows that the complainant is entitled to a decree upon the first and third claims of No. 382,323 for an injunction and an accounting, but without costs.

THE JOHN G. STEVENS.¹

In re THE JOHN G. STEVENS.

(District Court, E. D. New York. September 13, 1893.)

MARITIME LIENS—PRIORITY—NEGLIGENT TOWAGE—SUPPLIES.

A lien for supplies, and a lien arising out of the neglect of some duty assumed by a voluntary agreement between the parties, are equal in point of merit, and priority will be given to that one which first accrued. *Loud v. The R. S. Carter*, 40 Fed. 331, distinguished.

In Admiralty. On application for distribution of proceeds.

Geo. A. Black, for Loud and others.

Alexander & Ash, for colibelants Gladwish and others.

Wing, Shoudy & Putnam, for the J. G. Stevens.

BENEDICT, District Judge. This is a controversy in regard to priority, between Loud and others, as owners of the schooner *Flint*, and Gladwish, Moquin & Co., coal dealers, each having a lien upon the tug *John G. Stevens*. The tug having been sold under the order of this court, and the fund being insufficient to pay both the claims, the question arises as to which of these parties is entitled to be paid first out of the fund in court. The claim of Loud and others, owners of the schooner *Flint*, arises out of injuries to the schooner *Flint* caused by negligence on the part of the *John G. Stevens* while performing a contract to safely tow the schooner *Flint*. The claim of Gladwish, Moquin & Co. arises out of coal furnished by them

¹ Reported by E. G. Benedict, Esq., of the New York bar.

to the John G. Stevens prior to the time of the injury done to the Flint by the John G. Stevens.

If the claim of Loud had arisen out of a tort, pure and simple, committed by a vessel between whom and the Flint no relation by contract existed, the decision of the circuit court of this district, affirming a decision made by this court in the case of *Loud v. The R. S. Carter*, 38 Fed. 515, 40 Fed. 331, would be decisive, and compel a decision here that the claim of Loud is entitled to priority over the claim of Gladwish, Moquin & Co. But that case differs from this, in that the claim of Loud against the *R. S. Carter* was for a tort, pure and simple, arising out of a collision between the Flint and the *R. S. Carter*, between which vessels no relation by contract existed. Here the claim of Loud against the John G. Stevens is for damage done by the John G. Stevens by reason of negligence in performing her contract to tow the Flint. The question therefore arises whether, in distributing proceeds by a court of admiralty, this distinction between two competing claims makes a difference that is to be noticed in determining the question of priority. In the case of *Loud v. The R. S. Carter*, above referred to, this question was not before the court. When the case of *Loud v. The R. S. Carter* was decided by this court, the case of a claim arising out of neglect of some duty assumed in pursuance of a voluntary agreement between the parties was carefully excepted. The same exception was made by the circuit court. It cannot be held, therefore, that the decision in favor of Loud against the tug *R. S. Carter* compels a decision in favor of Loud in this case.

But in that case the ground upon which a difference between the two claims there involved was held by this court to exist was that one was a voluntary creditor, who, for a consideration, gave time, with a lien on the vessel, in place of present payment, while the other was an involuntary creditor who had no option, and between whom and the offending vessel no relation whatever existed; and this difference was also noticed by the circuit court. No such difference exists between the two claims here conflicting. The claim of Loud, although, in a certain sense, a claim *ex delicto*, arises out of the neglect on the part of his employe in the performance of a contract voluntarily entered into by Loud. Loud selected a careless tug to tow the Flint, and suffered thereby. It was at his option what tug should be given the opportunity to injure the Flint. In the exercise of this option, he selected a careless one, responsible, indeed, to him for any damage to the Flint caused by negligence, but given the opportunity to do damage to the Flint by the voluntary act of Loud. In this respect, therefore, the claims of Gladwish, Moquin & Co. and of Loud stand on the same ground. In respect to the time of the inception, the claims differ. The claim of Gladwish, Moquin & Co. for coal arose prior to the claim of Loud. For the reason given in the case of *The Samuel J. Christian*, 16 Fed. 799, it must be held that the claim of Gladwish, Moquin & Co. is entitled to priority over the subsequent claim of Loud in the distribution of the proceeds in question here.

THE ANERLEY.¹

SHERBORNE v. THE N. & W. NO. 4 and BOSTON TOWBOAT CO.

(District Court, S. D. New York. October 8, 1893.)

1. SHIPPING—ANCHORED VESSEL—DANGER OF DRIFTING—DUTY.

When there are known indications of danger of the drifting of an anchored vessel from any extraordinary cause, whether ice, storm, or position, ordinary prudence requires more than one anchor to be let go, and the omission of this precaution is at the vessel's risk.

2. COLLISION—ANCHORED VESSEL—HARMLESS CONTACT—ANTICIPATION OF LATER INJURY—NECESSITY OF CHANGING POSITION.

When two barges drifted in the ice alongside a steamship, and remained there two or three hours, and until the change of the tide, when, in swinging, the ship was injured, but during the interval before the turn of the tide the ship had made no attempt to extricate herself from her dangerous position, as she might have done, *held*, that the ship was partly liable for the damage.

3. SAME—THREE VESSELS IN FAULT—DIVISION OF DAMAGES.

Where two barges, entangled, and practically one mass, drifted upon an anchored vessel, which made no effort to avoid the damage which subsequently was sustained by her, *held*, that the anchored vessel should pay one-half the damage, and the other half should be divided between the two barges.

In Admiralty. Libel for collision. Decree for divided damages.

Convers & Kirlin, for libellant.

Robinson, Biddle & Ward, for the N. & W. No. 4.

Wilcox, Adams & Green, for the Boston Towboat Co. and the Merryman.

BROWN, District Judge. The primary cause of the damage to the libellant's steamer *Anerley* was the drifting of the two barges in the ice during the night of February 22d, whereby the two came alongside the *Anerley*. No immediate damage was done. The damage arose afterwards, upon the change of tide from flood to ebb, when the relation of the three became somewhat complicated upon swinging to the southward, and the *Anerley* had a plate stove in before the vessels got clear. I am satisfied that the two barges, after they got alongside the *Anerley*, made all reasonable efforts on their part, and did as well as they could, to get clear, and to avoid any subsequent damage. If their original drifting upon the *Anerley* was without any fault on their part, the libel should be dismissed.

The case differs, however, from others that are cited on behalf of the respondents, in that both the defendant vessels had ample notice of the presence of an unusual quantity of ice in the bay, and of the consequent necessity of taking special precautions against the liability to be carried away by the ice; to say nothing about their place of anchoring, nearly in line with each other and with the *Anerley*. Both barges had two anchors. Neither put out

¹ Reported by E. G. Benedict, Esq., of the New York bar.

more than a single anchor,—except that the *Merryman*, a few minutes before she began to drag, when it was too late, dropped her second anchor, and soon drifted upon the *N. & W. No. 4*, which did not drop her second anchor at all. To put out both anchors, would have been but an ordinary precaution under the circumstances shown in the evidence. The danger from ice was not sudden or unexpected; but, as I have said, had been long evident.

The neglect of reasonable precautions is not to be justified by citing instances of the negligence of other vessels. I do not find any case in which, under analogous circumstances, such accidents have been adjudged inevitable. On the contrary, where there are known indications of the danger of drifting from any extraordinary causes, whether from ice, storm, or position, ordinary prudence requires that both anchors be let go; and the omission of this precaution is held to be at the vessel's risk. *The Sapphire*, 11 Wall. 164, 170; *The Energy*, 10 Ben. 158; *The John Tucker*, 5 Ben. 366; *The Eloina*, 10 Ben. 458; *The Lilian M. Vigus*, 22 Fed. 747; *The Mary Fraser*, 26 Fed. 872. The English authorities are equally clear. *The Despatch*, 14 Moore, P. C. 83; *The Egyptian*, 1 Asp. (O. S.) 358; *The Maggie Armstrong*, 2 Asp. (O. S.) 218; *The John Harley*, Id. 290.

It is further urged that the volume of ice was so great that two anchors would have made no difference. Very clear proof would be required to sustain a defense of that kind in behalf of those whose negligence is proved. In the present case there is nothing amounting to proof at all; but only certain opinions of persons interested. On the other hand, the fact that the ice parted not long after the two barges had drifted alongside the *Anerley*, and the uncertainty whether the steamer, though having out but a single anchor, drifted at all, show, as it seems to me, that this defense is mere speculation. I must, therefore, hold both barges in fault for getting into a false position alongside the *Anerley*, which was the original cause of the subsequent damage.

But I think the *Anerley* is also to blame for not taking means which were easily within her power, and which might safely have been employed, to avoid the subsequent damage. That there was danger to be apprehended from the swinging of the vessels to the southward on the change of tide from flood to ebb, is manifest. The barges were alive to this danger. The *Anerley* seems to have shown entire indifference to the result. There was an interval of between two and three hours during which the *Anerley* might have been removed out of the way or have slipped her cable. Her inaction would almost seem to justify the hypothesis that she supposed the barges alone were likely to suffer damage; and that she would leave them to get out of it as they could. The situation, however, plainly involved danger to them all; and it was the duty of the *Anerley* as much as of the barges, to do what was easily within her power during the considerable interval that elapsed before the change of tide, to avert the danger. *The Sapphire*, 11 Wall. 164.

Decree for the libellant for one-half of the damages against both defendants.

(November 23, 1893.)

A motion was afterwards made to divide the loss in the proportion of one-third to each vessel.

BROWN, District Judge. It is unnecessary to consider at this time what should be done in cases like *The Brothers*, 2 Biss. 104, and *The Peshtigo*, 25 Fed. 488, where three vessels are adjudged in fault; because in this case, before any damage arose the two barges became entangled fast together and were practically one mass, and therefore, as respects the subsequent negligence of the steamer, and the resulting damage, they should be treated as one. They did what they could to get out of the way, and to avoid the plain danger from swinging on the turn of the tide. The steamship, as I find, was culpably indifferent and made no such effort. Under such circumstances she should pay half the damages. The two barges, as between themselves, divide the other half of the damages, because it was by the fault of each barge that they got into a false position and became entangled as one mass near the steamer, and thereby caused the danger. See *The Express*, 3 C. C. A. 342, 52 Fed. 890; *The Ice King*, 52 Fed. 894.

THE GUILDHALL.¹

SCHULZE-BERGE et al. v. THE GUILDHALL.

(District Court, S. D. New York. November 6, 1893.)

1. SHIPPING—CARRIERS—BILL OF LADING—EXCEPTIONS—NEGLIGENCE.

A shipowner cannot by stipulation exempt himself from the consequences of his own negligence. Such stipulations are held void in this country, as contrary to public policy, and as not being evidence of any contract, so far as the shipper or consignee is concerned.

2. SAME—CONTRACTS CONTRARY TO PUBLIC POLICY—FOREIGN LAW.

Contracts contrary to the public policy of this country cannot be enforced or upheld in our courts, wheresoever made.

3. SAME—STIPULATION EXEMPTING FROM NEGLIGENCE—EVIDENCE.

The insertion of a stipulation against the consequences of negligence in a bill of lading, and the receipt of the goods under such bill, are not sufficient evidence of any such assent to the stipulation by a shipper or consignee as to make it a contract.

4. SAME—DAMAGE TO CARGO—NEGLIGENT COLLISION—STIPULATIONS EXEMPTING FROM LIABILITY.

Where cargo is damaged by reason of the shock of a collision caused by the negligence of the shipowner, such owner cannot rely on the exceptions of the bill of lading, exempting the ship from liability for damage caused by "insufficiency in strength of packages, breakage, * * * collisions, perils of the seas," etc.

¹ Reported by E. G. Benedict, Esq., of the New York bar.

5. SAME—DAMAGE BY COLLISION—RECONDITIONING CARGO—NEGLIGENCE.

When a vessel, after collision, opened her forward hatches, and reconditioned the cargo there, under direction of her owners, but did not open her after hatches at all, being unsuspicious of any damage there, it was held that such failure to examine the condition of the after cargo was negligence in her owners, who were therefore liable for any damage caused thereby.

6. SAME—INTEMPERATE CAPTAIN—NEGLIGENCE OF OWNER.

It is negligence in a shipowner to appoint as captain a man known to be intemperate, or whose intemperate habits might have been ascertained on reasonable inquiry.

In Admiralty. Libel for damage to cargo. Decree for libelants. Butler, Stillman & Hubbard and Mr. Mynderse, for libelants. Convers & Kirlin, for respondent.

BROWN, District Judge. The above libel was filed to recover for damage to nine barrels of alizarine out of a cargo of 250 barrels brought from Rotterdam to New York by the steamship Guildhall in November, 1892.

The steamer left Rotterdam on the 15th of October. Early on the morning of the 16th she came into collision with the steamship Myra, off the English coast, and incurred damages which made it necessary for her to put into London for repairs. Upon a suit in the English courts, the Guildhall was held solely to blame for the collision; and under the stipulation and admissions in this case, that fact must be assumed here.

After repairs, the steamer sailed from London on the 6th of November, and arrived in New York on the 25th. On the discharge of the cargo, two barrels of the alizarine were found wholly empty, the heads being gone; seven others were partially empty, the hoops having been shoved forward so that the chimes were loose. The log leaves no doubt that the vessel experienced very tempestuous weather on her voyage between London and New York.

The libelants contend that the damage was primarily caused by the shock of collision; and that the damage was afterwards further increased by the failure of the claimants to examine the cargo and to recondition the barrels in London, as might and should have been done on the ship's arrival there; so as to prevent the additional loss by leakage from the seven barrels during the voyage.

The claimants contend that the damage was caused solely by the tempestuous weather; that is, by the excepted "perils of the seas;" or that under the evidence, it is at least quite as likely to have arisen from that cause as from the collision; that the tempestuous weather was quite sufficient to account for the loss; and that if it be uncertain which was the cause, and as likely to be the one cause as the other, the action, according to the rule laid down in *Clark v. Barnwell*, 12 How. 272, 280, and in *The R. D. Bibber*, 8 U. S. App. 42, 2 C. C. A. 50, 50 Fed. 841, should be dismissed.

As to the cause of the damage, I feel bound to give conclusive weight to the testimony of the first and second mates of the Guildhall, who, on their original examination on December 15th, about

three weeks after arrival in New York, both state that the damage was done by the shock of collision; that there was no other way that they could account for it. The damage, as the first officer says, "showed itself in the ends, mostly; all in the ends; all the damage in the ship was end-on damage." The barrels were stowed with ends fore and aft, and on discharge were found "slightly shifted fore and aft;" not at all from side to side.

The answer of the claimants also states that "whatever loss there was, was caused by the shock of the said collision, or from one or more of the other perils excepted in the bills of lading;" and no allusion is made in the answer to tempestuous weather as the probable cause of damage. The defense relied on was the exceptions in the bill of lading, which embraced "insufficiency in strength of packages, breakage, and any neglect or defaults of the master, mariners, or others in the service of the owners, collision, perils of the seas," etc., and provided that "the rights of the parties in relation to the carriage and delivery under the bill of lading should be governed by English law." It was not until four or five months after his original testimony that the first officer, upon re-examination on May 5th, suggested tempestuous weather and shifting of the cargo forwards by pitching, as a cause of the loss. They had two gales, he says, of about 36 and 18 hours each:

"Question. In which direction was the cargo shifted, sidewise or forward, or both ways? Answer. Forward, as if it was caused by the pitching of the ship, so you would think, and the casks had slid off their tier. You often discover that, even with boxes. They will slide off either forward or aft. You will often discover that."

On cross-examination he says he does not desire to change his former testimony; that he intended in his December examination to tell the truth; and that "his memory then would be much more clear." That the damaged barrels, however, had not slid off the tiers, is proved by the stevedore who discharged them. He says: "The stowage was good; the tiers were perfect; but there were one or two barrels damaged in each tier." "The casks were strong, heavy, oak casks, with iron bands." The second mate testified that there was no shifting of the cargo sideways. Though the weather was, doubtless, heavy and tempestuous during the two gales, the whole evidence leaves no doubt in my mind, that the primary cause of the damage was the collision, as the officers originally testified.

If the owners were in no way responsible for the negligence contributing to the collision, the terms of this bill of lading, if valid, would, therefore, absolve them and their vessel from responsibility for the damage. These stipulations are valid by the law of Rotterdam and of England. But the obligation of this steamer, as a common carrier, was to deliver her cargo safely in this country, at the port of New York. As against the consignee and owner here, she cannot commit torts on the high seas against his property with impunity, nor justify such torts, except by some valid contract, proved according to the law of the forum. By numerous decisions of the supreme court of the United States, stipulations

like these, inserted by a common carrier in a bill of lading, are, first, void as against public policy: *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 9 Sup. Ct. 469; and secondly, they are not evidence of any contract to that effect on the part of the shipper, or consignee; because unreasonable, and not having the necessary element of voluntary assent. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Railroad Co. v. Lockwood*, 17 Wall. 357, 359; *Express Co. v. Caldwell*, 21 Wall. 266; *Railroad Co. v. Stevens*, 95 U. S. 659; *The Energia*, 56 Fed. 124. Contracts against the public policy of this country cannot be enforced or upheld in our courts wheresoever made. *Lewisohn v. Steamship Co.*, 56 Fed. 602; *Oscanyan v. Arms Co.*, 103 U. S. 261. Such, also, seems to be the law of England. *Hope v. Hope*, 8 De Gex; M. & G. 731, 743; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 369. In the latter case Mr. Justice Fry said:

"It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of the country wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else."

If this be the law of England, then, under the very terms of the clause last above cited from this bill of lading, the preceding stipulations, though valid abroad, should not be enforced here, because contrary to our public policy. This principle is recognized and embodied in the first two sections of the act of congress, approved February 13, 1893; 27 Stat. 445, c. 105.

It is further necessary that any contract of exemption shall be proved, as a matter of evidence, according to the law of the forum. *Hutch. Carr.* § 45; *Hoadley v. Transportation Co.*, 115 Mass. 304. But since by the federal law of this country, as above stated, the insertion of such stipulations in the bill of lading, and the receipt of the goods under it, are not sufficient evidence of any assent to them, by the shipper or consignee, the exemptions alleged fail to be established as a contract by any sufficient legal proof. See *The Brantford City*, 29 Fed. 373, 393, 394, and cases there cited; *The Energia*, *supra*.

It is unnecessary, however, to pursue this branch of the case further; because, upon the evidence, the entire damage, whether arising directly from the collision, or afterwards from the nonrepair of the injured barrels, appears to be so connected with the negligence of the owners, that the exemptions are insufficient to absolve them, even if treated as valid, and applied according to the English law.

As to the loss subsequent to the collision, it appears that the barrels in question were stowed in hatch No. 3; that a very slight inspection, on removing the after hatches in London, would have shown that these casks were damaged and needed repair. Forward, the cargo was examined; and being found injured by the collision, about one-third of the whole cargo was discharged, warehoused, and reconditioned. No damage, however, having been suspected aft, that part of the ship where the libelants' goods were stowed was not examined. Hatches Nos. 3 and 4 were not opened. Having notice of

damage to the cargo by collision, it was at the vessel's risk that even the most superficial examination, by removal of the after hatches, was neglected. This negligence is attributable to the owners. By the stipulation it was agreed that the steamer was repaired and dispatched from London "under the supervision of her owners." The captain had been lost overboard and drowned on the day following the collision, and on arrival at London the ship's crew were mostly discharged, and the officers, as Guthrie says, "had nothing to do with the cargo there." The owners, through the dock company, took charge of overhauling and reconditioning both ship and cargo. As exceptions of responsibility for negligence are strictly construed, no negligence on the part of the owners is included, unless expressed. *Macl. Shipp.* 409, 509, 510; *Hayn v. Culliford*, 4 C. P. Div. 182; *Taylor v. Steam Co.*, L. R. 9 Q. B. 549. No such clause being found in this bill of lading, the owners are not exempted from liability for such subsequent damage as proceeded from the lack of examination and reconditioning of the damaged casks.

Still further, it seems to be impossible in this case to acquit the owners of negligence in not manning the ship with a competent master. The evidence leaves no doubt that this master was of such intemperate habits, and so addicted to intoxication, as to render him wholly unfit for his position. He was appointed, and took charge of the steamer for the first time, at Sunderland, England, the registered home port of the vessel, whence she sailed to Rotterdam for this voyage. The master was intoxicated when the vessel left Sunderland; he was drunk several days while she was loading in Rotterdam, though apparently not at the moment of leaving Rotterdam; and he was intoxicated at the time of the collision. He was on the bridge for about two and a half hours after leaving Rotterdam, and then went to his room, left the navigation to the officers, and gave no further attention to the ship. The evidence does not admit of the supposition that this drunkenness was a rare, or an accidental, or an exceptional occurrence; and the appointment of such a man to command, is presumptive negligence in the owners, since it cannot be supposed that on an appointment at the home port, reasonable inquiry would not have disclosed his unfitness. The burden of proof is on the owners to prove due diligence in this regard, and that has not been proved. The duty of the owners to exercise due diligence properly to man and equip the ship by the appointment of a competent master, is also recognized by the act above cited, (27 Stat. 445, § 2,) and from and after July 1, 1893, all stipulations seeking to lessen or to avoid that obligation are declared unlawful.

The lack of a competent master cannot be deemed immaterial. The collision took place before daylight, at about 5 o'clock in the morning. The first officer was below. It was the captain's watch, and it was his business to be either on deck or within immediate call and capable of directing the navigation in any emergency. He was neither; but intoxicated below. The navigation was in the sole charge of the second mate; and when the ship's whistle was found to be choked, so that she could not answer the *Myra's* signal, and the *Myra's* changing lights foreboded danger, while still a half or

three-quarters of a mile away, and there was instant need of a master's skill and experience, he was not in a condition to be called, but "stupefied with drink;" and when he got on deck a few moments after collision, he gave a wrong order, which the second mate was obliged to reverse. Soon after, he went to his berth, leaving the officers to bring the ship into port; and on the following day, before arrival, he fell overboard and was drowned. It was by the owner's fault that a competent master was not on board. The owners must, therefore, answer for the collision, since it cannot be shown that a competent master, during the master's watch, would not have avoided this collision. *The Pennsylvania*, 19 Wall. 125, 136; *The Bolivia*, 1 C. C. A. 221, 49 Fed. 169, 172.

Decree for the libelants, with costs, with a reference to compute the damages, if not agreed upon.

MINOR v. COMMERCIAL UNION ASSUR. CO., Limited.

(District Court, N. D. California. November 29, 1893.)

No. 10,252.

1. GENERAL AVERAGE—STATE STATUTES—WHEN CONTROLLING.

An adjustment in general average, made in California, under contracts of insurance entered into in that state, is governed by the California Civil Code, and therefore the freight must be valued at "one-half the amount due on delivery," as prescribed by section 2153, without regard to the customs of merchants or underwriters.

2. SAME—CONTRACT AS TO VALUATION—CONSTRUCTION.

An agreement that an adjustment in general average shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that such valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one-half its gross value, as in California, this will prevail.

In Admiralty. Libel by Theodore H. Minor against the Commercial Union Assurance Company, Limited, to recover on an adjustment in general average. Libel dismissed.

E. W. McGraw, for libelant.

Andros & Frank, for respondent.

MORROW, District Judge. This is an action to recover on an adjustment in general average on two policies of insurance issued by the respondent corporation on freight on certain cedar logs laden on the barkentine *Marion* for a voyage from Point Arena, Central America, to San Francisco. The libel states two causes of action.

The first cause of action is to recover the sum of \$291.49, the balance of the sum of \$723.73, for the payment of which it is averred the respondent was liable under an adjustment in general average on a policy issued by the respondent, and dated the 19th day of

August, 1889, wherein it insured in the sum of \$2,000 freight on cedar laden on the barkentine Marion on a voyage from Point Arena, Central America, to San Francisco.

The second cause of action is to recover the sum of \$37.31, the balance of the sum of \$92.64, also averred to have become due from the respondent under an adjustment in general average on a policy issued by the respondent, and dated March 7, 1890, on freight valued at \$384 on cedar logs for the same voyage mentioned in the first cause of action. This policy was issued after the average expenditure occurred, but the covering note was issued prior thereto, so that the date of the policy is immaterial.

The material facts are that on the 18th day of February, 1890, the barkentine Marion, then on the voyage from Point Arena to San Francisco, when off the "Heads," came in collision with another vessel, in consequence of which the barkentine was injured to such an extent as to render it necessary to procure the aid of the tug-boat Reliance to tow her into the port of San Francisco,—a service which was successfully performed. On the 10th day of June, 1890, J. D. Spreckels & Bros., the owners of the tug Reliance, filed, in a cause of salvage, a libel in this court against said barkentine, to recover for the above-mentioned services, and also for services rendered in pumping the water from the said vessel, the sum of \$2,487.50, alleging special contracts to pay that sum. Such proceedings were thereafter had that on the 9th day of February, 1891, this court upheld the contracts set forth in the libel, and pronounced for the amount claimed. The vessel only was proceeded against.

In delivering the opinion of the court Judge Hoffman said:

"But I do not see how this amount, which is the total compensation for saving ship and cargo, can be collected from the vessel alone, the cargo not having been libeled. * * * In general, the vessel is not liable for the proportion of salvage due by the cargo. An interlocutory order will be made referring the matter to the commissioner to ascertain and report the proportionate share of salvage due from the vessel."

No hearing was had on this reference, for the reason that the underwriters on the freight and cargo, as well as on the hull, agreed in writing among themselves—among whom was the respondent—to waive the fact that the cargo and freight had not been proceeded against, to accept as correct the said sum of \$2,487.50, and to contribute for the same in general average. The following is the agreement as it is set forth in the libel:

"We, the undersigned, do hereby consent that an adjustment of the loss on the barkentine Marion, which occurred February 18th, 1890, may be made by C. V. S. Gibbs, adjuster, on the following basis: Salvage to be paid to J. D. Spreckels & Bros., \$487.50; valuation of Marion after collision, \$3,000.00; valuation of freight, \$2,956.06; valuation of cargo consigned to Parrott & Co., \$2,970.45; valuation of cargo consigned to owners of Marion, \$150.00. This stipulation applies to general average adjustment only. We agree to abide by adjustment made on above basis."

—And thereupon C. V. S. Gibbs, the adjuster mentioned in the agreement, made up a statement in general average. By this statement, as appears from the pleadings and the evidence, he took as

the contributory value of the freight the gross amount thereof, to wit, \$2,956.06. The respondent claimed that this was erroneous, and that the contributory value of the freight, for the purpose of the average statement, should have been taken at one-half the gross amount thereof, to wit, \$1,478.03; made a restatement of the average on this basis, by which it appeared that its proportion of the average on the freight was \$487.57, which amount it paid to the libellant. This action is brought to recover \$328.80, being the difference between \$816.37, found by the adjuster to be due in general average from the respondent as underwriter on freight, taking the gross amount thereof as its contributory value, and \$487.57, paid by the respondent, taking one-half of the gross amount of the freight as its contributory value.

Upon these facts three questions were discussed by counsel on the argument:

(1) What is the general usage and custom among underwriters in foreign countries and in the United States, including those of San Francisco, in respect to the rule for ascertaining the contributory value of freight in general average?

(2) Is there any difference, either in principle or usage, in estimating this value, where an extraordinary expenditure growing out of a salvage service is to be contributed for, and any other extraordinary expenditure is to be contributed for in general average?

(3) What is the true construction of the agreement entered into in this case by the underwriters on hull, cargo, and freight, in respect to the contributory value of the latter?

In the argument of counsel the first two questions were discussed in a most able and interesting manner, and the general usage and custom of underwriters in foreign countries and in the United States cited, and the authorities reviewed. In this state, however, the provisions of the Civil Code have been extended to this subject, and the adjustment of general average losses provided for and regulated in the following sections:

Section 2152: "The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears to the value of the whole. But an adjustment made at the end of the voyage, if valid there, is valid everywhere."

Section 2153: "In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution."

Section 2155: "The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, or expense necessarily incurred, for the preservation of the ship and cargo from extraordinary perils."

The suggestion of counsel for respondent, in the note to his brief that the provisions of section 2153 are conclusive as to the rule to be observed in ascertaining the contributory value of freight in general average, seems to me to be unanswerable. The contract of insurance declared on was made in this state, as was also the adjust-

ment in general average; and both were, therefore, subject to the law which provided that in making up the average statement one-half only of the freight due should be taken as the contributory value of the freight. In the absence of any express contract to the contrary, the positive provisions of the statute cannot be controlled or varied by any custom or usage of merchants or underwriters relating to the values on which average statements are to be based. Section 2155 likewise conclusively determines the question whether the amount paid for the salvage service in this case should be contributed for in general average. That the salvage expenditure was "necessarily incurred for the preservation of the ship and cargo from extraordinary perils" is established by the facts in the case, and the judgment of this court upon the salvage claim.

The only remaining question is the proper construction of the agreement as to the contributory value of the freight. The agreement entered into by the underwriters on the hull, cargo, and freight provides "that an adjustment * * * may be made by C. V. S. Gibbs, adjuster, on the following basis." It then states the amount to be contributed for in general average, the valuation of the ship after collision, valuation of freight and valuation of cargo, and it then provides: "This stipulation applies to general average adjustment only," and concludes as follows: "We agree to abide by adjustment made on above basis." It will be observed that the adjustment is to be made not upon the enumerated values, but upon the basis of such values; in other words, the values were to be taken as the foundation upon which the adjustment should be made in accordance with the principles of law. To ascertain the contributory value of freight, it was necessary to have a basis upon which to make the calculation, and that basis is here stipulated as a fact. Upon this primary fact the law determines the contributory value of freight as one-half of its gross value.

It follows as a conclusion from these premises that the adjustment in this case was erroneous in assessing the contribution due in general average on the freight on its gross value, instead of taking one-half of such value, as provided by law; and the respondent is therefore entitled to a judgment dismissing the libel, and it is so ordered.

THE GREENVILLE.¹

THE DEVOE.

THE SCOW NO. 40.

NEW YORK & N. R. CO. v. THE GREENVILLE and THE SCOW NO. 40
and THE DEVOE.

(District Court, S. D. New York. October 30, 1893.)

1. ADMIRALTY—PRACTICE—RULE 59—ANSWERS BY VARIOUS PARTIES.

Where a new party defendant is brought into a suit by petition of an original defendant under the fifty-ninth admiralty rule, the libellant should answer the petition, the petitioner should answer the libel, and the new party should answer both libel and petition.

2. COLLISION—VESSELS MEETING IN NARROW STREAM—PROPER CHANNEL.

The tug G., with a scow astern on a short hawser, came down the Harlem river, and improperly shaped her course so as to pass through the easterly passage of the Third Avenue bridge, which was on her port hand, instead of taking the unobstructed westerly or starboard passage, whereby her scow was brought into collision with a railroad float in tow alongside the tug D., which was coming up through the easterly passage, and which, owing to the bridge, the narrow stream, and the absence of lights on the G. indicating a tow, or on the tow to show its position, was unable to do anything to avoid collision. *Held*, that the G. alone was liable.

In Admiralty. Libel for collision brought by the New York & Northern Railroad Company against the steam tug Greenville and scow No. 40, the tug Devoe being subsequently brought in on petition of the original defendants. Decree against the Greenville alone.

Carpenter & Mosher, for libellant.

Benedict & Benedict, for claimants.

BROWN, District Judge. About 7:30 o'clock in the evening of September 15, 1892, the libellant's car float No. 2, being in tow on the starboard side of the tug Devoe, while proceeding up the Harlem river, and soon after passing through the easterly passage of the draw of the Third Avenue bridge, came in collision with scow No. 40, which was coming down the river in tow of the steam tug Greenville, upon a hawser 25 or 30 feet in length. The tugs, after the exchange of a signal of two whistles, were passing starboard to starboard; and the float, striking the starboard bow of the scow, which projected probably some 10 feet beyond the line of the Greenville, ran up over the starboard bow of the scow upon her starboard bitt, which was thereby forced through the bottom of the float, and held her fast.

The original libel was filed to recover damages against the tug Greenville. On petition by the latter, under the fifty-ninth rule of the supreme court in admiralty, the Devoe was brought in as an additional defendant. The claimant of the Devoe, construing the fifty-ninth rule as requiring from the new party an answer to the libel only, did not answer the petition, but did answer the libel. As

¹ Reported by E. G. Benedict, Esq., of the New York bar.

the libel, however, made no charges of fault against the Devoe, the Devoe's answer was in effect an admission of the averments of the libel, and closed with praying that the petition, as respects the Devoe, be dismissed, though the answer did not controvert any of the statements of the petition. Thus no issue was presented by the pleadings as between the two defendant tugs; and the object of the fifty-ninth rule, as regards the pleadings, was not fulfilled.

The intent of that rule was, I think, misconstrued. After providing that a defendant, by petition, may bring in another vessel or third party, alleged to be in fault, the rule provides that if the process issued upon the petition "be duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new parties shall answer the libel," etc.

The former part of the rule provides for what the original defendant may do as petitioner. The clause requiring "the other parties to answer the petition," means all the parties to the cause other than the petitioner, including the new defendant already served with process and thereby brought into the cause as a party defendant; and the latter by the next clause is also required to answer the libel. This is the grammatical, as well as the logical, construction of the rule, by which it is intended that all the litigants shall answer the charges made against them respectively.

The Devoe was, accordingly, on application of the Greenville, directed to answer the petition. Being owned by the libellant, her answer, as respects the navigation, was in substance the same as the original libel.

Upon the merits of the controversy, which have been very strenuously contested as between the Greenville and the Devoe, upon very conflicting testimony I think that the responsibility for this collision should be placed wholly upon the Greenville; because without reason or necessity, in approaching the draw of the Third Avenue bridge, she shaped her course for the easterly passage, which was on the port hand, instead of taking the starboard or westerly passage. This was in violation of the ordinary rule of navigation; and it materially and unreasonably obstructed and endangered the passage of the Devoe and her tow through the easterly side of the draw. *The E. A. Packer*, 58 Fed. 251.

The Greenville and her tow were, as I find, very nearly in the line of the easterly passage, and probably within about 300 feet of it at the time of the collision; whereas, she ought to have been shaping her course for the westerly passage, as there was nothing to prevent her doing so, from the time when she passed through the Fourth Avenue draw. The float in tow of the Devoe was large and cumbersome; it was 200 feet long; with the Devoe alongside she took up the entire width of the easterly passageway, save 3 or 4 feet. Such tows were in the habit of passing through the draw of the bridge; and the easterly passage was their usual and proper course in going up. The Greenville, on passing through the Fourth

Avenue bridge, if she had not already heard the Devøe's signal for the Third Avenue draw to be opened, had, nevertheless, no reason to expect that the easterly passage would be free; nor if she did expect that, had she any right, except at her own risk, within such narrow limits as the Harlem river affords for navigation between the two bridges, to shape her course for the easterly passage to her own left, when the westerly passage to her right was unobstructed.

The weight of evidence is that she was not carrying two vertical lights to indicate a tow; while the scow behind her was low, not easily distinguishable in the night, extended considerably beyond the line of the Greenville, and carried no light to indicate this fact. These circumstances are sufficient to explain the collision, and to make the Greenville primarily responsible for it; and the Devøe should not be held chargeable, except upon reasonably satisfactory evidence that notwithstanding the circumstances and the difficulties of the situation, she might, by reasonable diligence and skill, have avoided the collision.

The libelant contends that the Devøe might have avoided the collision by reversing earlier, and by putting her helm hard-a-starboard earlier than she did; and that under the exchange of two whistles she was bound to do so. But the straightened limits of the navigation open to her seem to furnish a sufficient answer to this contention. She was certainly in no fault for answering the Greenville's signal with two whistles; for her best course in the situation of the Greenville, was undoubtedly to the left. Her answer meant only that she would do what she reasonably could to avoid collision; and she was only bound to take measures to avoid what she had reason to suppose was before her, viz., the Greenville alone, and not the scow behind the Greenville, which was not then distinguishable. The pleadings and the evidence leave no doubt in my mind that the Devøe did go far enough to the westward to avoid the Greenville; and that the contact with the Greenville arose after the starboard corner of the float had overrun the starboard corner of the scow, which extended considerably beyond the Greenville; and that no contact with the Greenville would have happened but for the collision with the scow astern of her. Taking the pleadings and the testimony together, there is not sufficient evidence to satisfy me that the Devøe did not go to the westward as much, and as quickly, as she could reasonably have been expected or required to do under the peculiar circumstances. For the arm of the open draw extended 100 feet above the abutment. This had to be avoided, both by the tug and by the float. The stern of the float extended about 100 feet beyond the stern of the tug; and after the stern of the float was out of the draw, there was scarcely more than 100 feet to the collision. The Devøe could not stop in the draw; nor could she safely change her heading much until the float had wholly passed through; the captain testifies that he had to look out not to hit the arm of the draw. And in the ebb tide specially, he had to avoid in backing the risk of being carried against the abutment, and the arm of the draw.

Under these circumstances, there seems to me no satisfactory evidence that the Devoe and her float were not managed with such reasonable skill as was required of her; or that she should have backed, or starboarded more, or earlier, than she did.

The position of the Greenville and her tow was evidently important in this relation. I have found that she was only about 300 feet above the bridge, not so much from the estimates stated in the direct testimony, which could not be expected to be accurate, especially in the nighttime, as upon the other circumstances in evidence. The report by the pilot of the Greenville, made shortly after the accident, is satisfactory evidence of her position at the time when the whistles were exchanged; viz., "halfway between the two bridges;" that is, about 600 feet above the Third Avenue bridge. As the Greenville was without doubt proceeding under one bell, and had the beginning of the ebb tide in her favor; and as the Devoe was also under one bell, with some tide against her; and as the latter stopped before even the tug had got through the draw, and soon backed, there is no probability that the Devoe advanced, after the exchange of whistles, more than the Greenville advanced. This would make the collision about 300 feet above the bridge, or within 100 feet after the Devoe's float had cleared it. Within such narrow limits, and hemmed in to the westward, as the Devoe and her tow were until the extended arm of the draw was passed, I cannot find any fault on their part established; and the decree, therefore, should be against the Greenville only, with costs.

THE A. CROSSMAN.¹

DONNELLY v. THE A. CROSSMAN et al.

(District Court, S. D. New York. October 31, 1893.)

COLLISION—STEAM VESSELS MEETING—LOOKOUT—DELAY IN SIGNALING—FAILURE TO REVERSE.

The steamship M., coming down the East river above the bridge, found herself embarrassed by various tows ahead and on the New York shore, and therefore kept towards the Brooklyn shore, giving two whistles to the leading tows, and passing them on her starboard hand. The tug C., going up the river astern of the above-mentioned tows, and having libellant's scow in tow on a hawser, also received two whistles from the M., when the latter was very near. Having previously given insufficient attention to the M., the C. gave one whistle, and headed more to the Brooklyn shore, but the steamship struck libellant's scow. Libellant brought suit against the C. and against the pilot of the M., the latter steamship not being found within the jurisdiction. *Held*, that the inattention of the C. to the position and course of the M., the delay in signaling on the part of both vessels, the attempt of the C. to cross the bows of the M. towards Brooklyn, and the failure of the M. to reverse when the C. was seen, all contributed to the collision, and hence, that both defendants were in fault.

In Admiralty. Libel for collision. Decree for libellant.

¹Reported by E. G. Benedict, Esq., of the New York bar.

Stewart & Macklin, for libelant.
Carpenter & Mosher, for the Crossman.
McCarthy & Berrier, for Wood.

BROWN, District Judge. On the 22d of March, 1892, about 2 P. M., the Spanish steamship Murciano, bound down the East river, when a little below Catharine street ferry, on the Brooklyn side, and probably about three or four hundred feet off the Brooklyn shore, came in collision with the libelant's scow Arthur D., which was in tow on a hawser from the steam tug A. Crossman, and about 200 feet astern of her, bound up the river, by which the libelant's boat was considerably injured. The above libel was filed to recover the damages against the tug Crossman, and against the respondent Nathan Wood, who was the pilot in charge of the Murciano, the steamer herself not being found within the jurisdiction.

The testimony in the case is conflicting, and there is much confusion as to many of the facts. The principal facts, as I find them, are as follows:

When off Jay street, Brooklyn, the pilot of the Murciano found the middle of the river on the New York side embarrassed by at least four different tows, all only a short distance below the bridge; while ahead of him, and towards the Brooklyn side, was a James street ferryboat, about to round for her New York slip just above the bridge. It was not prudent for the Murciano to keep on and go among these several tows in the middle, or on the New York side of the river, and she properly, therefore, kept towards the Brooklyn side. Above Jay street the Murciano had been going at only half speed; at Jay street she was reduced to dead slow; and off Adams street her engines were stopped, with the intent to wait above the bridge, and on the Brooklyn side, until all the tows below had passed up under the bridge, so as to avoid being carried against any of them by any sheer to starboard that the steamer would be liable to when the flood current struck his port bow if she went on. Accordingly, when off Adams street, being then about one-third the distance across from the Brooklyn shore, she gave a signal of two whistles to the leading tow, which was answered by two; and soon after she gave another signal of two whistles to the other tows, as they approached the bridge. According to the testimony for the Murciano, a third signal of two whistles was given to the Crossman, which was answered by her with one whistle. The witnesses for the Crossman testify that the signal given to her was before the signals given to the other tows; and that the steamer's signal was a signal of one whistle only. I am persuaded, however, that this is a mistake, and that the Murciano gave no signal of one whistle at or about that time. The situation and the circumstances render it wholly improbable, and the direct evidence on her part to the contrary should be accepted as correct.

The opposing testimony of the captain of the Rambler about the Crossman's whistles has little weight with me, because it is in part certainly incorrect; he was considerably below the Crossman, and there is probable confusion with other signals. In the beginning of his testimony on that subject he says: "When I first noticed the

steamship was the tugboat Archie Crossman's first whistle;" "when I heard the Crossman blow one whistle, I see the steamship," which indicates that he had not before noticed the steamer. By subsequent leading questions he was made to say that he heard the steamer give one whistle in answer to the Crossman. This also agrees in making his first notice of the steamer to have been after one whistle from the Crossman. But it is certain that the steamer gave no whistle at all in answer to the Crossman. Whatever the steamer's whistles were, they were before the Crossman's; and from his first answer, it is evident to my mind that he had not noticed the steamer until after the Crossman's one whistle, to which he refers, was given. This, moreover, was, as he says, "several minutes" before his own signal to the Murciano; he repeats this statement, in effect, several times; and this makes it probable that the Crossman's exchange of whistles which he was thinking of, was not the exchange with the steamer, but the exchange with the James slip ferryboat about a minute before. For the master of the Crossman testifies that he exchanged a signal of one whistle with that ferryboat, when the latter was a little above the bridge and heading towards the Crossman, at the time when the Crossman was off Jewell's wharf; that is, only a few hundred feet below the bridge. From the speed of the Crossman in the flood tide, it is certain that the exchange of whistles could not have been more than about one minute, probably less than a minute, before her signal of one whistle in reply was given to the Murciano, when the Crossman was under or just above the bridge. It is probable, therefore, that the exchange of one whistle, referred to by the captain of the Rambler, was the exchange with the ferryboat, though he states them in the wrong order. This explanation would also agree with pilot Wood's testimony that his signal to the Crossman was after his signals to the other three tows.

That the Murciano's headway by land was nearly, if not wholly, checked at the time of the collision, is sustained not only by the direct evidence on her behalf, but by the fact that the libellant's scow, though light, did not receive any more damage than her own speed—probably not less than eight miles an hour with the tide—would account for; and by the further fact that most of the various tows had passed or were abreast of the Murciano when the collision occurred, and the fact that under her previous headway, without backing, she had reached, at collision, a few hundred feet only below the Catharine ferry.

I am obliged also to find that the Murciano was not further from the Brooklyn shore than the Crossman was, at the time when the signals between them were exchanged; that the Crossman was then heading somewhat towards the Brooklyn shore, and that that circumstance alone brought the Murciano on her port bow; that there was no material sheer of the Murciano towards the Brooklyn shore after the signals between them; that there was not time after those signals for the Murciano to change her place in the river materially, considering her very slow motion by land, and the fact that at collision the Murciano was pointing nearly straight down the river. There is also no doubt that the scow at collision was crossing the

river at an angle of at least a point and a half towards the Brooklyn shore, following the direction of the tug, and that the latter was at least 150 feet off from the side of the steamer at collision. This furnishes conclusive proof that before the Crossman's porting in the attempt to cross the steamer's bow, she and her tow must have been further away from the Brooklyn shore than the Murciano, and that there would have been no collision had the Crossman kept her previous and proper course up the river to the westward of the steamer.

I find, therefore, that the collision was brought about, first, by the insufficient previous attention by the Crossman to the position and course of the Murciano; secondly, through too great delay in the giving of signals to each other by both; thirdly, through the attempt by the Crossman to cross the bow of the Murciano towards the Brooklyn shore without necessity; and fourthly, through the failure of the Murciano to reverse her engines when the course of the tug was seen. The evidence does not show any justification for the omission of the latter duty. On backing, the bows of the Murciano would have gone to starboard, and this change of her heading, with a little backward motion, might very likely have avoided the collision; at least, I cannot find that it might not have avoided the collision, and hence cannot say that the nonobservance of the rule was immaterial.

Both defendants must, therefore, be held in fault. Decree for the libellant against both, in the usual form, with costs, and a reference to compute the damages, if not agreed upon.

THE CONCHO.¹

THE J. J. DRISCOLL.

THE H. B. RAWSON.

REED et al. v. THE J. J. DRISCOLL, THE H. B. RAWSON, and THE CONCHO.

(District Court, S. D. New York. October 30, 1893.)

COLLISION — STEAM VESSELS MEETING — TIDE — PROPER SIDE OF CHANNEL — LOOKOUT.

A steamer rounding the Battery into the East river collided with a schooner in tow of a tug on a hawser about 150 feet long. The tow was going out with the ebb tide, and making slow progress. The tug saw the steamer and her course in season to have kept away more to the north side of the channel, which she did not attempt to do until a few minutes before the collision. The steamer did not keep a proper watch on the tow and its movements, though both were visible in season, and hence did not avoid the latter by porting, as she could easily have done. *Held*, that both were in fault.

In Admiralty. Libel for collision, brought by Peter B. Reed and others against the steamer Concho and the tugs J. J. Driscoll and H. B. Rawson. Dismissed as to the Rawson, and decree against the Concho and Driscoll.

¹ Reported by E. G. Benedict, Esq., of the New York bar.

Wing, Shoudy & Putnam, for libelants.
Robinson, Biddle & Ward and Mr. Hough, for the Driscoll.
Stewart & Macklin, for the Rawson.
Butler, Stillman & Hubbard, for the Concho.

BROWN, District Judge. About 1 p. m. of March 1, 1893, as the steamship Concho, coming in from sea, was rounding Governor's island, and proceeding up the East river in the ebb tide, she came in collision with the libelant's large four-masted schooner, William Johnson, bound down the East river, in tow of the tug Driscoll, on a hawser about 150 feet long. The stem of the steamer struck the schooner's port side, not far from amidships, at an angle of from five to six points, doing damage, for which the above libel was filed.

A few moments before collision the Rawson had come up on the port side of the schooner for the purpose of aiding in docking her in Erie basin, on her arrival there; but before she had fully made fast, the likelihood of collision was perceived, and her lines were cast off, and she dropped astern. As was conceded upon the trial, no fault is made out as respects her, and the libel against the Rawson is, therefore, dismissed.

As between the Driscoll and the Concho, the testimony is extremely conflicting, both as to the place where, and the manner in which, the collision occurred. Upon the whole evidence, I am satisfied that the collision took place after the Concho had completely rounded Governor's island, and got headed up the East river; and that it was about in mid-river, and on a line between pier 2 and Governor's island.

In behalf of the Concho it is contended, that the collision was brought about from the lack of power in the Driscoll; so that the master of the Concho was misled as to the tow's rate of motion, and did not succeed in getting astern of her, as he had shaped his course and expected to do; that the tug and tow, though heading towards the New York shore, did not draw away from before the Concho, as was expected, but drifted down upon the Concho with the ebb tide; and further, that the tug did not make seasonable efforts to keep out of the way. The time of the collision was about two hours before the end of the ebb current, which must, therefore, have been running at the rate of about two knots per hour.

From the time it took, viz., about 50 minutes, to tow the schooner from Newtown creek, about $3\frac{1}{4}$ miles, it would seem that the tug had a towing power with that schooner of less than two knots per hour through the water; so that in crossing the East river tide, her advance would be less than her drift, a condition of inefficiency no doubt calculated to mislead and endanger other vessels, unless fully appreciated and provided against.

It is doubtful whether towing a heavy tow with so slight power ought to be held reasonable and prudent navigation in the tides of the East river. It is unnecessary, however, to consider that point here. For the fact of her slow progress through the water must have been known to the tug; and in broad day it must also

have been apparent to the steamship, had any careful attention been given to the tug and the schooner. Timely observation and proper maneuvering in reference to the apparent facts, were equally incumbent upon both the tug and the steamer. I think both are to blame for not taking more timely and efficient measures to avoid each other. To the Driscoll, it was evident that the Concho was bound up the East river. Her course lay to the southward of the Driscoll. The Driscoll must have been nearly half a mile distant when the Concho was seen rounding Governor's island. The Driscoll was somewhat in the proper water of the Concho, as I find that she did not get to the north of mid-river at the time of collision. She should have hauled over to starboard more quickly and effectually than she did, so as to get into the water where she claims to have been, but where I am obliged to find she was not. She did not attempt to get more to the northward until a few minutes before collision.

The Concho, on the other hand, did not keep a proper watch on the tug and tow. No report of them was made by the lookout; and though seen from the bridge early enough, it is plain not much attention could have been given to their movements, until they were quite near. There was abundant unobstructed room for the Concho to the right; and had the tow been observed, and had the Concho ported in time, so as to pass to starboard by a reasonable margin, as she could easily have done, the collision would have been avoided; it would also have been avoided by reversing sooner, which was equally in her power.

Decree for the libelants against the Driscoll and the Concho, with costs; as to the Rawson, the libel is dismissed.

THE JOSEPHINE B.

THE ARROW.

THE MAUD.

WOODBERRY et al. v. THE JOSEPHINE B. and THE ARROW.

McALLISTER v. THE ARROW and THE MAUD.

(Circuit Court of Appeals, Second Circuit. November 13, 1893.)

1. COLLISION—RULES OF NAVIGATION.

A steam lighter, meeting a tug with a schooner in tow on a hawser 250 feet long, in Hell Gate, rounding Hallett's Point on a flood tide, has no right to presume, in the absence of a signal, that the tug will disobey the state statute which requires vessels to pass port to port, there being no controlling custom of navigation at that point in such cases authorizing a departure from the statute, and is in fault for attempting to pass starboard to starboard, without signals to that effect.

2. SAME—FAILURE OF TUG TO STOP OR SLOW.

A tug towing a schooner through Hell Gate, with a flood tide, on a hawser 250 feet long, is not in fault in failing to stop or slow on meeting a steam lighter which fails to give any signal.

3. SAME—NEGLIGENCE OF TUG.

A tug will not be held in fault for taking a single schooner through Hell Gate on a hawser 250 feet long, in the absence of any special regulation on the subject, where the testimony of experts on the subject is conflicting.

Appeals from the District Court of the United States for the Southern District of New York.

In Admiralty. Libels for collision by Horace W. Woodberry and others, owners of the schooner Maud, against the steam lighter Josephine B. and the steam tug Arrow, and by James McAllister, owner of the Josephine B., against the Arrow and the Maud. The collision happened in Hell Gate, East river, in the afternoon of June 12, 1890, between the Maud, in tow of the Arrow on a hawser, bound east, and the Josephine B. bound west. Both boats were damaged, and each libeled the other and the tug Arrow. The decrees of the district court awarded full damages in the first-named suit in favor of the Maud against the Josephine B. and the Arrow, and in the last-named suit awarded half damages in favor of the Josephine B. against the Arrow, and dismissed the libel as to the Maud. Reversed, with instructions to enter decrees against the Josephine B. in both cases.

W. W. Goodrich, for the Maud.

J. A. Hyland, for the Josephine B.

A. B. Stewart, for the Arrow.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. When the master of the lighter first sighted the tug the former was just below Negro Point, and the latter had just come around Hallett's Point, both, as he says, near the center of the channel. The Northam, a large passenger steamboat, bound for New Haven, came around Hallett's Point immediately after the Arrow and Maud, and overtook them on their starboard side, keeping well over to the Long Island shore. The Josephine B. passed to the starboard side of the Arrow and the port side of the Northam, and had barely cleared the latter, when she came in collision with the Maud, which was towing on a hawser 250 feet long. According to the statement of the master of the Josephine B., the Northam was as close to the Long Island shore as she could get, and the distance between her course and that of the tug and tow was from 100 to 200 feet. He further testified that the width of the channel there was about 900 feet. The only faults charged in the several pleadings are these:

Against the Josephine B.: (1) That she attempted to pass the tow starboard to starboard, instead of port to port; (2) that she gave no proper signal in answer to the signal of the Arrow; (3) that she did not slow, stop, or back in time to avoid the collision or take some other steps to avoid the collision.

As to the Arrow: (4) That she did not slow, stop, or back in time to avoid the collision; (5) that she did not regard the fact that the Northam was overtaking her in a place where navigation

is difficult and dangerous; (6) that she went ahead before receiving a signal from the Josephine B.; (7) that she did not keep to the north, or Ward's Island, side of the river; (8) that she undertook to tow the schooner on a hawser about 300 feet long through Hell Gate.

As to the Maud: (9) That she did not keep proper lookout; (10) that she did not steer directly after the tug; (11) that she did not starboard her wheel before collision.

The fifth of these charges of fault was not discussed upon the argument, as the rule of the supervising inspectors upon which it was predicated was not in the record, nor apparently proved before the district court.

The neglect of appellants to present to this court the chart which was in evidence in the district court makes it impossible to determine as accurately as the district judge could the exact location of the collision, the position of the vessels when sighting each other, and their subsequent movements. All the important witnesses testified with this chart before them, carefully marking upon it courses and positions, which, as the record shows, were noted by letters or symbols. Without the chart, much of their testimony is unintelligible. The statements that the collision took place at the "point marked 'B,'" or that one or other of the vessels was at the time of sighting at the points marked "W" or "J," or what not, might as well be left out of the record altogether, if they are not accompanied with the map which alone identifies them.

It is beyond dispute, however, that the Josephine B., wholly unincumbered, was moving through a comparatively narrow channel, against a very strong tide, while the Arrow, with her tow, was moving in the opposite direction, through the same channel, with the tide. They were steamboats meeting each other on waters within the jurisdiction of the state of New York, and the rule of the road required "each boat so meeting to go towards that side of the river which is to the starboard or right side of such boat." Rev. St. N. Y. pt. 1, c. 20, tit. 10, § 1. This the Josephine B. did not do. Her master admits that when he first sighted the Arrow she was 1,200 feet off. At that time he was in no immediate danger. He admits that he knew the rule of the road, and took the responsibility of departing from it, and of directing his course towards the port side of the river. He further admits that he might have gone between the Arrow and the Ward's Island shore, if he had made up his mind to do so when he first sighted her. The rocks known as the "Hog's Back" interfered with navigation close to the Ward's Island shore, but he saw the Arrow before he got near the Hog's Back, and might, for all that appears, have kept on that side of the channel, stopping his engines, or running them sufficiently slow to hold his tug against the current, till the Arrow and her tow had passed him on the side the law required them to take. Indeed, the master of the Josephine B. admits that he could have stopped. His excuse for his maneuver is that he supposed the Arrow, having a tow on such a hawser, would go well over towards Hog's Back to prevent the strong tide that sweeps across the channel from that

point from carrying such a tow upon Steep or Scaly Rocks on the Long Island side. But he had no right to assume that the Arrow would thus disobey the statute, in the absence of some controlling custom of navigation at that point, or some notification by her that she was intending to depart from the rule of the road. We agree with the district judge that there is no such preponderance of evidence in the case as will establish a custom changing the general rule, and no notification to that effect was given by the Arrow; in fact the only signal given by the latter was a single blast, indicating a maneuver in conformity to the rule. The Josephine B. was therefore clearly in fault for not obeying the rule of the road, and passing port to port.

The Arrow, going with a tide of such strength, in a channel where there were rocks and cross eddies, was in no position to stop or slow,—a circumstance which disposes of the fault charged against her in the pleadings, and numbered 4 and 6, *supra*. Nor was she in fault for not keeping to the north, or Ward's Island, side of the river, since the statute required her to keep to the starboard side; and neither a controlling custom, nor the avoidance of immediate danger, nor any notification by the Josephine B. that she proposed to disregard the rule of the road, called for any such maneuver by the Arrow. As to the alleged fault, numbered 8, above, viz. the taking of her tow through Hell Gate on a hawser of such length, we should be inclined to hold her responsible. Such a method of navigation seems unwise; but not only is there evidence that it is quite common, when a tug has a single large schooner in tow, but some of the experts testify that such is the safer course, and that the other method would render control of the tug more precarious, while not increasing materially her control of the tow. We concur with the district judge in the conclusion that the conflict between the experts is so great that, in the absence of any special regulations on the subject, the party holding the affirmative of the question has not shown towing on a hawser to be a fault, by a fair preponderance of proof.

As to the Maud, we concur with the district judge in exonerating her. That she did sheer or sag somewhat to starboard is probable, but in such a tide this was unavoidable. It was not the proximate cause of the collision.

Decree reversed, and cause transmitted to the district court, with instructions to decree, in the first case, in favor of the Maud against the Josephine B. for full damages, and to dismiss the libel against the Arrow, with costs of both courts to the Maud against the Josephine B.; and, in the second case, to dismiss the libel of the Josephine B. against both Arrow and Maud, with costs of both courts to the Arrow.

FOSDICK v. LOWELL MACHINE SHOP et al.

(Circuit Court, D. Massachusetts. December 9, 1893.)

No. 2,872.

1. LACHES—WHAT CONSTITUTES—INFRINGEMENT OF PATENT.

An action was brought by the son and administrator of a patentee 18 years after the latter's death, and 10 years after the expiration of the patent, alleging infringement during the whole term of the patent. The patentee had lived in the same town with defendant from the time of receiving the patent until his death, nine years later, and it did not appear that he ever claimed infringement. *Held*, that complainant was guilty of laches, and equity would afford him no assistance by way of discovery.

2. SAME—BILL FOR DISCOVERY.

When plaintiff is guilty of gross laches, equity will decline to interfere under a bill for discovery, the same as under a bill for relief.

In Equity. Bill of discovery in aid of an action at law brought by Sylvester W. Fosdick, administrator, against the Lowell Machine Shop and others. Heard on exceptions to the answer. Bill dismissed.

John T. Wilson, for complainant.

John Lowell and John Lowell, Jr., for defendant.

COLT, Circuit Judge. This is a bill for discovery in aid of an action at law on a patent. The case was heard on exceptions to the answer. The following facts appear by the bill: The patent was granted to John F. Fosdick, the plaintiff's intestate, on December 23, 1862, and the patentee died 9 years afterwards, in 1871. In 1889, 18 years after the patentee's death, and 10 years after the expiration of the patent, the plaintiff, a son of the patentee, took out letters of administration on his father's estate, and at the May term, 1890, brought an action at law in this court against the defendant corporation for infringement of said patent during the term of 17 years for which it was granted, and claiming actual damages in the sum of \$1,000,000. It does not appear that the patentee made any claim for damages during his lifetime, or that the plaintiff made any claim prior to the commencement of suit, and no sufficient reason is assigned why the bringing of suit was so long delayed. It appears that the patentee, during his lifetime, resided in Lowell, where the defendant corporation has its place of business, and that the plaintiff is a citizen of Boston.

On this state of facts, I do not think that the aid of a court of equity should be invoked in favor of the plaintiff, but that such aid should be refused, by reason of gross laches and negligence in prosecuting this claim. It is a well-settled principle that a court of equity will not give its assistance to enforce a right, however clear it may have once been, when a long time has elapsed without action by the owner of the right. Hence, in matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, growing out of the difficulties of doing

entire justice when the original transactions have become obscure by lapse of time, and the evidence may be lost. Story, Eq. Jur. § 529; *Badger v. Badger*, 2 Cliff. 137; *Id.*, 2 Wall. 87. It seems to me that this rule applies to this case with much force.

I am aware that this is a bill for discovery, and not a bill for relief. By the modern practice, a court of equity will entertain a demurrer, plea, or answer to a bill of discovery, which relies on a specific defense at law. Langdell, Eq. Pl. § 176; *Smith v. Fox*, 6 Hare, 386. I can see no good reason why a court of equity should not decline to interfere in the case of a bill for discovery, the same as in the case of a bill for relief, where the plaintiff has been guilty of gross laches and long acquiescence. In no case should the aid of a court of equity be invoked in favor of a stale claim.

Bill dismissed.

BALL & SOCKET FASTENER CO. v. BALL GLOVE FASTENING CO.¹

(Circuit Court of Appeals, First Circuit. October 27, 1893.)

No. 57.

1. SPECIFIC PERFORMANCE—NATURE OF CONTRACT—PATENTS FOR INVENTIONS.

Where the parties to litigation respecting rival patents make a compromise contract, whereby one withdraws from the business, turns over to the other all his tools, and grants him an exclusive license, the latter to issue to the trade samples of the goods, and offer them to the public in the same manner as other goods of its own manufacture, and carry on the business for the common interest, this creates an agency and fiduciary relations, and a bill for specific performance will lie to enforce it.

2. SAME—CONSTRUCTION OF CONTRACT.

Such a contract assumes that the patents referred to in it are valid, according to the true construction of their claims; and plaintiff's patents cannot, for the purposes of the contract, be limited or affected by the issuance of a patent to defendant on a prior application pending at the time of the contract.

3. SAME—LIMITATION OF CLAIMS—REJECTION AND AMENDMENT.

Application of the rule that the amendment of a rejected broad claim by the insertion of specific details restricts the claim, at least with reference to the particulars named, to the precise details in the precise forms described, although a different form might be a mere mechanical equivalent.

4. SAME—INFRINGEMENT—EQUIVALENTS.

Where the essence of a patent is the mere fashion of detailed construction in glove fasteners, a socket with yielding sides to receive a ball cannot be the equivalent of an eyelet, through which the ball or button penetrates, and protrudes on the further side.

5. SAME—GLOVE FASTENERS.

The second claim of patent No. 290,067, and the fourth claim of No. 306,021, issued to Edwin J. Kraetzer, December 11, 1883, and September 30, 1884, respectively, for improvements in glove fasteners, are restricted by the proceedings in the patent office to the precise details described. 38 Fed. Rep. 309, 39 Fed. Rep. 790, and 53 Fed. Rep. 245, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill for relief in respect to a contract relating to certain patents for improvements in glove fasteners. There was a

¹ Rehearing granted.

decree for complainant in the court below. See 36 Fed. Rep. 309, 39 Fed. Rep. 790, and 53 Fed. Rep. 245. Respondent appeals. Reversed.

The contract in question was as follows:

This agreement, made this twenty-first day of March, A. D. 1885, by and between the Ball and Socket Fastener Company of Nashua, N. H., a corporation duly organized under the laws of the state of New Hampshire, party of the first part, the Ball Glove Fastening Company, of Boston, Mass., a corporation duly organized under the laws of the state of Massachusetts, party of the second part, and Henry M. Rowe, of Winthrop, William F. Griffin, of Boston, Edwin J. Kraetzer, of Cambridge, George R. Gay, of Cambridge, Sylvester S. Crosby, of Cambridge, and Alfred T. Turner, of Cambridge, all in the state of Massachusetts, party of the third part, witnesseth: That whereas, the party of the first part owns and controls certain letters patent granted to William S. Richardson, and is engaged in the business of making what are known as "ball and socket fasteners;" and whereas, the said party of the second part is proprietor of certain letters patent dated September 30, 1884, numbered 306,021, and other letters patent dated July 17, 1883, numbered 281,376, and other letters patent dated December 11, 1883, numbered 290,067, all granted to Edwin J. Kraetzer for improvement in glove fastener, and also owns and controls two English patents, one dated January 22, 1884, No. 1,861, and the other dated August 15, 1884, No. 11,319, or however otherwise the two English patents may be numbered, the same being taken as a communication, and for said invention of said Kraetzer, as patented in the United States; and whereas, the party of the second part began the manufacture of glove fasteners under said Kraetzer patent, and the party of the first part brought suit in the circuit court of the United States for the first circuit and district of Massachusetts against the parties herein named as parties of the third part, being stockholders of the said Ball Glove Fastening Company, which suit is still pending and undetermined; and whereas, the parties hereto are desirous of adjusting their controversies, and of making a business arrangement for the manufacture of said Kraetzer fastenings for common advantage: It is hereby understood and agreed by and between the parties of the first and second parts that the party of the first part is hereby made the exclusive licensee, under the said Kraetzer patent for the United States, and under the said English letters patent, to manufacture and sell glove fastenings, or other fastenings embodying the contrivances and improvements shown in the said Kraetzer letters patent, and to that end agree to transfer to the said party of the first part the dies and tools already made for the manufacture of said articles. And the party of the first part hereby agrees to issue to trade samples of the said goods, and offer the same in the same manner that it now issues or offers, or shall hereafter issue or offer, other goods of its own manufacture. It being understood that the present method of exhibiting ball and socket fasteners to the trade is to put samples of the several sorts upon cards for the selection of customers, each sort of fastening having a particular number. The price to be put upon said Kraetzer fasteners by the party of the first part shall not exceed the prices put upon the ball and socket fastenings as now known, and shall not exceed similar goods for similar uses made by the Ball and Socket Fastener Company. The object of this article being that the Kraetzer and Richardson fasteners shall be offered by the Ball and Socket Fastener Company to the trade on equal footing and terms, and that the public may select between them on their merits. And similar rates of discount for similar quantities shall be allowed on said Kraetzer fastenings as on the Richardson. And for each and every gross of the Kraetzer fastenings sold by said Ball and Socket Fastener Company the party of the first part shall account for Kraetzer fasteners to the party of the second part once in six months, to include the last days of June and December, for all sales made in the preceding six months, rendering the account within the first fifteen days of July and January, respectively, and will pay for each and every gross sold within the period of the account at the rate of twenty cents a gross as royalty on said Kraetzer

fastenings. This agreement or license is to continue during the life of the said patents, both in the United States and in England. The party of the second part is to pay the English patents fees as they accrue from time to time. The party of the first part is to prosecute infringements of their patents at their discretion, and the party of the second part is to prosecute infringements of its patents at its discretion: provided, however, that if the party of the first part thinks it of paramount importance that an infringement should be prosecuted, which the party of the second part does not consider should be, the party of the first part may prosecute infringements of the Kraetzer patents in the name of, and for the advantage of, the party of the second part, on assuming the cost of prosecution, and indemnifying the party of the second part against loss for damage therefor. And it is further understood and agreed by and between the parties of the first and third parts that a stipulation shall be made for the discontinuance of the suit now pending, without costs or prejudice, and that the reason shall be stated in said stipulation that the complainants have compromised the contention, and undertaken the manufacture of the goods alleged to be infringed for mutual benefit of the parties interested. Executed and delivered by the treasurers of the respective corporations on the day and year first above written.

The Ball & Socket Fastener Co.

By Wm. S. Richardson, Treas.

Ball Glove Fastening Co.

By W. F. Griffin, Treas.

Henry M. Rowe.

William F. Griffin.

George R. Gay.

[Seal.]

In presence of (corrections being first made as noted by my initials in the margin) Thomas Wm. Clarke.

Whereas, since the following agreement of March 21, 1885, was signed, an interference has been declared between the said Kraetzer patent, No. 290,067, and an application of W. S. Richardson, of which the Ball and Socket Fastener Company is or will be the assignee, it is hereby understood and agreed by the said Richardson and by the Ball and Socket Fastener Company that, in case the said interference is decided in favor of said Richardson, such decision shall in no way prevent the carrying out in good faith of the aforesaid agreement of March 21, 1885. Executed and delivered this eighth day of April, 1885.

Wm. S. Richardson,

The Ball and Socket Fastener Co.

By W. S. Richardson, Treasurer.

In presence of W. F. Griffin.

Cousten Browne and Thomas W. Clarke, for appellant.

John R. Bennett and William B. H. Dowse, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The appellant (respondent below) contends that there is no jurisdiction in equity over the subject-matter of this bill. If it is a bill for infringement, as the complainant below seems to regard it, the parties are properly made, and the jurisdiction is, of course, not to be questioned. If it is to be taken as a bill for a specific enforcement of rights under the contract set up in it, the court is yet of the clear opinion that for that purpose we have here the proper parties, and full jurisdiction in equity over the merits of the controversy.

The prayers of the bill are sufficient in either aspect, as they include discovery and an account, a decree for payment, injunctions

to prevent the violation of the provisions of the agreement, and "such other relief as the equity of the case may require." So far as the relief desired is a mere account of stipulated royalties, counsel are not able to point out any decision of the supreme court clearly sustaining the bill. On the other hand, it is claimed that *Root v. Railway Co.*, 105 U. S. 189, defeats jurisdiction in the case at bar. But that was a case of a mere tortious infringement of a patent expired before the bill was brought, while this suit, in one view, relates to patents still in life, and, in another, to agreed royalties.

The contract stipulated that the respondent below should render semiannual accounts; and as it was exclusively to conduct the manufacture and sale of the goods in question, and as the knowledge of the facts necessary to make an account was therefore peculiarly, and, indeed, wholly, its own, there is a strong equity in favor of enforcing specifically this portion of the agreement. But the matter before the court is one especially the subject of equity jurisdiction and relief. This will appear from an examination of the terms of the contract between the parties. This stated that they were desirous of making a business arrangement for the manufacture of the Kraetzer fasteners for common advantage. It made the respondent below the exclusive licensee under the Kraetzer patents, so that the complainant below withdrew from all active part whatsoever. It provided that the complainant should transfer to the respondent the dies and tools, and that the latter should issue to the trade samples of the goods, and offer the same in the same manner as other goods of its own manufacture. It stated that its object was that the Kraetzer and Richardson fasteners should be offered by the respondent to the trade on equal footing and terms, so that the public might select between them on their merits; also, it provided that, in disposing of the litigation then existing, it should be stated that a compromise had been made for the mutual benefit of the parties interested. It was agreed that the contract should continue during the life of the various patents referred to in it.

We find, then, an arrangement by which, for a period of years, the complainant below unreservedly intrusted itself, its interests, and property related to the subject-matter of this suit, to the hands of the respondent below; and the latter undertook to carry on the resultant enterprise for the common interest. Perhaps this did not create a trust, in the technical sense of the word; but it did create a joint interest, an agency, and fiduciary relations, with all the duties resting on the respondent which the word "fiduciary" implies. The adjustment and protection of rights and interests growing out of such joint and fiduciary relations are the peculiar privileges of equity jurisprudence, by the consent of all the authorities.

Having determined that the circuit court had jurisdiction to pass on the merits of the case at bar, it remains to be considered what they are. First of all, it must be admitted that a contract of this character, establishing fiduciary relations, must be liberally con-

strued to maintain its purpose, secure good faith in its execution, and prevent unjust evasions. Nevertheless, if a complainant has mistaken his remedy, or if his bill is not properly framed to meet truly the breach of the agreement, if there is a breach, the court ought not to attempt to make the law elastic, beyond what the law permits, even though the result may temporarily delay justice.

The appellee, while at times insisting that the case presents only, or mainly, questions of infringement, at other times urges upon the court that the specified royalty was to be paid on all fasteners "embodying the contrivances and improvements shown in the said Kraetzer letters patent." What we put in quotation marks is, indeed, an extract from the contract in controversy; but the appellee apparently dwells on the word "shown," as though all contrivances and improvements exhibited by the Kraetzer patents were to be regarded by the court, rather than only those which are technically claimed in them. But the bill was not framed to raise this proposition. While its allegations are limited to the inventions which were patented, and in accordance therewith, the decrees in the circuit court were specifically based upon the second claim of Kraetzer's first patent, and the fourth claim of his second. Therefore, we are to deal, not with what is shown in either the Richardson or Kraetzer patents, in any general sense of the word, but with what was covered by the respective claims thereof, and we are to deal with them on the principles which we will now set out:

The question of the validity of the Kraetzer patents stands, so far as this case is concerned, upon the agreement between the parties, which, for all present purposes, assumes that both the Kraetzer and Richardson patents are valid. We start, therefore, with the proposition that all the patents referred to in the agreement are to be taken to be valid according to their respective claims. We also start with the further proposition that the Kraetzer patents are in no way affected, for the purposes of this cause, by the one issued to Richardson, September 8, 1885, No. 325,699, because that was obtained on his application shown in the indorsement on the contract, and was thereby provided for. The case is to stand as though it had never been applied for or issued, and as though none of its claims had ever been conceived by his brain. Much testimony will be found in the record touching this indorsement; but it is not necessary to dwell on it, as its effect is too clear to be misunderstood. Indeed, independently of it, the result would be the same. To permit any undisclosed improvements controlled by either party to be set up for the purpose of limiting the rights of the other under the contract at bar, and especially for diminishing the apparent extent or validity of its patents, would effect an unjust evasion of the stipulated terms. To sum up: So far as this suit is concerned, the various patents referred to in the agreement are to be held valid, and the claims in each to be fully sustained according to their fair intent, as such claims are usually construed under the rules of the patent laws; and, so far as the validity and extent of the claims are concerned, neither is to be diminished by any prior patents or inventions, known or unknown, disclosed or undisclosed, although

they may come in, to some extent, for the purposes which we will state.

The record contains very much touching the state of the art, and prior patents. From what we have already said, it is plain that they cannot be introduced here for the purpose of invalidating any of the patents covered by the contract, or any portion of any claim of any of such patents. Nevertheless, they, as well as the file wrappers and their contents, are appropriate to be considered for ascertaining the true construction of the various patents involved, and especially for determining whether, according to such construction, the improvements were of a primary or secondary character, and how far the combinations admit of the doctrine of equivalents. On this topic, it is to be borne in mind that, in general, for the purposes of a bill of this character, while the validity of the several claims of the various patents cannot be attacked, their true construction, assuming them to be valid, must be ascertained, as in cases of bills in equity for damages and injunctions against strangers infringing.

Coming, therefore, to the fasteners of the later Kraetzer patent, No. 306,021, which clearly differ, at least in style, from the Richardson fasteners, in that the former present the appearance of a button, the question arises whether the patent is of such a primary character that it is to be construed broadly, or whether it is to be held narrowly, not merely to the combination, but even to the precise form of combination shown in the specification and claims. With reference to this, we examine only claim 4, as that is the only one brought to our attention, or to the attention of the circuit court, and is the one upon which the decree of that court was expressly based. Looking at the general state of the art, this claim is, presumably, not to be construed to cover every fastener having a hood, or the appearance of a button. This is plain from the Mead patent, No. 227,440, issued in 1880, and several other patents contained in the record, and which need not be stated in detail. Nevertheless, notwithstanding this presumption, and for the reasons already stated, if the claim is, in fact, so broad as to cover every fastener with a hood having the appearance of a button, the patent, for the purposes of this case, must be construed accordingly, although its issue was inadvertent, and although, as against strangers infringing, invalid. But, for the purpose of ascertaining its true construction, we turn to the file wrapper and contents. It there appears that the patent, as originally applied for, was rejected on account of the Schloss English patent of 1870, frequently referred to in the record. It was thereupon amended by inserting in the fourth claim the words, "its base ring as described, and," so as to read, "and with a separate hood having two ears extending from its base ring as described, and between said flanges or jaws." The reasons for this amendment need not be stated in detail, but they may be inferred from the addition to the specifications which relates to the Schloss patent. This amendment must be held to be a conclusive admission that claim 4 does

not cover a primary improvement, and must be limited to a combination having ears extending from the base ring precisely as described, although ears extending from another point might be a mechanical equivalent. After this amendment, the application was again rejected, on the ground that it was anticipated by the British patent of 1877, No. 809, issued to Bayer, and also frequently spoken of in the record. In consequence of this, the claim was again amended by inserting the word "entire" before "ring," so as to read, "an entire ring, provided with two elastic flanges or jaws," and the specifications were amended by inserting what now appears touching this Bayer patent.

The rule touching the effect of such amendments has been several times laid down by the supreme court in patent causes, although it is only a peculiar application of the general principles of law relative to the interpretation of instruments. In the case at bar, the amendments relate to the very pith and marrow of the alleged improvement, touch directly the question of novelty, and were understandingly and deliberately assented to; so that the rule of interpretation referred to undoubtedly applies. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 5 Sup. Ct. Rep. 475; *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. Rep. 399; and *Watson v. Railway Co.*, 132 U. S. 161, 165, 10 Sup. Ct. Rep. 45, are striking instances of its application under circumstances closely analogous to those of the case at bar.

It is plain, therefore, that the amendments stated compel such a construction of this claim as, at least with reference to the two particulars in which amended, narrows it down to precise details in the precise forms described. While, with reference to other elements, there may be some room for objections to equivalents, with reference to these two particulars there is, essentially, none. The attention of the learned judge of the circuit court could not have been properly called to the file wrapper and its contents, and to the amendments which we have explained. Kraetzer is estopped from claiming that "ears," or what will answer their purpose, extending from anything except the base of the hood, are the equivalent of his devices. Even if the whole substance of his inventions, in other particulars, was found in the fasteners manufactured by the respondent below, yet the bill could not be sustained, so long as the amendments to claim 4 touching "an entire ring," and the extension of the "two ears from the base ring of the hood," are not covered. In the Kraetzer fasteners, the two ears are upset over the ring located on the inside of the fabric, for the purpose of combining the whole device together, and securing it to the glove. As stated in the claim, these ears extend from the base ring of the hood, and nowhere penetrate any part of it. In the Mead fasteners, of which complaint is made in this suit, the ears which thus bind the different parts to each other penetrate the dome of the hood from without, and are upset within it, before reaching any part of its base. In this particular, the Kraetzer fasteners, as covered by claim 4 of his later pat-

ent,—giving this claim its true construction, in view of the file wrapper and its contents,—are not imitated in the Mead fasteners. As the claim comes down to the merest mechanical details, a change in such details is not a colorable departure, but a substantial one, so far as this patent is concerned. *Duff v. Pump Co.*, 107 U. S. 636, 639, 2 Sup. Ct. Rep. 487.

It is true that the complainant below claims that the very principle of the invention is "the addition of a hood to the eyelet, or fastening device, of the buttonhole member, to give it a button-like appearance." We have seen it is not possible to maintain this proposition, though, if it were, our conclusions would probably be in conformity with the views of the circuit court.

The proposition of the complainant below with reference to the second claim of the earlier Kraetzer patent, which claim is the only other basis of contention brought to the notice of the court, is stated as follows:

"The buttonhole member [meaning the Mead device] is a spring-flanged eyelet formed of two parts,—a ring or base provided with two spring flanges, and an eyelet for securing the spring flanges to the flap of the glove. The spring-flanged eyelet thus formed may very properly be said to be an exact counterpart of the Kraetzer spring-flanged eyelet. It is immaterial how you designate the parts, since the fact remains that the parts are substantially identical."

In view of the complicated history of the second claim of the earlier Kraetzer patent, as shown by the file wrapper and its contents, the court feels sensibly the omission from the application for it of any explanation of the nature of the invention which it covers, especially as there is also a like lack in the proofs. The patent contains nothing touching this particular, except the following:

"It [meaning the invention] consists in a novel construction and arrangement of the parts as hereinafter more fully set forth and claimed, by which a cheaper and more effective device of this character is produced than is now in ordinary use."

It is claimed that no such explanation is needed, because the question of identity, as between the Kraetzer patents and the Mead construction, may be determined by the court upon comparison. But whether or not this is practicable depends on the further question, whether the device is so simple that one not skilled in the art can be assumed to understand it, and probably, in the present case, to understand, also, the somewhat complicated methods of manufacturing the various fasteners presented in this record, with reference to the facility and cheapness of production. It is true that by a practice which seems to have somewhat gained favor in the courts, and which appears to be preferred by some patent solicitors, a description is held sufficient, if from it, aided by the drawings, the model, and the other parts of the application, the invention can be fully ascertained. *Rob. Pat. § 489, note 1.* In other words, the position seems to be that what can be made certain by any reasonable amount of skill is of itself certain.

While, however, it is not necessary, for the present case, to consider how far a description is sufficient which gives only the de-

tails of the article claimed, without stating the pith of what the novelty consists of, or how far the invention extends, we are compelled to repeat that the absence of this, in the case at bar, alike in the specifications and in the proofs, in connection with the complicated history of this second claim, and the entire lack of explanation of the various steps taken in perfecting it, has added to the difficulty which the court has had in arriving at its conclusions. It appears from the brief of the appellee that there was used by it in the circuit court an affidavit of Mead, apparently somewhat explaining the nature of the various inventions, and which may have materially affected the conclusions of that court; but we do not find this in the proofs submitted to us.

An examination of the record discloses that this second claim is merely for a combination of the narrowest and most precise character. Moreover, while it is true, as said by complainant, that there might be such a device as a proper eyelet with a hood added, and while the later Kraetzer patent comes quite near this, yet, for the purposes of the fasteners in controversy, the socket with yielding sides, which in the Richardson patents antedates Kraetzer, and appears again in the Mead device, cannot be the equivalent of an eyelet,—a thing in such common and universal use,—whether with or without Kraetzer's flanges. To maintain otherwise, where the essence is in the mere fashion of detailed construction, is contrary to the common sense of mankind. The eyelet answers the purpose of a buttonhole, the metallic sides being simply for protection and support,—the ball, button, or whatever it may be, penetrating, and, as expressly stated in Kraetzer's specifications, protruding on the outer side,—while the socket, as used in the devices now before the court, answers throughout as a cap, and as a crude ball and socket joint. Pending the numerous efforts of Kraetzer to obtain this patent, and in referring to the Richardson patents, No. 260,050 and No. 276,714, he said in his letter to the commissioner of patents of October 1, 1883, that they "show no eyelets," yet each of them had the socket with yielding flanges. While, under other circumstances than those at bar, and with reference to other devices than those which we are now considering, an eyelet and a socket may prove to be equivalents, yet, for the present uses, there is an essential distinction between them.

It is not necessary to follow with entire detail the fortunes of Kraetzer's application for this earlier patent. Originally, it contained six claims, one of them, as already stated, being specifically for his alleged eyelet, which was afterwards abandoned. His first application was rejected on the ground that it was anticipated by the Richardson patents No. 260,050 and No. 276,714. His claims were amended, and a patent again refused for apparently the same reason. Finally, what is now the second claim was stated as one for a combination of a ball catch adapted for attachment to a glove, and an eyelet, with certain details, which were described. This was again rejected as anticipated by the Richardson patents, already referred to. It did not describe the particular method of attaching the ball catch, and, being thereafter amended so as

to describe this in the precise terms which now appear, it was at last allowed. Thus, on the principle of the cases which we have already cited, Kraetzer's patent came down to minute details of an inner plate, an outer plate, a stud, a shank, and a ball, and an eyelet, without any right to assert originality as to the elements which we have named, or any of them, or even as to the combination of those elements, except with the minute details specified; and no contrivance which uses the socket can be held as infringing his second claim, of which the details of an eyelet are confessed on the patent office records to form a part.

The complainant below urges upon the court that the whole transaction was an intentional fraud on the part of the respondent below, and that developments subsequent to the execution of the contract in question show an entire want of good faith in its negotiation. The bill, however, is not so framed as to call upon the court to investigate propositions of this character. It does not follow that the complainant is without remedy. If the Mead device was more desirable than that of the complainant, it, perhaps, ought to supersede it; but if, on the other hand, the Mead fasteners are not superior, and especially if they are inferior, or have been adopted and pressed upon the market by the respondent solely for the purpose of evading payment of royalties to the complainant, or otherwise under such circumstances as to charge the former with profits on account of the fiduciary relationship already described, it is to be presumed that the latter has ample remedy on the contract at law or in equity. These matters, however, are not now for consideration, as the bill rests entirely on the claim that respondent below has produced the very article covered by Kraetzer's patents, and we suggest them only in order that the parties may see we do not go beyond what the precise issues now before us call for.

Decree of the circuit court reversed; case remanded to that court, with instructions to dismiss the bill, with costs.

BOOK et al. v. JUSTICE MIN. CO.

(Circuit Court, D. Nevada. November 27, 1893.)

1. EQUITY JURISDICTION—WAIVER OF OBJECTIONS THERETO.

One who files a bill asking equitable relief, procures the appointment of an examiner, takes testimony before him, submits the same to the court, and argues the case on the theory that it is an equity suit, thereby waives his right, if he ever had any, to a jury trial; and it is too late, when the issues have been found against him, to claim that the suit was really an action at law.

2. SAME—FEDERAL COURTS—STATE STATUTES.

A suit by a person in possession of real estate to determine an adverse claim under the Nevada statute (Gen. St. § 3278) is an equity suit, and cognizable as such in the federal courts.

3. EQUITY PLEADING—ANSWER AND CROSS BILL—WAIVER OF OBJECTIONS.

If matters which should be included in a cross bill are set up in the answer, and no objection is made until the issues are determined upon evidence introduced by both parties, this is a waiver of the technical objection, and the court may grant affirmative relief upon the answer, as if it were a cross bill.

In Equity. Suit by William Book and W. H. Blowey against the Justice Mining Company to determine an adverse claim. On motion for a new trial. Denied.

Robert M. Clarke, for complainants.

W. E. F. Deal, for defendant.

HAWLEY, District Judge, (orally.) Complainants move the court for a new trial; among other things, upon the ground that the case was an action at law, and not a suit in equity, and should have been tried by a jury. Complainants' position relative to the character of this suit is, to say the least, very inconsistent. It seems to be: (1) That, if they had won, it would have been an equity suit, and they would have been entitled to a decree; but, having lost the case upon its merits, it is an action at law, and they are entitled to a trial by jury. (2) The court had jurisdiction to enter a decree in their favor, but it had no jurisdiction to enter a decree in favor of the defendant. (3) If they had won, they would have won everything; but, having lost, they have lost nothing. It is admitted that the bill was filed under the belief that equity was the proper remedy; but counsel for complainants claims that he was mistaken as to the proper form of the action. The bill prayed for equitable relief as follows:

"That said defendant be required to appear and answer this complaint, and show to the court its pretended title, interest, and estate, and that upon the final hearing your orators be adjudged and decreed to be the owners of said Peerless mining claim and location, and that defendant's claim thereto be adjudged and decreed to be invalid, and that defendant be perpetually enjoined from claiming or asserting any title, interest, or estate in and to said Peerless mining claim and location."

The defendant answered, asserting title to the property, fully setting up its adverse claim, and prayed for affirmative relief, as follows:

"This defendant further humbly prays that this defendant be adjudged and decreed to be the owner of said West Justice mining claim, and of said James G. Blaine mining claim, as hereinbefore described, and that complainants' claim to said portions thereof hereinbefore described be adjudged and decreed to be invalid, and that said complainants be perpetually enjoined from claiming or asserting any title, interest, or estate in or to said West Justice mining claim and location, or in or to said James G. Blaine mining claim and location, or any part thereof, and that an injunction be issued from this honorable court, enjoining and restraining said complainants, or either of them, their, or either of their, agents, attorneys, or employes, from working or digging in or upon either of said mining claims and premises, and from extracting and digging or carrying away any of the rock, earth, or ore in either of said mining claims, or from interfering in any manner therewith, and, upon the final hearing, that said injunctions be made perpetual."

When issue was joined, complainants moved for the appointment of an examiner to take testimony in the case, and an examiner was so appointed by consent of the parties to this suit. The testimony was taken before the examiner, and submitted to the court. The case was tried before the court, and decided, as an equity suit, without objection being made by either party as to the form of the action.

The parties having joined issue, each asking for equitable relief, and having voluntarily asked for the appointment of an examiner, and taken testimony before him, and submitted the same to the court, and argued the case upon the theory that it was an equity suit, have waived their right, if any they ever had, to have a jury, and it is now too late to object to the form of the action. *Kelly v. Smith*, 1 Blatchf. 290; *Magee v. Magee*, 51 Ill. 503; *Railway Co. v. Ward*, (Ill. Sup.) 18 N. E. 828; *Crump v. Ingersoll*, 47 Minn. 182, 49 N. W. 739; *Freeland v. Wright*, 154 Mass. 493, 28 N. E. 678; *Landregan v. Peppin*, 94 Cal. 467, 29 Pac. 771; *Evans v. Goodwin*, 132 Pa. St. 136, 19 Atl. 49; *Levi v. Evans*, 57 Fed. 681; *Reynes v. Dumont*, 130 U. S. 395, 9 Sup. Ct. 486; 1 Daniell, Ch. Pr. 555. In *Landregan v. Peppin*, which was an action brought under the provisions of section 738 of the Code of Civil Procedure of California for the purpose of quieting title to certain quartz mines, the complaint was in the usual form, and the answer denied the allegations thereof, except as to the adverse claim, and alleged that at, and for a long time prior to, the commencement of the action, the defendant was the owner of, in the possession of, and entitled to the possession of, all of said real estate. The court found all the allegations of the complaint to be true, and a decree was entered, quieting plaintiff's title. After the entry of the decree, plaintiff moved the court for an order to the sheriff that he be placed in possession of the property. The defendant opposed the motion. The court, in discussing the question, said:

"It will be noticed that section 738 of the Code of Civil Procedure, which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of a title in fee to the smallest leasehold; and, unquestionably, it is the duty of the defendant to set out his interest, whatever it may be, when called upon, under this section of the Code. If he has an adverse claim which will support an issue at law, upon which he desires a jury trial, it is his duty to set out that claim, make that issue, and demand a jury trial. In this action it is not necessary to determine whether or not the pleadings were sufficient to entitle either party to a jury as to any of the issues created. If not sufficient, the defendant should have made them so, if his adverse claims of interest justified such a course; and, not having done so, he cannot now be heard to complain that he was deprived of his right to a jury trial."

In *Levi v. Evans*, where the suit was first brought as an action at law, upon common counts for money had and received, additional pleadings were filed in the state court, without objection, stating the grounds for equitable relief. The cause was thereafter removed to the United States circuit court, and was tried as an equity suit, without objection. The circuit court of appeals said:

"If additional and amended pleadings, exhibiting causes of action of an equitable nature, could not properly be filed in an action at law, all objection to such course of procedure was expressly waived by the appellant, and he voluntarily appeared to these equitable suits, pursuant to a stipulation entered into by him with the appellees for a valuable consideration. Good faith and fair dealing would now preclude the appellant from profiting by his objection. But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law."

In *Freeland v. Wright*, which was a bill in equity brought to redeem a mortgage of real estate, the court said:

"If an application to frame issues for a jury would have been granted, if seasonably made, the plaintiff waived her right by allowing a reference to a master, and a hearing before him, before asking for a jury trial. *Parker v. Nickerson*, 137 Mass. 487. It would be unreasonable to permit a party to go to trial before a master, and take his chances of a favorable report, and then, if dissatisfied with the result, have another trial before a jury, and thereby put the other party to unnecessary expense and trouble."

This view of the case is absolutely conclusive of the question. But, owing to the positions assumed by complainants, it is deemed proper to add that, in my opinion, counsel for complainants was not mistaken as to the proper form of the action. It is an equity suit. The statutes of Nevada provide that:

"An action may be brought by any person in possession, by himself, or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." Gen. St. Nev. § 3278.

An action brought under this statute, by a party in possession, to quiet the title to a mining claim, is an equity suit, and may be tried and disposed of as such. *Low v. Staples*, 2 Nev. 209; *Mining Co. v. Marsano*, 10 Nev. 370; *Landregan v. Peppin*, supra; *Balmear v. Otis*, 4 Dill. 558; *Clark v. Smith*, 13 Pet. 195; *Wickliffe v. Owings*, 17 How. 48; *Holland v. Challen*, 110 U. S. 24, 3 Sup. Ct. 495; 1 *Post. Fed. Pr.* § 7; 3 *Pom. Eq. Jur.* § 1396. Foster, in enumerating the state laws creating new rights which can be enforced by federal courts of equity, specifies one authorizing a person in possession of land to sustain a bill to determine and quiet the title to the same. In *Balmear v. Otis*, which was an action brought under the Iowa statute to quiet title, the court said:

"A proceeding under the Iowa statute to quiet title, is, in its essence, an equity suit. In the federal courts, whether a particular case is one at law or equity depends upon the case stated in the petition. If the case there made shows a mere contest of legal titles, and the defendant is in possession, the remedy is at law. If the plaintiff is in possession, or if neither party is in possession, and the petition or bill shows that equitable relief is necessary or proper, the jurisdiction is in equity."

But complainants claim that defendant, not having filed a cross bill, is not entitled to any affirmative relief. If this position was conceded to be correct, and applicable to the facts of this case, it would only result in a modification of the decree so as simply to dismiss the complainants' bill, and enter judgment for defendant for its costs. The contention of counsel is that when the court came to the conclusion that complainants were not in the legal possession of the mining ground in controversy, and were mere trespassers thereon, their right of action could not be maintained, and the court should have dismissed the bill, and remitted the defendant to its right of action at law, by ejectment, to remove complainants from the premises, and that the court had no jurisdiction to render a decree in favor of defendant, as prayed for in its answer. In *Chamberlain v. Marshall*, 8 Fed. 398, which is the principal case relied upon by complainants, it appeared from the bill itself that

the complainants did not have the legal title. If it had appeared from the bill itself that the complainants were not in possession of the Peerless claim, the court might have dismissed the bill, without deciding the case upon its merits, on the ground that the complainants, not being in possession, could not maintain the suit. But the facts in this case are that it appeared from the allegations in the bill, and from the evidence, that the complainants were in the actual possession of the Peerless ground, claiming title thereto, and their right of possession and title could not be determined until after all the evidence taken on behalf of both parties was submitted, and the case heard and determined; and the case having been tried upon its merits, without objection being made as to the regularity of the procedure, or the sufficiency of the pleadings, it is now too late for the complainants to make the objection that the defendant is not entitled to any relief because a cross bill was not filed. *Coburn v. Cattle Co.*, 138 U. S. 221, 11 Sup. Ct. 258. A cross bill may be brought by a defendant in a suit against the plaintiff, in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. *Shields v. Barrow*, 17 How. 145; *Ayres v. Carver*, Id. 595; 3 *Daniell*, Ch. Pr. § 1742; 1 *Fost. Fed. Pr.* § 170. Matters which regularly should be included in a cross bill may, if no objection is made, be set up in an answer, and relief granted as if a cross bill had been filed. *Kelsey v. Hobby*, 16 Pet. 277; *Coburn v. Cattle Co.*, *supra*. This being true, was there any necessity for a cross bill in this case? Does not the answer set up every fact that could have been set up in a cross bill? Is not the relief asked for in the answer the same as would have been prayed for in a cross bill? Is it not within the province of this court to treat the answer as a cross bill, if such a bill was necessary in this case? Is not this court authorized by the course of proceeding in chancery cases to dispense with the cross bill, and make the same decree upon the answer to complainants' bill that could have been made if a regular cross bill had been filed? The practice suggested by these questions has been frequently adopted by courts of equity as being convenient, safe, and proper for the purpose of avoiding a multiplicity of suits. *Bradford v. Bank*, 13 How. 69. And I shall adhere to this practice in the disposition of this case, as it will tend to save further expense and unnecessary litigation.

Having regularly obtained jurisdiction of this case, under the pleadings, as an equity suit, it is the duty of this court to settle and determine the rights of the parties in accordance with the principles of equity and justice, although an action at law might have been sustained to settle and adjudicate their rights. *Landregan v. Peppin*, *supra*; 1 *Daniell*, Ch. Pr. 555; *Hawes*, Jur. § 67, and authorities there cited; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.*, 134 U. S. 535, 10 Sup. Ct. 604; *Beecher v. Lewis*, 84 Va. 632, 6 S. E. 367; *Crump v. Ingersoll*, 47 Minn. 181, 49 N. W.

739; *Danielson v. Gude*, 11 Colo. 88, 17 Pac. 283. In *Brown v. Iron Co.*, the court, in discussing the questions applicable to the case, said:

"But the maxim, 'He who seeks equity must do equity,' is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence, and plead an unsubstantial technicality, to overthrow protracted, extensive, and costly proceedings carried on in reliance upon its consent. Surely, no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant."

After referring to the cases of *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; 1 *Daniell*, Ch. Pr. 555; *Lewis v. Cocks*, 23 Wall. 466; *Oelricks v. Spain*, 15 Wall. 211,—the court said:

"The doctrine of these and similar cases is that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late, even though, if taken in limine, it might have been worthy of attention."

In *Beecher v. Lewis*, which was an action to settle accounts growing out of a trust fund, the court said:

"Its jurisdiction having been thus rightly invoked and exercised, there was no reason to turn the parties around to another forum, and to fresh litigation, to finally settle these same accounts between them, for, when a court of equity has once acquired jurisdiction of a cause upon equitable grounds, it may go on to complete adjudication, even to establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. * * * As was said by the lord keeper, afterwards Lord Chancellor Nottingham, speaking of this court, in *Parker v. Dee*, 2 Ch. Cas. 200, 'And, when this court can determine the matter, it shall not be a handmaid to the other courts, nor beget a suit to be ended elsewhere.'"

After enumerating several cases where this principle would be applicable, the court adds:

"And, in the last place, when neither of these principles applies, there is great force in the ground of suppressing multiplicity of suits, constituting, as it does, a peculiar ground for the interference of a court of equity."

In *Crump v. Ingersoll*, 47 Minn. 181, 49 N. W. 739, the court said:

"The issues presented and the relief sought were such as equity might take cognizance of, and the parties proceeded to try and submit the case upon the merits, but the court stopped short of complete relief; and defendants insist that their rights under the contract are not, and ought not to be, affected by the judgment. In other words, the controversy is still open and undetermined, notwithstanding the trial already had. It is urged, as respects this branch of the relief sought, that the plaintiffs have an adequate remedy at law; but why put the parties to a second trial, when the case has already been voluntarily submitted to the court without a jury, and the facts found fully warranting the relief sought? The strict, technical rule ought not to be applied in such cases, especially where, as I think was the case here, both parties treated the case as an equity case, and consented to its trial as such."

With reference to the other grounds of the motion,—that the evidence is insufficient to support the decree, and that the decision is contrary to the evidence,—the opinion of the court heretofore rendered is sufficiently explicit. It speaks for itself. The questions therein decided will not be again reviewed.

Certain affidavits have been filed by complainants with reference to newly-discovered evidence, which it is claimed is material to the issues, and could not, with reasonable diligence, have been discovered and produced at the trial. These affidavits do not state facts sufficient to authorize this court to grant a new trial, even if they could be considered by the court. But the fact is that they were not filed in time, and are not properly before the court. They should be stricken from the files.

The motion for a new trial is denied.

ARNOLD et al. v. CHESEBROUGH et al.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

No. 77.

1. COMMON-LAW MARRIAGE—EVIDENCE.

In a suit by a daughter to compel certain executors to account for that portion of the estate devised and bequeathed to her deceased father, where the issue involved was the legitimacy of such daughter, the mother testified to a ceremonial marriage, which she afterwards denied, upon being called as a witness by the defendants, and also to an agreement by the father that there should be a marriage upon the death of his mother. It further appeared, *inter alia*, that the cohabitation was illicit in its origin; that the reputation of marriage was divided, although the parties registered as husband and wife, in their true names, at respectable hotels in the city where they resided, and elsewhere; that at various times and under different circumstances they held themselves out as husband and wife; that he never introduced the mother as his wife to the members of his family or any of his relatives; that on some occasions he represented her as his mistress, and on one occasion she was turned out of an hotel at which she was stopping with him as his wife, upon the admission of both that she was only his mistress; that soon after the birth of the daughter the mother deserted the father, and became the mistress of another man; that thereafter the maternal grandmother recovered and collected a judgment against the father for the seduction of the mother; the father never undertook to support his daughter, or treated her in any way as having a legal claim upon him; that he always executed conveyances of real estate as if unmarried; that he left a draft of a will which did not mention the mother or daughter; that, although he was a man of large means, neither the mother nor any of the relatives of the daughter made any claim against him as the legitimate father of the child during his life, nor against his estate until 14 years after his death. *Held*, that there was hardly an established fact in the record which was inconsistent with the theory that the parties held themselves out as husband and wife merely from motives of expediency, while the presumption from facts well proved, and the considerations arising from demonstrative conduct, denoted that the marital relation did not exist. Wheeler, District Judge, dissenting.

2. SAME.

To hold that acting as husband with a woman means what it purports, as assuming other capacities does, and legitimize issue, seems more

v.58f.no.6—53

wholesome than to interpret it away by comparison with false pretenses of others in similar circumstances, and bastardize issue. Per Wheeler, District Judge, dissenting.

8. SAME.

A contract, in case of cohabitation, per verba de futuro, is a valid contract of marriage. 1 Bl. Comm. 465; 1 Kent, Comm. 87; 2 Greenl. Ev. § 460; *Jewell v. Jewell*, 1 How. 219. Per Wheeler, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

In Equity. Bill by Leonora A. Arnold and Thomas E. Arnold, her husband, against Charles A. Chesebrough individually, and as trustee and executor under the last will and testament of Margaret Chesebrough, deceased, and Elizabeth Lounsbury, executrix under the last will and testament of Stephen R. Lounsbury, deceased, (the said Stephen R. Lounsbury having also been an executor and trustee under the will of Margaret Chesebrough,) to compel defendants to account to complainants for the portion of the estate of the said Margaret Chesebrough bequeathed and devised to Blasius M. Chesebrough, son of Margaret Chesebrough, and the father of complainant Leonora A. Arnold, and to his lawful issue. The circuit court dismissed the bill. 46 Fed. Rep. 700. Complainants appeal. Affirmed.

For previous decisions in the course of the litigation, see 30 Fed. Rep. 145; 33 Fed. Rep. 571; 35 Fed. Rep. 16; 41 Fed. Rep. 74.

J. H. V. Arnold, for appellants.

Walter S. Logan, for respondents.

Before WALLACE and SHIPMAN, Circuit Judges, and WHEELER, District Judge.

WALLACE, Circuit Judge. The dismissal of the bill of complaint by the decree of the circuit court proceeded upon the ground that Leonora A. Arnold, the principal complainant, was not the issue of a marriage between her mother and Blasius M. Chesebrough. The question which this appeal requires us to decide is whether Mrs. Arnold's father and mother were husband and wife. The decision depends upon the effect of direct evidence relative to a ceremonial marriage between the parents, and of indirect or presumptive evidence indicating the matrimonial relation, arising from their cohabitation and repute, conduct, and declarations. In such actions the burden of proof is upon the party who asserts the marriage; but the law presumes, from considerations of decency and public well-being, that every competent couple, who ostensibly cohabit as husband and wife, demeaning themselves towards each other as such, and were received into society, and treated by friends and relatives as being entitled to that status, have been legally married. This presumption is indulged with special cogency when the legitimacy of the offspring is the issue for judgment. A perfect marriage may be constituted by the consent of the parties to live together as husband and wife, as well as by a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the

deduction as well as by direct evidence. But, in the absence of direct proof, marriage cannot be proved by cohabitation alone, however long maintained. The evidence must support a matrimonial cohabitation, as distinguished from a meretricious one. *Com. v. Stump*, 53 Pa. St. 132; *Rose v. Clark*, 8 Paige, 574; *Cunningham v. Cunningham*, 2 Dow, 482. The facts that parties have publicly acknowledged each other as husband and wife; have assumed the marriage rights, duties, and obligations; have been generally reputed in the place of their residence to be husband and wife,—are relevant to prove a contract of marriage between them. Both cohabitation and reputation are necessary to establish a presumption of marriage, where there is no proof of actual marriage. A divided repute, however, is of no efficacy. It must be a general and consistent one, to be of value. We have to apply these rules of evidence to a voluminous mass of testimony, much of which is untrustworthy, eliminating from consideration much in the record which is incompetent. We cannot undertake to recapitulate the testimony, or analyze it in detail, as it would serve no useful purpose to do so.

The facts, in outline, are these: Leonora A. Arnold was born at New York city in October, 1857. Her father was Blasius M. Chesebrough, and her mother was Josephine Cregier. The father and mother met at a dancing school in New York city, where they both resided, in 1854, and on the evening of their first meeting she accompanied him to his rooms, and remained with him during the night. She was then about 16 years of age, and was living with her mother, who kept a boarding house. He was about 35 years of age, and was an ostentatious, dissolute, lewd, eccentric man; addicted to drink, capricious, and extravagant. He had studied law, but, becoming enamored of the stage, had devoted himself to theatrical enterprises. He associated generally with low companions. He had inherited some property, but derived the larger part of his income from the allowances made to him by his widowed mother, a woman of wealth, whose children seldom visited her, except to obtain money, and who led an isolated life. He had one brother, but seldom met him. Shortly after the episode mentioned, Josephine left her mother's house, and went to live with him. They lived together at various hotels and boarding houses in New York city from 1854 to 1858. Whether they lived together continuously does not satisfactorily appear, but they certainly lived together the greater part of the time. She went by the name of "Mrs. Chesebrough," and they held themselves out as husband and wife whenever it seemed expedient or desirable to do so; but she passed as his mistress among those of his associates to whose opinion of his respectability he was indifferent. They made occasional journeys, sometimes with his own equipage, to distant parts of the country. In September, 1855, while they were at the United States Hotel at Saratoga Springs, a child was born to them, died at its birth, and was buried at that place. It would seem that they selected this place, after the close of the conventional season, to have the accouchement take place there. When the birth of a second child, Leonora, was expected, they went to live with Mrs. Cregier, Josephine's mother.

Leonora was born at Mrs. Cregier's house. He was frequently intractable, and when in drink was quarrelsome and violent. Apparently, she wearied of his caprices and abuse. In 1858 she left him clandestinely, going first to South Carolina, and subsequently to Tennessee, and lived while in these states with one Jackson, as his wife. Leonora was left in the mean time at the house of Mrs. Cregier. Her father did not support her, and she was provided for by Mrs. Cregier until the latter's death, which took place in 1870. In 1858 Mrs. Cregier sued him for six months' board of himself and family, and obtained a judgment for \$175. In 1859 Mrs. Cregier brought suit against him for the seduction of Josephine, claiming, in substance, that the relations had been illicit while he and Josephine lived together, and that Leonora was the fruit of their unlawful cohabitation. Mrs. Cregier and one of Josephine's sisters were witnesses at the trial of that suit. Blasius did not interpose any defense, and a judgment was obtained against him for \$2,500, and subsequently collected. Mrs. Chesebrough, the mother of Blasius, died in 1860, and he then succeeded to a large property. He died in 1866, having lived as a bachelor since Josephine left him, ignorant of her whereabouts. He left no will. Leonora and Mrs. Cregier attended his funeral. In 1868 Josephine returned for a time to New York. While there, she, with her mother, consulted counsel, with a view of enforcing any rights which could be claimed by them or Leonora against the estate of Blasius. Soon after her grandmother's death, Leonora made a visit of a few months to her mother, in Tennessee, and then returned to New York. Thereafter she lived part of the time with her relatives, and part of the time supported herself by her own exertions. Between the visit to her mother in 1870, and 1880, she never heard from her mother. In 1879 Leonora married Mr. Arnold, and in the fall of that year, induced by the representations of designing persons, who had been conversant with the affairs of Blasius, he began to collect evidence to set on foot the attack which culminated in the present suit. In 1880 Leonora went to Tennessee to find her mother, and secure her assistance, and found her. Shortly afterwards, Josephine came to New York. Until this time, neither of them had taken any legal proceedings founded upon any alleged rights as the wife or daughter of Blasius.

The only evidence of a ceremonial marriage which appears in the record consists in the testimony of Josephine, the alleged wife. She testified as a witness for the complainants that, after she and Blasius had lived together some time, they went to Baltimore, Md., and were married there by a clergyman, at his house. She could not give his name or residence, and stated that no witnesses were present. She made no mention of a marriage certificate or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place, or the person performing it, or the attendant circumstances. It suffices to say of it that it was improbable and incredible. She did testify, however, that while in Baltimore they stopped at Barnum's Hotel. It is in proof that no persons of their name were guests of that hotel. There was no publication of marriage, and no license to marry; and

in the absence of a license it would have been a criminal offense, on the part of a clergyman, to perform the ceremony. At a later stage in the taking of the proofs, she testified as a witness for the defendants, and made a complete retraction of her previous testimony relative to the ceremonial marriage. She then testified that there never was a ceremonial marriage, and that, during the time they lived together, she never believed or considered herself the wife of Blasius. When asked, however, if anything had been said between them relative to a marriage, she stated that he had promised her that he would marry her when his mother should die; but she gave no details as to the time, occasion, or circumstances of such a conversation. Of course, no credit ought to be given to the testimony of a witness who has committed bald perjury. We cannot say whether she testified truthfully in her original or in her subsequent testimony. Certainly, if any of her statements can be accepted as credible, it is only those which it would be against her probable interest or inclination to make. We may believe that on the first occasion when she met Blasius she surrendered her person to him, and that she lived with him for some period of time before the alleged ceremony of marriage, and that she left him clandestinely, and lived in the south as the wife of another man until after his death. She testified to these facts originally when she was trying to appear as a semi-respectable woman, and as to them did not recant in her subsequent testimony; but her testimony is worthless as to every other material fact which she might suppose would be of benefit to either of the parties.

We must reject as unworthy of credit the direct evidence of marriage. If there was a promise to marry her at some future time, cum copula, there was no marriage according to the law of their domicile. *Cheney v. Arnold*, 15 N. Y. 345; *Meister v. Moore*, 96 U. S. 76. The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blasius, satisfies us that the relation was a meretricious, rather than a lawful, one. As the question is wholly one of fact, we shall content ourselves with a few general observations upon the proofs.

Irrespective of the admissions of Josephine, the testimony satisfies us that the cohabitation was illicit in its origin. This being so, it is presumed to have continued illicit, and all presumptions in favor of the innocence and morality of the parties are repelled. Men sometimes marry their mistresses, but such cases are the exception. After there has been an open, illicit commerce, they seldom accord to the woman who has forfeited all claims to her own self-respect, and to the countenance of her friends, the rights of a wife. The ordinary presumption against a subsequent marriage is stronger than usual, in this case, because each of the parties regarded the marriage tie with contempt. He was a frequenter of houses of ill fame. Her notions of propriety are shown by her summary abandonment of her infant child, and becoming the mistress of Jackson. The reputation of the relation was, at best, a divided one. It was convenient, and indeed, for some purposes, was necessary, that they should maintain the semblance of a matrimonial

relation. If they had not done so, they would not have been received in such hotels and boarding houses as suited his ambitious tastes. Some of their acquaintances would have ignored them. Tradesmen would have been less indulgent. Even their servants would have treated them with less civility. It would be strange if some of those with whom they came in contact had not been led to believe them to be married. None of his relatives supposed him to be married. His boon companions understood her to be his mistress. Some of her relatives and acquaintances, doubtless, believed that she was his wife. No one was so near to her, or so likely to have a better appreciation of the true nature of the cohabitation, as her own mother. Mrs. Cregier was a hard-headed, practical woman. What she believed is sufficiently shown by the record of the seduction suit. Convincing evidence that they were not husband and wife is found in their own conduct. Unless they had so deputed themselves that it was notorious she was only his mistress, there was no reason why he should not have introduced her to his mother as his wife. Neither her education, her manners, or her social surroundings stood in the way. There was nothing except her relations with him. Old Mrs. Chesebrough would have rejoiced to know that her son had married a decent woman. As a married man, who had finally concluded to change his mode of life, he could have appealed more effectually than before to his mother's bounty. If Josephine had been his wife, why should he have made a secret of the fact, and represented her deliberately to decent persons as being only his mistress? Such a significant episode as that detailed by the manager of the Clifton House, at Niagara Falls, where they represented themselves as man and wife until they quarreled, but finally admitted what their true relation was, cannot be explained away upon any theory of his eccentricities. He was not so utterly bereft of manly impulses as to permit her, if she had been his wife, to be ejected from the hotel as a mistress, and sent to New York, while he continued to remain there as a guest. He made conveyances of real estate as a single man. He submitted without protest to the making of a judicial record which branded her as a concubine, and his child as a bastard. Her conduct in leaving him without making any claim against him for support, and in making no such claim during his life, or against his estate until 14 years after his death, proves almost irresistibly that she knew she could not establish such a claim. She knew of his death about the time it took place, must have known, as his wife, she could secure a comfortable fortune from his estate, and she had consulted astute counsel. We place but little stress upon the circumstance that he did not recognize Leonora as a legitimate child by any testamentary disposition. We are not satisfied that he knew the contents or the effect of the will which was drawn, but not executed. He always acknowledged her paternity, and evinced sometimes some interest in her, and even affection for her. He would not have been unwilling to curtail the inheritance of his brother, even in favor of an illegitimate child. Yet there is in proof no single act of his towards Leonora, after her mother left

her, to indicate that he regarded her as having any lawful claim upon him. Mrs. Cregier was a capable and energetic woman. She took the place, after Josephine disappeared, of father and mother to Leonora. She knew how to find plenty of lawyers to take up litigations upon contingent rewards. When Blasius died, and the proofs were fresh of the relation between him and Josephine, the time had come when she could have asserted Leonora's rights, if she had any, with the prospect of securing for her grandchild, and incidentally for herself, the comforts of an ample fortune. But although she and Josephine concerted together, surveyed the ground, and consulted enterprising counsel, no attack was made throughout the four years she lived after the death of Blasius. Her inaction is unaccountable, except upon the theory that she felt satisfied there was no case sufficiently strong to warrant the attempt. She speaks from the grave, an unsummoned witness, whose testimony is more persuasive than that of a score of persons, who, with fragmentary knowledge or confused recollection, speak of incidents which took place 20 years before.

It has been observed by the courts that the concomitants of those living in illicit intercourse together are often identical with those of married people. *Breadalbane Case*, L. R. 1 H. L. Sc. 182; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Barnum v. Barnum*, 42 Md. 251. It is not surprising that, to some extent, there should have been a repute that Blasius and Josephine were married. It is not strange that Leonora—a motherless child, practically—should have gone by the name of Chesebrough. It is not strange that the infant, who died at the hotel where they had registered and lived as though married, should be buried as the child of Mr. and Mrs. Chesebrough. In our judgment, there is hardly an established fact in the record which is inconsistent with the theory that they held themselves out as husband and wife merely for motives of expediency, while the presumptions from facts well proved, and the considerations arising from most demonstrative conduct, denote that the real relation did not exist. The decree is affirmed, with costs.

WHEELER, District Judge, (dissenting.) In 1853 Blasius M. Chesebrough, afterwards known as George M., was about 35 years old, a son of a widow of large means, and had some property of his own, and was a brother of the defendant Charles A. Chesebrough. Josephine Cregier was about 16 years old, and the daughter of a widow. Both were born, and all lived, in the city of New York. They met at a dancing school in Bond street, in a building where he had rooms, and she stayed with him in his rooms that night, and lived with him some afterwards before any pretense of marriage. On the 18th of August, 1854, they registered as husband and wife, with servant, at the Everett House, and lived there as such, excepting an absence of a few days, until October 6th. They lived together at other hotels and boarding houses, in the same way, afterwards, and had a carriage and driver, and drove about the country somewhat. About September 20, 1855, they drove to Saratoga, and registered at a hotel there as husband and wife. A child was pre-

maturely born to them there, which lived but a few days, and was buried in a lot in the cemetery there, which he procured. They continued to live together some part of the time at hotels and boarding houses in the same manner, and were to some extent spoken of as husband and wife among acquaintances. In the summer of 1857, she went to her mother's, and on October 9th the plaintiff was born there, and was their child. Dr. Groves attended her in her confinement, and made return of the birth, as required by law, to the registry, with the name of the father as "George Chesebrough," and of the mother as "Josephine Chesebrough." Her mother, on April 6, 1858, commenced a suit against him for board of himself and family for the six months previous, and, on appearance by him, recovered judgment for \$175. At times, when drunk, he was very violent, and treated her with great abuse. At some time in 1858 she suddenly left him and her child, and went, without his knowledge, to Charleston, S. C., and lived with another man there. Dr. Groves commenced suit in December, 1858, against him, for attendance upon her when the plaintiff was born, and recovered judgment therein upon default. On February 4, 1859, her mother commenced suit against him for loss of services by her seduction resulting in the birth of the plaintiff, and, on default and inquest of damages, recovered judgment therein for \$2,500. He tried to find her, but died in 1866 without having heard from her. This suit is brought in behalf of the plaintiff Leonora Augusta as his heir. Her mother was present at the examination of witnesses in behalf of the plaintiffs, and testified that in driving about they drove to Baltimore, and were married there in 1854, before going to the Everett House to board. Afterwards, she testified in behalf of the defendant that this was false, that they were never married, and never understood that they were, but that they agreed to be married when his mother should die. The circuit court found and held that there was no marriage, and dismissed the bill. The assignment of errors upon this appeal relates principally to this ruling.

There is no presumption of legitimacy arising from parentage. *Blackburn v. Crawfords*, 3 Wall. 186. But cohabitation as husband and wife is presumed to be lawful, and legitimacy may be found from it, although, if it was illicit in the beginning the presumption is rebutted until a marriage is shown which would change its character. 2 Greenl. Ev. 462; *Jewell v. Jewell*, 1 How. 219; *Gaines v. New Orleans*, 6 Wall. 642. The mother's testimony that there was a marriage remains in the case, although retracted, and is strongly corroborated by their holding themselves out as husband and wife, and living together openly as such at respectable hotels and boarding houses, and particularly by their recognition of each other as married parents at the time of the death and burial of their first child. She could destroy the force of her testimony, so far as it rested upon her truthfulness, but could not take away from it the support of this corroboration. Her first testimony was consistent with their acts and conduct, but the last was not. The theory of a marriage is further supported by the registry of the birth, for the mother would not become Josephine Chesebrough but

by marriage; and it is further strongly supported by the judgments against him for her board as a part of his family, and for the physician's services at the birth of the plaintiff, for he would be liable for neither if she was not his wife. This theory is also somewhat supported by the reputation of a marriage among their relatives, friends, and acquaintances, but this is met by proof of reputation to the contrary. The proof of reputation could be done away with by counter proof of the same sort; but proof of a marriage in fact by direct evidence, or by acts and conduct of the parties, could not be disproved by evidence of reputation to the contrary. 1 Greenl. Ev. § 107. Mr. Justice Davis, in *Gaines v. New Orleans*, 6 Wall. 706, said:

"Concede it is true that Clark behaved so as to cause his most intimate friends to disbelieve the fact of marriage; that he held himself out to the world as a single man, and by public repute, after the time of the alleged marriage, lived with Zulime, ostensibly, not as his wife. Still, the case of the complainant is not weakened."

There, as here, the cohabitation began meretriciously, and ended in desertion of the father by the mother, and unlawful cohabitation by her with another man. As marriage is, in law, but a civil contract between the parties, resting upon their consent, although most often celebrated by religious ceremony, the open and public registration of their true names, as they would be if married, in noted and respectable hotels of the city and in the neighborhood, within the city of their former homes, and of the homes of their relatives and friends, and living there, in sight of all, as if married, would be direct manifestation of the consent upon which the contract would rest, and stronger evidence of its existence than any negative reputation, which would necessarily be founded upon mere hearsay. He was dissipated, a frequenter of bawdy houses, and an associate of lewd women, but the mother of the plaintiff appears to have been more and different to him than any other woman. Reputation of his marriage would not be likely to spread to these places, or among these women, and his reputation of being single appears largely from these sources. He made conveyances as single, and had a draught of a will made, which did not mention her or the plaintiff, after she had left him, which goes to show that he then held himself out as single; and administration was applied for on his estate as if he had died single, which goes to show that he was, to those making the application, then reputed to be single. The record of this suit for seduction seems to be admissible as a declaration by her mother which would tend to show family understanding that there was no marriage, but the judgment was not between such parties as to be at all conclusive of anything. This is all reputation, and not direct proof, and is to be considered in connection with other proof of reputation, in arriving at what the extent and pervasiveness of the reputation of marriage or no marriage actually was. When all this is considered, it shows, as found by the circuit court, a reputation too much divided to prove a marriage. It is also too much divided to disprove a marriage otherwise shown, if admissible at all for that purpose. Their acts and conduct to-

wards each other, corroborating and making plain her testimony that there was a marriage in fact, remain. That the registration of their names as, and calling themselves, husband and wife, was necessary for admission to decent places, and that men and women do so for the purpose of living together at such places, is said in argument; but such use of their true names in such and so many prominent places, in the near vicinity of their relatives and acquaintances, and in the city of their own birth and home, does not seem attributable to that mere purpose, and no such custom is proved, or appears to be sufficiently general to be taken judicial notice of. That men live double lives under different names in the same city, and that men and women register at places as husband and wife, under other names, for the purpose of living together there temporarily, may be assumed; and that such holding themselves out would have no tendency to prove that they were husband and wife, but rather the contrary. The difference between using false names and true ones wholly changes the effect of the use as proof. And this purpose of living together temporarily does not explain their traveling together under their true names, as husband and wife, just before the birth of their first child, and burying it as theirs in that relation. Although her first testimony, in view of her last, would be entitled to no weight, alone, and these acts and this conduct might not be sufficient to establish a marriage, against her last, her first furnishes a key to, and is more consistent with, all these, than the last, and helps out and confirms the proof of a marriage in fact. That both treated the bonds of matrimony lightly would not show that they did not, lightly or otherwise, enter into them. The greatest argument against the presumption arising from this holding each other out as husband and wife, and cohabitation, is founded upon the supposition that the cohabitation began meretriciously. But this rests wholly upon her testimony. Take that out, and the first cohabitation shown was that at the Everett House, where they had registered and lived together openly as husband and wife. But her testimony cannot be taken out, for it is in, and must be considered, first and last, and all together, according to its consistency with itself and other proved facts. When so considered, that part which states that they were married while away, just before going to the Everett House, seems more consistent with their going there, and living together as they did, there and elsewhere, long enough to bring forth two children in due course, than her subsequent statement that this was false, and that the marriage was to take place when his mother should die. And to hold that acting as husband with a woman means what it purports, as assuming other capacities does, and legitimize issue, seems more wholesome than to interpret it away by comparison with false pretenses of others in similar respects, and bastardize issue. Furthermore, as laid down by Sir William Blackstone, any contract made, *per verba de praesenti*, and in case of cohabitation *per verba de futuro*, was deemed a valid marriage. 1 Bl. Comm. 465. This is so laid down by Chancellor Kent, (1 Kent, Comm. 87,) and by Professor Greenleaf, (2 Greenl. Ev. § 460.) The circuit court for the

district of South Carolina so charged the jury in *Jewell v. Jewell*, 1 How. 219; and the supreme court, being equally divided, did not reverse this ruling. The testimony of the mother as to the agreement to marry is not retracted or contradicted, and is corroborated by the same circumstances as her testimony of the marriage. If this be true, and that be law, the plaintiff is legitimate.

STIER v. IMPERIAL LIFE INS. CO.

(Circuit Court, W. D. Missouri, W. D. June 5, 1893.)

1. INSURANCE AGENCY—RIGHT TO TERMINATE.

The contract right of an insurance agent to commissions on renewal policies does not make his agency an agency coupled with an interest, so as to prevent the company from terminating it at will. *Newcomb v. Insurance Co.*, 51 Fed. 725, distinguished.

2. SAME.

A provision that an agency may be terminated on certain specified grounds does not imply an agreement that it shall exist indefinitely, so long as the agent commits none of the specified delicts. *Sewing Machine Co. v. Ewing*, 12 Sup. Ct. 94, 141 U. S. 627, applied.

3. SAME—CONTRACT—CONSTRUCTION.

In a contract creating a life insurance agency, a provision which contemplates the taking of insurance according to several distinct classes of policies is not violated by the act of the company in pushing its business in one class to the neglect of another, although the latter is more profitable to the agent.

At Law. Action by George H. Stier against the Imperial Life Insurance Company of Detroit, Mich., to recover damages for breach of contract. By consent of parties the cause was referred to a referee, and is now heard on exceptions by both parties to his report. Defendant's exceptions sustained, and plaintiff's exceptions overruled.

The other facts fully appear in the following statement by PHILIPS, District Judge:

This is an action founded on contract of agency. The defendant, an insurance company, in 1889 employed the plaintiff, by written contract, as agent to solicit policies, stipulating for certain commission on premiums collected, and for certain commission on renewal premiums. Among the classes of policies was what is known as "Natural Premium Policies" and "Level Premium Policies." The principal business done by the company was in the natural premium line. After the plaintiff had acted as such agent for a year or more after the execution of the contract, the company concluded, from experience, that it was more advantageous to its interests to turn its attention more especially to the prosecution of the level premium plan, and so advised the plaintiff, and withdrew its efforts to advance further the natural premium plan. As the latter was more profitable to the agent, he declined to accept the change; and after much correspondence and negotiations the plaintiff withdrew, and took employment in a rival insurance company, and brought this suit, as for a breach of contract, and predicated his damages of what he claims is the customary mode of admeasuring damages on such breach. By consent of the parties the cause was referred to L. E. Wyne, Esq., to take the evidence and make a finding of the facts and damages. To his report, finding for the plaintiff, and assessing his damages at \$3,198, both parties have filed exceptions.

Gates & Wallace, for plaintiff.

Karnes, Holmes & Krauthoff, for defendant.

PHILIPS, District Judge, (after stating the facts.) It is more important than usual, in the consideration of this case, to keep in mind the character of the action and the state of the pleadings. The action throughout is predicated upon a contract, and proceeds for breaches thereof. The contract is set out in substance, and it is then averred that the plaintiff kept and performed the same on his part, and that the defendant broke and failed to keep the same. The petition alleges that the contract was to continue in force until the same was terminated by the neglect or refusal on the part of plaintiff to account for moneys belonging to defendant by the terms and conditions of the contract, or until there was dishonesty or non-compliance with the rules and instructions of said contract on the part of the plaintiff. It is also averred that, if he should fail to furnish to the defendant company an average of \$20,000 per month taken and paid for in three consecutive months, the company might cancel said contract without notice; that defendant bound itself to issue policies known as the "Natural Premium Renewal Term Policies," the "Natural Premium Annuity Bonds," "Five-Year Renewable Term Policies," "Ten-Year Renewable Term Policies," and "Monthly Life and Savings Policies;" also, "Participating and Non-participating Level Premium Policies," and "Survivor's Endowment Policies,"—and to allow plaintiff on each of said policies a certain compensation set out in the contract. It is also averred that defendant bound itself to pay plaintiff a renewal commission on adjusted natural premium policies and natural premium yearly renewable term policies, and life and savings policies, for the first year, \$1.80, the second, \$1.60, and \$1.40 the fourth and subsequent years.

The breaches of the contract assigned are that in 1891 the defendant refused and ceased to issue any natural renewable term policies, etc., and refused to permit plaintiff to solicit or take any applications for the policies mentioned in the contract, and made an entire change in the kind of policies issued, and substituted new and different policies therefor, which substituted policies were not so advantageous to plaintiff as those provided for; and afterwards made no effort to collect the renewal premiums on policies issued under applications taken by defendant, but used every means to discourage, and did discourage, parties holding such policies from paying renewal premiums, thereby depriving plaintiff of his commissions, etc. It is to be observed that it is nowhere averred that defendant discharged the plaintiff from his agency, nor is it averred that the plaintiff secured an average of \$20,000 insurance per month for three consecutive months, as provided by the contract.

The answer, after tendering the general issue, avers that the plaintiff discontinued acting under said contract long prior to the institution of the suit, without notice to defendant, and engaged in soliciting insurance for another insurance company, a rival in business to the defendant; and it avers that in the months of May, June, and July, November, and December, 1890, the plaintiff did not procure

and furnish to defendant an average of \$20,000 of insurance per month taken and paid for, by reason of which the right accrued to defendant to cancel said contract of agency without notice to plaintiff; that it was under no obligation to plaintiff to make any effort to collect renewal premiums on its policies; and avers that plaintiff voluntarily abandoned the further performance of said contract on his part, and that by mutual consent said contract was annulled and surrendered.

No reply was filed, and no denials made to the new matter thus set up in the answer, and under the Code of Practice these matters stand admitted by the pleadings. If the plaintiff discontinued acting under said contract, and engaged in soliciting insurance for another rival insurance company of the defendant, and "he voluntarily abandoned the further performance of said contract on his part, and by mutual consent said contract was annulled and surrendered," it is not perceived that there is any foundation for the finding of the referee that defendant could not terminate the contract at its pleasure. Nor am I satisfied, as a matter of law, that defendant did not have the power to terminate the agency. In the absence of an agreement of employment for a definite period of time, the agency is one at will, determinable at the pleasure of the principal, unless the agency is coupled with an interest in the subject-matter. This is fundamental. Mechem on Agency (section 204) says:

"The authority of the agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; * * * and unless the agent has acquired, with the authority, an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. * * * It is the general rule of law, therefore, that as between the agent and his principal the authority of the agent may be revoked by the principal at his will at any time, with or without giving reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent; and this is true, even though the authority be in express terms declared to be exclusive or irrevocable. But, though the principal has the power thus to revoke the authority, he may subject himself to a claim for damages if he exercises it contrary to his express or implied agreement in the matter."

Chief Justice Marshall, in *Hunt v. Rousmanier*, 8 Wheat. 203, with characteristic aptness defines a power coupled with an interest. He says:

"What is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power * * * must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves seem to import this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But, if we are to understand, by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united."

Clearly, therefore, the plaintiff had no such interest in the subject-matter of the contract as would take away the customary option of the principal to terminate the agency. But it is claimed by the

plaintiff, on account of article 18 of the contract in question, that the implication was that the power of dismissal is denied, except for the causes therein specified. This article is as follows:

"This contract may be terminated upon the neglect or refusal of the said George H. Stier to account for all moneys belonging to the company according to rule 7, or for dishonesty, or for noncompliance with any of the foregoing rules and instructions."

The case of Newcomb against this same company (51 Fed. 725) is relied upon in support of this construction. I should feel great embarrassment to oppose my unsupported opinion against any considerate conclusion reached by the learned judge who delivered that opinion. It is to be kept in mind, to a proper understanding of the Newcomb Case, that the action there was for a quantum meruit, and that the facts alleged were in many respects quite different from these under consideration, and the questions passed upon arose upon demurrer to the petition.

I am unable to perceive that the provision that the contract might be terminated upon certain specified grounds enforces the conclusion that it was intended thereby to prolong the existence of the agency indefinitely, or so long as the agent did none of the specified delicts. A not dissimilar question arose in *Sewing Machine Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, where it was held that an agency contract containing the provision that a "violation of the spirit of this agreement shall be sufficient cause for its abrogation" does not imply that it could only be abrogated for sufficient cause. Mr. Justice Harlan said of this, (page 636, 141 U. S., and page 97, 12 Sup. Ct.):

"This clause, it may be suggested, was entirely unnecessary if the parties retained the right to abrogate the contract after 1875 at pleasure, and implies that it could be abrogated only for sufficient cause, of which, in case of suit, the jury, under the guidance of the court as to the law, must judge, in the light of all the circumstances. We cannot concur in this view. The clause referred to is not equivalent to a specific provision declaring affirmatively that the contract should continue in force for a given number of years, or without a limit as to time, unless abrogated by one or the other party for sufficient cause. It was inserted by way of caution, to indicate that the parties were bound to observe equally the spirit and letter of the agreement while it was in force."

It seems to me that the proper meaning of article 18 is that, for any of the designated derelicts, the right arose absolutely to the principal to terminate the contract without any liability, leaving the right untouched to exercise the power of discontinuance subject to a liability under a quantum meruit action. The general rule of law is that such contracts are revocable at pleasure "unless the power to revoke is restrained by express stipulation." *Mechem*, Ag. §§ 209, 210. This rule is aptly put in *Coffin v. Landis*, 46 Pa. St. 431, 432. The court say:

"The true question is, what was the contract? To what did the parties bind each other? We are not at liberty to make contracts for them, or to add any stipulation which they have not seen fit to incorporate. We cannot give a mere expectation the sanction or binding force of a covenant. * * * There is nothing said in regard to the time during which the agreement should continue, and nothing in its language to define the

duration of the service of plaintiff or his employment by the defendant. This the contracting parties appear to have left out of consideration, or at least failed to make it a subject of covenant obligation. It may be that neither was willing to bind himself for any definite period. * * * It is evident, then, that were we so to construe the agreement as to hold it obligatory upon the one party to employ, and upon the other to serve, during any period, we should be in danger of imposing liabilities which both parties absolutely avoided assuming. And, if it be admitted that neither of the parties contemplated a severance of the relation affirmed by the contract at the will of the other party, it does not follow that we are at liberty to treat the agreement as continuing a covenant against him. That would be to make an expectation of results equivalent to a binding acknowledgment that they should follow."

The case of Insurance Co. v. Williams, 91 N. C. 69, pertinently illustrates the application of this rule. Williams was appointed agent to solicit insurance. On first-year payments he was to receive a given per cent., and on renewals a given per cent. The agent prosecuted his agency to a considerable extent, when the company, unable to successfully conduct its business, sold out and assigned many policies to another insurance company, and renewals were effected, through another agency, on some of the policies taken by Williams. For these renewals he sought to recover compensation. Although it might have been there, as in the case here, that the agent was induced to accept the agency in reliance on the expectancy of profits from the renewals, the court held that the company, in the absence of any express provision to the contrary in the contract, had the right to terminate the contract in the manner it did; that the agent had no such interest associated with the business as entitled him to a continuance of the agreement against the will of the principal. "The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value. * * * Although renewals are the consequence of the original contract of insurance, and in this particular beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract which creates the agency and regulates its terms." While the contract here provides that the agent may be entitled to commission on renewal premiums, notwithstanding the termination of the agency for any cause save dishonesty, yet it is on the express condition that the agent has secured \$1,000,000 of policies in force; but there is no claim made that he had secured this amount. The principal difference between the case supra and this is that Williams sought to recover his commission on cases actually renewed, but by another agent, while this plaintiff seeks to recover damages on the theory that his interest would have been equal to \$1,200 a year for three years, had the company diligently striven to effect such renewals. It is a difference, it seems to me, without a legal distinction.

There must be, in the absence of a clear provision to the contrary, the element of mutuality in such a contract. If, as against the principal, the agent had the right to insist on a continuation of the agency so long as he did none of the prescribed acts in article 18, the correlative right of the principal must obtain to

hold the agent to perpetual service, or so long as he was faithful; and thus it would result that, nolens volens, the employment could be made perpetual. It is quite evident from the second paragraph of the opinion in the Newcomb Case, *supra*, that the learned judge had in mind the recognized distinction between the reserved power to discharge and the right and wrong of a discharge, where the remedy is not in an action *ex contractu* for the discharge, but a quantum meruit action predicated upon its injurious exercise. In the latter instance the suit is not founded on the breach of the contract, as such, but is an action of *assumpsit* for a quantum meruit, in which the contract may be put in evidence, and will control the maximum of recovery. *Mansur v. Botts*, 80 Mo. 654, 655, and citations. Keeping this distinction in view, the vice is apparent in the finding of the referee that the defendant broke its contract with the plaintiff in not permitting him to continue the prosecution of his work in taking insurance on the natural premium plan, or in discouraging the prosecution of that system by its determination to specially prosecute the level premium policies. Is there any provision or stipulation in the contract which bound the defendant to adhere exclusively to the natural premium plan, which in contemplation of law would constitute a breach of contract, if defendant should at any time thereafter determine upon a more special prosecution of the level premium plan? I am wholly unable to find any such provision in terms.

The power of attorney to the plaintiff simply appoints the plaintiff agent for the defendant company in a designated territory, under instructions, conditions, and rules governing agents; and it distinctly appears on the face of the petition, as it does on the back of the contract in question, that the commissions which the plaintiff was to receive applied not only to natural premium policies, but also to nonparticipating level premium policies, participating level premium policies, and to survivors' endowment policies. The fact that one class of policies was or was not more profitable to the agent than another, or that it may have been in the contemplation of either that the business of defendant was to be mainly confined to the natural premium policies, cannot, it seems to me, affect the question as to whether or not by the contract the defendant obligated itself to so confine its business. If it did not so covenant in the written agreement, no damage can be predicated of a breach of contract in this respect. Carried to its logical conclusion, the contention of plaintiff would have entitled him to claim damages had the defendant, at any time after executing the contract, concluded that the prosecution of the level premium plan was more advantageous; and, without abandoning the natural premium plan, given more especial attention to its own preference. And it is just as inferable, by implication, that had the plaintiff, after entering upon his agency, discovered that the level premium plan was more beneficial to him than the natural premium, he could as well claim that the contract forbade the defendant to do anything which would lessen his profits under the level plan, as to make his present claim, in so far as anything appearing on the face of the contract itself.

When we turn from the contract to the evidence in the case, the cause of the plaintiff finds less support. As already stated, it stands admitted by the pleadings that the plaintiff, without being discharged by the defendant, himself broke the contract by voluntarily entering the service of an antagonistic insurance company; and it appears from the evidence that he actually entered into a written contract of agency with the Provident Savings Life Insurance Society, by which he stipulated for commissions "upon policies of the above forms secured by said Stier upon the lives of persons whom he has heretofore insured in the Imperial Life Insurance Company of Detroit," which contract bears date July 28, 1891. On August 20, 1891, the president of the defendant company wrote to the plaintiff as follows: "We are informed that you are now doing business for the Provident Savings Life, which of course terminates your contract with this company, and we desire you to forward all supplies to us to this office at once,"—which indicates that the plaintiff had taken service there without terminating his agency with this defendant, and without its knowledge or consent. While it is to be conceded that prior to plaintiff's thus taking service in the employ of another company this defendant had signified to him its desire and purpose to conduct its business upon the level premium plan, yet it is not true that the defendant company, as is alleged in the petition, refused to permit the plaintiff to proceed further in the prosecution of his agency upon the natural premium plan. The evidence shows that as late as June 30, 1891, after an effort had been made to agree upon another contract between the parties, the president of the defendant wrote to the plaintiff as follows:

"If this contract [the new one] is not satisfactory to you, we stand ready to carry out the old one; and, if you feel that you prefer the old plans to the new ones, send us in your old line rate books, and we will forward you supply of the old ones, so there will be no grounds of dissatisfaction of any kind on that point. However, I am satisfied it would be by far the best for all parties concerned for you to take up the new plan."

The utmost that the referee could find against the defendant on this branch of the case is that, owing to the desire and purpose of the defendant to turn its business in the direction of the level premium plan, the plaintiff did not receive the support and cooperation of the defendant required under the natural premium plan. But as it cannot be maintained, in my opinion, that the contract restrained the defendant from directing its own business in a channel which it conceived to be most profitable to it, and such channel being one provided for in the contract itself, it would seem to follow that no action for damages is predicable upon the contract for a breach in so endeavoring to direct and control its business. It is true, the petition alleges that the defendant broke its contract with the plaintiff in failing to furnish him with the requisite supplies and blanks, etc., yet, as no damages have been found or reported as arising therefrom, this may be treated as *damnum absque injuria*.

In view of the conclusion thus reached, it is not needful to be decided whether or not, under article 17 of the contract, any dam-

age can be predicated of the loss of commissions on renewal premiums, for the reason that it does not appear that the plaintiff had secured \$1,000,000 of insurance in force. The referee made his assessment of damages against the defendant based solely upon prospective earnings of the plaintiff on commissions of renewal premiums for three years, taking as a basis a general average of his earnings prior to the interruption of the agency. Serious criticism is made of this theory of assessment; but, in view of the pleadings and palpable facts of this case, my conclusion is that defendant's exceptions to the referee's report are well taken, and the same are sustained, and plaintiff's exceptions thereto are overruled.

AMACKER v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. November 27, 1893.)

No. 97.

1. PUBLIC LANDS—PRE-EMPTION—EFFECT OF FILING AMENDED CLAIM.

The voluntary filing of an amended pre-emption claim, excluding part of the lands previously pre-empted, is a cancellation of the first entry as to the lands excluded, although no formal cancellation is entered of record.

2. SAME—HOMESTEAD—CASH ENTRY—GRANT TO NORTHERN PACIFIC RAILROAD COMPANY.

Act June 15, 1880, § 2, (21 Stat. 238,) allowing persons who, under any homestead law, had theretofore entered lands properly subject to such entry, to entitle themselves thereto by paying the government price therefor, restored to a homestead settler, whose claim had not been abandoned, although his entry had been canceled for failure to comply with the requirements of the law under which it was made, such a right or claim to the land that it did not pass to the Northern Pacific Railroad Company, under the grant to said company by Act July 2, 1864, § 3, (13 Stat. 367,) of lands on each side of its road which were "free from pre-emption or other claims or rights" at the time of the definite location of its line, where such definite location was made after the passage of the act of 1880. 53 Fed. 48, reversed.

3. SAME.

The railroad company could not complain of the fact that the patent was issued to the widow of the person entitled to make the cash entry under the act of 1880, he having been alive at the time of the definite location by the company of its line.

In Error to the Circuit Court of the United States for the District of Montana.

At Law. Action in the nature of ejectment by the Northern Pacific Railroad Company against Maria Amacker. Judgment for plaintiff. 53 Fed. 48. Defendant brings error. Reversed.

Thomas C. Bach and Massena Bullard, for plaintiff in error.

Fred. M. Dudley, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. This is an action of ejectment in which the Northern Pacific Railroad Company sued the plaintiff in error to recover the possession of the N. W. $\frac{1}{4}$ section 17, township

10 N., range 3 W. of the principal meridian of Montana. Judgment was for the company. It relied for title on the act of congress passed in 1864, granting it the odd sections of government land within certain limits on each side of its railroad line wherever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office. The act also provides that if, prior to said time, the sections designated shall have been granted, sold, reserved, or occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by the company in lieu thereof, under the direction of the secretary of the interior, in alternate sections designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections. The act also requires the president to cause the lands to be surveyed for 40 miles on both sides of the entire line of the road after the general route shall be fixed, and provides that the odd sections shall not be liable to sale or entry or pre-emption except by said company. The character of the grant to the company is well defined. It is one in praesenti, but, as was said in *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389: “* * * The grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved.” In considering, therefore, what lands ultimately passed by the grant, there are two periods principally to be regarded: one the date of the granting act, the other the filing of the map of definite location of the road. Lands to which claims had attached at either period did not pass, though they were free from the claim at the other period.

In *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, a pre-emption claim existed at the date of the granting act which, however, had been abandoned before the map of definite location was found. It was held that it was not included in the grant. See, also, *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112.

In *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, a homestead entry was made after the date of the grant, but before the filing of the map of definite location, and it was held that the land was excepted from the grant.

It is contended on behalf of the plaintiff in error that the land in controversy in this suit is excluded from the operation of the grant to the railroad company upon two distinct grounds: First, by virtue of the pre-emption settlement of William M. Scott; and, second, by the homestead entry of McLean.

On the 5th day of October, 1868, one William M. Scott filed a pre-emption declaratory statement in the proper land office, claiming the said land, and alleging settlement thereon, which statement and filing were accepted and placed of record in the land office, and said entry has not been canceled. In the year 1869 the said Scott

built a cabin upon the premises, and lived there until the fall of that year. It was proven on the trial, over the objection of the plaintiff in error, that in the fall of 1869 Scott removed from the land, and lived in the city of Helena until 1878, when he changed his residence to the city of Butte; and that he never returned to the land in controversy, and never exercised any acts of ownership over the same, but, on the contrary, abandoned the land and his pre-emption rights in 1869. It is urged that the facts in regard to the abandonment of the claim by Scott were not properly the subject of inquiry on the trial; that, since the pre-emption entry remained of record uncanceled upon the plats of the land office, both at the time of filing the map of general route of the road and at the time of fixing the definite line of the same, it served to place the land within the exceptions named in the grant to the railroad company; and that the facts in regard to the alleged abandonment of the claim can only be considered by the officers of the land office, or in a direct proceeding to cancel the entry.

But, while the pre-emption entry remains uncanceled upon the plats of the land office, it elsewhere appears from the records that upon the 14th day of October, 1872, Scott voluntarily filed in the land office his amended pre-emption claim, wholly excluding therefrom the land in controversy, and fixing his pre-emption entry upon other lands. This act must be deemed an effectual cancellation of his former entry, so far as the land in controversy is concerned. The fact that the entry remained of record upon the plats, and no formal cancellation of the same was entered, is immaterial. If we concede that the entry was in force upon the date of the filing of the map of general route of the road, which was February 21, 1872, it was nevertheless canceled upon October 14th of the same year; so that both at the date of the grant to the railroad company and the date of fixing the line of definite route this land was free from the Scott pre-emption. The fact that at an intermediate date, the date when the map of general route was filed, the land was subject to the pre-emption claim, and was therefore not within the class of lands which by operation of law were withdrawn from settlement and entry under the public land laws, does not in any way affect the title or status of the land as between the parties to this action.

The map of general route filed on the 21st day of February, 1872, was filed in the general land office. On the 6th day of May, 1872, it was filed in the local land office of the district within which the land is situated. Three days before this last date William McLean made his homestead entry upon the land in controversy. On April 21, 1876, it was provided by statute that all pre-emption and homestead entries of the public lands made in good faith by actual settlers upon the tracts, of not more than 160 acres each; within the limits of any land grant, prior to the time when notice of withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, the proper proofs thereof have been made by the parties holding such tracts, shall be confirmed, and patents

for the same shall be issued to the party entitled thereto. By the act of June 15, 1880, (section 2,) it was provided that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homesteads may have been attempted to be transferred by bona fide instruments in writing, may entitle themselves to said lands by paying the government price therefor, with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

On the 3d day of July, 1879, the register and receiver of the local land office wrote to the commissioner of the general land office that McLean had been notified under the directions contained in the circular of December 20, 1873, to show cause why his entry should not be canceled for failure to make proof of compliance with the law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry; and thereupon, on September 11, 1879, said entry was canceled. McLean died on August 20, 1882. After his death, his widow, upon the assumption that his right to purchase under the act of 1880 descended to her, made application to purchase upon the 15th day of March, 1883. McLean's entry having been recognized as confirmed under the act of April 21, 1876, payment for the land under the subsequent act of June 15, 1880, was accepted as equivalent to proof of compliance with the provisions of the homestead law, and a patent was accordingly issued to the widow.

There can be no question but that the act of April 21, 1876, protected and made valid the homestead entry of McLean. There was nothing in the grant to the railroad company that would deprive congress of the power to pass that act. The provision in the grant that upon the filing of the map of general route the lands within certain limits were to be withdrawn from entry or settlement, would not interfere with the recognition of the right of a homestead settler, whose entry was made after that date; and the rule adopted in the act was a reasonable one in providing that the withdrawal should take effect only from the date when the map should be filed in the local land office, and thereby information should be conveyed as to the particular lands to be withdrawn. It was the object of the act to afford relief to persons who, without notice of the withdrawal, had made entries on lands prior to the time when notice of the actual withdrawal came to the officers of the local land office. But the homestead entry of McLean having been canceled upon the 11th day of September, 1879, and all his rights thereunder extinguished, the decision of the case is left to depend upon the question whether or not the act of June 15, 1880, restored to the homestead settler such right or claim to the land that thereby it came within the exceptions contained in the grant to the railroad company, and was not upon the 6th day of July, 1882, land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims. Notwithstanding the

cancellation of his entry, the record discloses that there was no abandonment of the claim by McLean.

The act of June 15, 1880, gave him the right to acquire title to the land by paying the government price therefor. The only limitation upon that right was the reservation which protected the rights of others who might subsequently enter said land under the homestead laws. This reservation could in no way apply to the railroad company. The inquiry is therefore confined to the single subject of the nature of the right thus conferred upon McLean. The act gave him the absolute right to purchase this land as against all the world except subsequent homestead settlers. That right was acquired on the passage of the act in 1880. The act contains no expressed limitation of time within which the right is to be exercised. There is nothing in the language employed or the nature of the right conferred which would indicate that the right should have expired on July 6, 1882, the date when the map of the definite route of the road was filed. The definite and absolute right to purchase a tract of the public land at a fixed price conferred by statute upon the homestead entry man constitutes, in our judgment, a claim upon the land such as is contemplated in the reservation from the grant to the Northern Pacific Railroad Company. The right, in this instance, differed in no essential feature from the right and claim of a pre-emption settler. The pre-emptioner's right to purchase the land upon which his claim rests is no greater, and is no more protected by law, than that of the homestead entry man, whose entry has been canceled, but not abandoned. The cancellation of the entry extinguished the right to prove residence and acquire title under the homestead laws, but the entry was restored to life and subsisted for the purpose of protecting the right to purchase the land under the terms of the act. It served thereafter to notify the railroad company and all others except subsequent homestead settlers of the nature of the right that still existed in McLean. Such being the status of this land at the time the map of definite route was filed, the grant to the railroad company could not attach to it, for it was at that date land subject to a claim.

It is suggested that the right to purchase under the act of June 15, 1880, was personal to McLean, and did not descend to his widow; and reference is made in support of that contention to the case of *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, where the court expressed a doubt whether the widow of the homestead settler was entitled to the benefit of the act. It is unnecessary to determine that question in this case. McLean was still living at the period at which the rights of the railroad company were fixed, the date of filing the map of definite location. If the patent were erroneously issued thereafter to the widow of McLean, it is a matter of which the railroad company, the plaintiff in ejectment, cannot complain; for it must recover, if at all, upon the strength of its own title.

The judgment is reversed, and the cause is remanded for a new trial, with costs to the plaintiff in error.

AMATO v. JACOBUS.

(Circuit Court of Appeals, Second Circuit. November 17, 1893.)

MARSHAL'S FEES AND POUNDAGE.

Where, in the southern district of New York, an execution irregularly issued by plaintiff's attorney, is stayed after levy, and subsequently vacated by order of court, the marshal is entitled to fees for levying, but not to poundage, for under Code Civil Proc. N. Y. § 3307, subd. 7, poundage depends upon the collection of the execution. The court may, however, in its discretion, under such section, allow the marshal compensation for his trouble and expenses in caring for the property levied upon.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Dominick Amato against the Northern Pacific Railroad Company, in which, on May 28, 1891, judgment was entered in favor of plaintiff for the sum of \$4,033.76, after a trial before a jury, defendant's motion for a new trial having been denied. 46 Fed. 561. On June 3, 1891, an execution was issued thereunder, and delivered to the marshal, who levied upon and took into his possession certain property of defendant. The execution was subsequently stayed, and on July 14, 1891, was set aside, under Rev. St. § 1007, as being improperly issued within 10 days after the entry of the judgment, the defect appearing upon the face of the execution. The judgment was affirmed by the circuit court of appeals, (49 Fed. 881, 1 C. C. A. 468, 1 U. S. App. 113,) and finally by the supreme court, (12 Sup. Ct. 740, 144 U. S. 465.) The final judgment of affirmance was entered June 4, 1892. Thereupon new executions were issued. In taxing the marshal's bill of costs the clerk allowed him fees and poundage under the first execution, which was set aside by the court, and such taxation was affirmed by the circuit court, and a motion by plaintiff for payment to his attorney of money collected by the marshal under the last execution was denied. Plaintiff brings error to review the order of the circuit court. Reversed.

Roger Foster, for plaintiff in error.

Robert D. Benedict, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the court below that, as between the plaintiff in the execution and the marshal, the latter is entitled to the same fees and poundage which he would have been entitled to if the execution had not been irregularly issued. Having taken out the process, and directed the marshal to execute it, decency and common honesty forbid him to repudiate the payment of any fees earned by the marshal in obedience to his instructions when the process was vacated at the motion of the judgment debtor. We are unable, however, to find any sanction for the marshal's claim for poundage. That claim rests on the provisions of the state law, (section 829, Rev. St. U. S.,) and cannot be enforced unless that law (Code Civil Proc. § 3307, subd. 7) would au-

thorize a claim for poundage by a sheriff of the state. By the Code, as formerly by the Revised Statutes, (2 Rev. St. p. 645, § 38,) a sheriff is entitled to poundage only upon the amount collected by virtue of the execution, except where a settlement is made between the parties after levy, when the poundage is upon the value of the property levied upon, not exceeding the sum at which settlement is made. It is the settled construction of these provisions by the highest court of the state that the right to poundage depends upon the collection of the execution, and is not created by any services rendered in executing the process previously. *Campbell v. Cothran*, 56 N. Y. 279; *Flack v. State*, 95 N. Y. 471. In the latter case the court of appeals, speaking of the change introduced in the pre-existing law by section 38 of the Revised Statutes, say that the right to poundage is "thereby made to turn upon the performance by the sheriff of the final act to be done in the course of the service of the execution." The case of *Scott v. Shaw*, cited in behalf of the marshal's claim, (13 Johns. 378,) is not in point, because it arose when the state statute gave poundage as a part of the fees for the service of the execution, and not, as now, upon the collection of the execution. If the marshal had been prevented from collecting the execution by the interference of the plaintiff or his attorney with the course of enforcing the process, undoubtedly he would be entitled to compensation for the poundage he would have otherwise earned. This is not such a case, but it is one where an execution, which was irregularly issued by the plaintiff's attorney, was vacated after a levy by an order of the court. Such a case is within the spirit, and fairly within the meaning, of the provision of the Code, which authorizes the court having control of the process to allow the officer compensation for his trouble and expenses in taking care of and preserving property where execution is stayed after a levy.

The order appealed from, so far as it affirms the marshal's claim for poundage, is erroneous. So far as it allows him the other fees charged, it is correct. It is for the circuit court, and not for this court, to determine whether an allowance should be made to the marshal for his trouble and expenses in taking care of and preserving the property.

The order is reversed, with costs, and with instructions to the court below to make such further order as of right and justice should be made.

DENVER, U. & P. R. CO. v. PORTER.

DENARGO LAND CO. v. SAME.

(Circuit Court, D. Colorado. October 31, 1893.)

Nos. 2,658 and 2,659.

LIMITATION OF ACTIONS—VACANT LANDS—PAYMENT OF TAXES.

The running of the Colorado statute of limitations relating to payment of taxes on unoccupied land under color of title is interrupted by the entry of another thereon under color of title, although such payments are continued to the full term named in the statute.

At Law. These were two actions brought against James R. Porter by the Denver, Utah & Pacific Railroad Company and the Denargo Land Company, respectively, to recover certain lands. The cases were consolidated for trial, and a verdict was rendered for plaintiffs. Defendant now moves for a new trial. Granted.

Edward O. Wolcott and J. F. Vail, for plaintiffs.
B. F. Montgomery, for defendant.

THOMAS, District Judge. The Colorado statute on which the second cause of action in each complaint is based reads as follows:

"Whenever a person having color of title, either by pre-emption or otherwise, as aforesaid, made in good faith to vacant and unoccupied land or mining claims, shall pay all taxes legally assessed thereon, or for improvements situate thereon, for five successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied lands or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such taxpayer, by purchase, devise or descent, before said five years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section." Gen. St. § 2187.

The court charged the jury on the second cause of action alleged in the complaint as follows:

"I instruct you that, as a matter of law, the deeds in evidence are such as to give color of title to the plaintiff in this case, under this statute, for the land in controversy; and the questions for you to consider under this section are whether the plaintiff, so having color of title, did in good faith suppose that it had title, and did pay all taxes legally assessed upon the premises for five successive years prior to the commencement of this suit, to wit, May 16, 1891, and did at some time prior to said date, in some manner, enter into or take possession of the premises. The taxes paid by those under whom plaintiff claims title are to be considered in this connection as if paid by the plaintiff; and if you find that the plaintiff, or those under whom it claims title, did so pay taxes for five successive years, and did in good faith suppose that it or they had title to the premises, and did at some date prior to the institution of this suit, May 16, 1891, in some manner, take possession of the premises, then your verdict must be for the plaintiff."

The defendant duly excepted to the same. The charge ignored the fact that the defendant went into possession in March, 1890, and continued in possession of some part of the premises, at least. I think the court committed prejudicial error in thus charging the jury. Hill and his grantees under color of title did not pay taxes for five years prior to the commencement of this action on vacant and unoccupied land, for the defendant went into possession before the five years expired. The statute on which the second cause of action in the complaints is based, in my opinion, means that the payment of taxes under color of title must be made on vacant and unoccupied lands for the full term named in the statute, and that the entry into possession by the defendant under claim and color of title stopped the running of the statute. In addition to this, important and difficult questions of fact were submitted to the jury, requiring a reasonable time to examine the exhibits, and consider

and compare the evidence, and arrive at a safe conclusion; yet the jury rendered a verdict in both cases in less than half an hour.

After careful review of the cases and the record submitted, I think substantial justice demands that a new trial be had in both cases; and it is so ordered.

SWIFT et al. v. PHILADELPHIA & R. R. CO. SAME v. CENTRAL VT. R. CO. SAME v. DELAWARE, L. & W. R. CO. SAME v. FITCHBURG R. CO. SAME v. NEW YORK, C. & ST. L. R. CO.¹

(Circuit Court, N. D. Illinois. November 27, 1893.)

1. CARRIERS OF GOODS — UNREASONABLE CHARGES — INTERSTATE COMMERCE — COMMON LAW.

The common-law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, even when the contract of carriage is made in a state where that rule prevails, since such commerce is governed solely by the laws of the United States, and the United States have never adopted the common law.

2. REMOVAL OF CAUSES — JURISDICTION — INTERSTATE COMMERCE ACT.

Federal courts have no jurisdiction, in suits removed from state courts on the ground of diverse citizenship, to enforce the provisions of the interstate commerce act, since in removed cases the jurisdiction of the federal courts is no wider than that of the courts in which the cases were begun.

At Law. On demurrer to declarations. Demurrers sustained.

E. Walker, Albert H. Veeder, and Mason B. Loomis, for complainants in all the cases.

John G. Milburn, S. E. Williamson, and Gregory, Booth & Harlan, for defendants Fitchburg R. Co., New York, C. & St. L. R. Co., and the Delaware, L. & W. R. Co.

Ullman & Hacker and Osborn & Lynde, for defendant Philadelphia & R. R. Co.

Schuyler & Kremer, for defendant Central Vt. R. Co.

GROSSCUP, District Judge. The declarations in these cases are substantially alike. The first three counts, with some variations, aver that the plaintiff is a corporation engaged in the business of shipping dressed beef and other provisions from the Union Stock Yards, in Chicago, to New York, Montreal, and other points in the eastern states and Canada; that after the 4th day of April, 1887, (the date the interstate commerce law went into effect,) and until April, 1888, the plaintiff, from time to time, delivered and the defendant accepted for transportation to such terminal points certain of its manufactured products; that the defendants were common carriers, engaged with other common carriers, in transporting continuously from Chicago to the eastern terminal points at certain rates established and then in force as the rate between such points; that the plaintiff was compelled to pay these defendants, according to the schedule rates, the sum of 65 cents per 100 pounds from Chicago to New York or Boston, and other rates in like proportion to other points; and that the rates so taken and exacted were

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

unjust and unreasonable. Two of these counts allege that these rates were established by combination between defendant and other corporations, and that the plaintiff paid the same under protest. The other special counts, except the fifth and seventh, are substantially the same, except that they aver that the defendants, and the other common carriers engaged with them in transporting the goods, used bills of lading for such shipments in the name and style of the Great Eastern Fast Freight Line, or other fast freight lines. The fifth and seventh counts are substantially the same as the others, except that they proceed expressly under the interstate commerce act. Most of the defendants demurred to all of the special counts, one of them, the Delaware, Lackawanna & Western Railroad Company, in place of a demurrer, filed a plea to the jurisdiction to the fifth and seventh counts. The cases are removed here, on the petition of the defendants, from the state courts, on the ground of diverse citizenship.

The general question raised by the demurrer is whether there is any law, common or statutory, applicable to the transactions set forth, which prohibits the exaction of unreasonable rates, or affects any contract between the shipper and carriers whereby unreasonable rates are stipulated for and taken. There can be no question that, in the absence of such prohibition or restraint, a common carrier can lawfully demand or contract for such compensation for carriage as he may be able to obtain. His privileges would, in such cases, be like those of any other person, and subject only to the economic laws which flow from trade and competition. If there is any municipal law which supersedes or supplements these economic laws, and subjects the carrier to restraints or regulations not imposed upon general business, it must be found either in the municipal law of the states or in a law of the United States.

It is not disputed that within the territory of the states, and upon subjects affected by state law, such a prohibition exists. It is one of the restraints embodied in the common law of England, and is therefore in force within every jurisdiction where the common law is the law of the land. It seems to me equally clear that, outside of the interstate commerce act, there is no law of the United States, as a distinct sovereignty, imposing such restraint. The United States, as a distinct sovereignty, imposes no laws upon its subjects, except such as are expressly or impliedly enacted by congress. Congress has not adopted the common law of England as a national municipal law. The courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected. Outside of the interstate commerce act, there is no enactment of congress, and no self-operating provision of the federal constitution, which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce, or lay any restraint upon the rights of carriers or shippers engaged therein. *Welton v. State of Missouri*, 91 U. S. 282; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

The question then arises, is the municipal law of the state applicable to the transactions set forth in the declaration? Is the act or contract of a carrier, who accepts goods for carriage from one state into another, subject to that particular provision of the municipal law of the several states where the goods are taken, or through which they are conveyed, which prohibits the exaction of unreasonable rates? There can be no doubt that to congress is given, by the constitution, the absolute power to regulate commerce between the states. This power, independently of legislation, is not necessarily exclusive of the right of the states to reasonably regulate such incidents of interstate commerce, lying within their respective jurisdictions, as wharves, pilots, harbors, roads, bridges, etc. A wharf, harbor, or bridge lying within a state is a tangible entity, over which the laws of the state extend. The cost of their creation and the expenses of their maintenance make the imposition of tolls or charges not only reasonable, but necessary. These must be enforced by and subject to some law, and, in the absence of congressional legislation, there is no law except that of the state. The application of state law in such cases is not inconsistent with the general power conferred upon congress, and does not introduce into commerce between the states either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other states upon wharves, harbors, and bridges within their territorial limits. But the fixing of a rate for the carriage of goods from one state to another is not simply an incident of, or appurtenance to, commerce, but is the very core and essence of interstate commerce. It is not a physical entity within the limits of a state, and it cannot be subject to regulation in one state without coming into interference with the equally rightful regulations of other states, and thus producing hopeless contradiction and confusion. How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio, or Pennsylvania? The reasonableness of such rate depends, among other things, upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed, and taxes and assessments exacted, by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other states; and the amount of traffic carried, which may, in turn, be affected by the laws of the other states governing the acquisition of, or consolidation with, other lines. These, and many others, are the elements of the cost of carriage, and, before the reasonableness of a rate can be determined, the cost must be ascertained. The reasonableness of rates for such long distances, and over different methods of conveyance, can only be approximately ascertained, at best, by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1,000 miles long? I am of the opinion that a rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business,

and interpretations of the laws of different states, is essentially a national affair, and its regulation is therefore exclusively national. The rate of carriage is the heart pulse of commerce, and can be subject safely to a single source of restraint only. Many restraints, themselves entirely different and inconsistent with each other, would destroy the very possibility of uniformity or fixedness of rates. It follows, therefore, that in my opinion the local municipal law of the several states is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these.

It is urged on argument that, inasmuch as the contracts for shipment were made in Illinois, the law of Illinois necessarily entered into their constitution and terms; that a contract could not be made which contravened the municipal law of the state. The counts of the declaration which proceed upon contract assume that the rate charged was agreed upon between the parties. Now the law of Illinois does not introduce a new term into this contract. Its utmost effect would be to forbid a contract for an unreasonable rate, and therefore make the supposed contract unlawful. But the effect of this would be simply to abrogate the contract, and leave the transaction open to such adjustment as the application of the proper laws allowed. That law, as has already been pointed out, cannot be found in the jurisdiction of the states, but only in the body of the laws of the United States.

Those counts of the declaration which proceed directly upon the interstate commerce act cannot be sustained in these suits. The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts, acquired by the fact of diverse citizenship.

For the reasons above stated, the demurrers are sustained, and the several counsel will prepare their orders accordingly.

UNITED STATES v. ANDREWS.

(District Court, S. D. California. December 6, 1893.)

POST OFFICE—OBSCENE MATTER—PRIVATE SEALED LETTER.

The amendment of September 26, 1888, by which the word "letter" was inserted in the list of nonmailable matter enumerated in Rev. St. § 3893, brings within the prohibition thereof an obscene, private, sealed letter. U. S. v. Wilson, 58 Fed. 768, disapproved.

At Law. Indictment of A. D. Andrews for mailing an obscene letter. Heard on demurrer. Overruled.

George J. Denis, U. S. Atty.

J. Marion Brooks, for defendant.

ROSS, District Judge. The demurrer in this case raises the question whether a private, sealed letter, upon the envelope of which there is nothing but the name and address of the person to whom it is sent, is within the prohibition of section 3893 of the Revised Statutes, as amended by the act of September 26, 1888, (25 Stat. 496,) by which amendment the word "letter" was included in the list of articles made nonmailable by reason of their obscene, lewd, lascivious, or otherwise improper character. In support of the demurrer the counsel for the defendant relies upon a very recent decision of the district court for the northern district of California, in which it was held by Judge Morrow that such a letter does not come within the inhibition of the statute as amended in 1888. *U. S. v. Wilson*, 58 Fed. 768. I regret to be obliged to differ from Brother Morrow in that respect. From his opinion, with which I have been favored, it appears that his conclusion is based upon the opinion of the supreme court in the case of *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756, and particularly upon certain rules of construction there referred to by the court.

The indictment under consideration in that case was founded on section 3893 of the Revised Statutes, as amended by the act of July 12, 1876, (19 Stat. 90.) The matter thereby excluded from the mails was thus described in the statute: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how or of whom or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed;" and the question presented to the court was whether the term "writing" included a sealed letter upon the envelope of which there was nothing but the name and address of the person to whom the letter was written. Upon that question the decisions of the lower courts had been theretofore conflicting, some holding that it did, and others that it did not. In holding that the term "writing" did not include such a letter, the supreme court said, among other things:

"In the statute under consideration the word 'writing' is used as one of a group or class of words,—book, pamphlet, picture, paper, writing, print,—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written. We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as 'letters' was intended by congress to be expressed in a term so general and vague as the word 'writing,' when it would have been just

as easy, and also in strict accordance with all its other postal laws and regulations, to say 'letters' when letters were meant; and the very fact that the word 'letters' is not specially mentioned among the enumerated articles in this clause is itself conclusive that congress intended to exclude private letters from its operations."

The supreme court found a further argument in support of its view in the fact that the statute it was construing, after declaring by enumeration what articles should be nonmailable, added a separate and distinct clause declaring that "every letter upon the envelope of which * * * indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed * * * shall not be conveyed in the mails," and the person knowingly or willfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, said the court, "specifically designating and describing the particular class of letters which shall be nonmailable, clearly limits the inhibitions of the statute to that class of letters alone whose indecent matter is exposed on the envelope."

All of this is cogent reasoning why the term "writing," in section 3893 of the Revised Statutes, as amended by the act of July 12, 1876, did not include a private, sealed letter, upon the envelope of which there is nothing but the name and address of the person to whom the letter is written. But I am unable to see that it is at all applicable to the amendment of September 26, 1888, by which not only the specific term "letter" was inserted in the statute, but the separate and distinct clause of the act of July 12, 1876, declaring that "every letter, upon the envelope of which * * * indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed * * * shall not be conveyed in the mails," was omitted, and the prohibition in respect to delineations, epithets, etc., upon the envelope or outside cover or wrapper was made applicable to all matter otherwise mailable by law. Congress was not content with the law of 1876, by which, as has been seen, a particular class of letters only was excluded from the mail, to wit, those upon the envelope of which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written; and by the amendment of September 26, 1888, struck out that limitation, and inserted the specific word "letter" among the excluded things, without regard to what should be upon the envelope. It is difficult to see how the intent of congress to exclude all letters of the character denounced could have been made plainer. By a proviso to the act of September 26, 1888, it was declared that nothing in the act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself. This provision of the statute, securing the sanctity of private correspondence, is in line with what was held by the supreme court in *Ex parte Jackson*, 96 U. S. 735, where it was said that, while the law excluding from the mails obscene, lewd, or lascivious letters cannot "be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation in other

ways; as from the parties receiving the letters or packages, or from agents depositing them in the post office, or others cognizant of the facts."

Demurrer overruled.

UNITED STATES v. ALLEN.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 101.

CUSTOMS DUTIES—DRAWBACKS—COAL USED BY AMERICAN VESSELS.

The provision of Schedule N of the tariff act of 1883, allowing, as amended by the act of June 19, 1886, (24 Stat. 81,) a drawback of 75 cents per ton on imported coal afterwards used by steam vessels of the United States engaged in foreign commerce or the coasting trade, was not repealed by the provision in Schedule N of the act of October 1, 1890, which merely imposes a duty of 75 cents per ton on imported coal; but the drawback, less 1 per cent. thereof, is continued in force by the proviso to section 25 of said act, relating to drawbacks "allowable under existing law." 52 Fed. 575, affirmed.

In Error to the District Court of the United States for the Northern District of California.

At Law. Action by Charles R. Allen against the United States to recover a drawback on imported coal. Judgment for plaintiff. Defendant brings error. 52 Fed. 575. Affirmed.

Charles A. Shurtleff, Asst. U. S. Atty., (Charles A. Garter, U. S. Atty., on the brief,) for the United States.

Charles Page, (Page & Eells, on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On the 6th of April, 1891, Charles R. Allen, appellee herein, brought this action to recover from the United States, appellant herein, the sum of \$93.94 alleged to be due him as drawback under the provisions of the act of congress of March 3, 1883, (22 Stat. 511,) as amended by the act of June 19, 1886, (24 Stat. 81,) on certain bituminous coal by him imported into the United States, and subsequently consumed as fuel on the Humboldt, a steam vessel of the United States engaged in the coasting trade of this country.

There is no controversy as to the facts. The merits of the case are to be disposed of by determining the legal question whether or not the right of drawback given by the statutes above mentioned is repealed by the act of congress of October 1, 1890, (26 Stat. 600,) commonly known as the "McKinley Bill." To intelligently present this question, it will be proper to refer to certain portions of the statutes which are necessary to be considered in order to arrive at a correct construction of the act.

We quote (1) that portion of Schedule N of the act of March 3, 1883, which reads as follows:

"Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. A drawback of seventy-five cents per

ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board of vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the secretary of the treasury shall prescribe."

(2) Section 10 of the act of June 19, 1886, declares—

"That the provisions of Schedule N of 'An act to reduce internal revenue taxation, and for other purposes,' approved March 3, 1883, allowing a drawback on imported bituminous coal, used for fuel on vessels propelled by steam, shall be construed to apply only to vessels of the United States."

(3) That portion of Schedule N of the act of October 1, 1890, which reads as follows:

"Coal, bituminous and shale seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal, slack or culm, such as will pass through a half-inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel."

(4) Section 25 of the act of October 1, 1890, which declares—

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: provided that when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained. And provided further, that the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of custom duties when exported, shall in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter or agent, shall in writing order such drawback paid under such regulations as the secretary of the treasury shall prescribe."

The act of October 1, 1890, was evidently intended to be a complete revision of the tariff laws. As was said in *Re Straus*, "it manifests a plain intention to substitute that tariff act in the place and stead of all prior tariff legislation, so far, at least, as such legislation lays a duty upon imported articles of any kind." 46 Fed. 522; Letter of attorney general, 19 Op. Attys. Gen. 687. It will be observed, however, that the act does not, in direct terms, repeal the drawback on coal. The question is whether the prior acts allowing this drawback are repealed by the clause in section 55, "that all laws and parts of laws inconsistent with this act are hereby repealed."

It will be conceded, as claimed by appellant, that the omission from that portion of Schedule N of the act of October 1, 1890, imposing a duty of 75 cents a ton on bituminous coal, of the drawback clause in relation to such coal contained in the act of March 3, 1883, as amended by the act of June 19, 1886, of itself, indicates the intention of congress to abolish such drawback, and, if there were no

v.58f.no.6—55

other provisions in relation to this matter, would be conclusive upon the subject. But it is apparent that the question is not solved by a reference only to that portion of Schedule N. The true meaning and intent of the act cannot be ascertained without a careful consideration of the provisions of section 25. What does this section mean? What was the intention of congress in inserting the second proviso, "that the drawback on any article allowed under existing law shall be continued at the rate herein provided?" Does this section, in its entirety, deal exclusively with drawbacks upon exports? Is the word "article," as used in the second proviso, to be construed as applying only to an exported article?

In answer to these questions, we adopt the views expressed by Judge Ross in overruling the demurrer interposed by the United States, as follows:

"It is urged on the part of the government that section 25 deals exclusively with drawbacks upon exports, and that the word 'article,' in the second proviso, means and refers to an exported article, and to no other. An analysis of the section does not sustain the contention. The section provides in distinct terms for a drawback—First, on all articles wholly manufactured from imported materials, and thereafter exported; second, for a drawback on all articles made partly from imported materials, and thereafter exported. This language, as said by plaintiff's counsel, covers every possible manufacture made in this country, whether wholly, or partially only, of foreign materials, and thereafter exported. These provisions are followed by the proviso that the drawback allowed 'under existing law on any article shall be continued at the rate herein provided;' that is to say, the amount returned shall be that of the duty paid, less one per centum. There could be no clearer recognition than is here expressed of the fact that there were at the time of the passage of the act of October 1, 1890, existing laws providing for drawbacks. Among them, as has been seen, was the act of March 3, 1883, as amended by that of June 19, 1886, giving a drawback on bituminous coal imported into this country, and used on steam vessels of the United States. This drawback was therefore, by the express language of the second proviso of section 25 of the act of October 1, 1890, continued, but at the rate provided in that section, to wit, the amount of duty paid, less one per centum. This, it seems to me, is the natural and ordinary meaning of plain language. There is not only no authority in the court to interject by construction the word 'exported,' as the attorney for the government contends should be done, before the word 'article,' in the proviso in question; but it would, in effect, be so to construe that proviso as to make it apply to drawbacks on exported articles specifically provided for in the preceding clauses of the section,—that is to say, to drawbacks on articles manufactured in this country, wholly or partially of foreign materials, and thereafter exported. The court is not at liberty to say that congress meant by the words embodied in the proviso in question to provide for the same drawbacks it had immediately before made specific provision for, nor is it at liberty to hold that the legislature, in declaring 'that the drawback on any article allowed under existing law shall be continued at the rate' specified in the section, did not mean what its language naturally and plainly imports. It is true that ordinarily the office of a proviso is to restrain or qualify some preceding matter, and will be so restricted, in the absence of anything in its terms, or in the subject it deals with, indicating an intention to give it other and broader effect; but where, as in the present case, to restrict it to the matter preceding it would, as has been shown, make it mean precisely the same thing as the clause to which it is appended, the language employed should be given the natural and ordinary meaning it conveys as an independent clause. 'Like everything else, interpretation has its limits, beyond which it cannot legitimately go. Where the legislative meaning is plain, there is not only no occasion for rules to aid the interpretation, but it is contrary

to the rules to employ them. The judges have simply to enforce the statute according to its obvious terms.' Bish. Writ. Law, § 72; *Thornley v. U. S.*, 113 U. S. 313, 5 Sup. Ct. 491.

"The laws existing at the time of the passage of the act of October 1, 1890, allowing drawbacks, were not uniform. In some cases, a drawback was fixed at the amount of duties paid less ten per cent.; in others, the deduction was one per cent.; and by the act of March 3, 1883, the full amount of duty paid on bituminous coal was allowed as a drawback. Rev. St. §§ 3017, 3026; 18 Stat. 340; 23 Stat. 57. By the second proviso of section 25 of the act of October 1, 1890, the amount of drawback allowed is placed on all articles at a uniform rate, with certain exceptions specially provided for elsewhere in the act, as, for example, in paragraph 322, (26 Stat. 588,) in relation to salt. The provision of the act of March 3, 1883, in regard to that article, was as follows: 'Salt in bags, sacks, barrels, or other packages, twelve cents per one hundred pounds; in bulk, eight cents per one hundred pounds. Provided, that exporters of meats, whether packed or smoked, which have been cured in the United States with imported salt, shall, upon satisfactory proof, under such regulations as the secretary of the treasury shall prescribe, that such meats have been cured with imported salt, have refunded to them from the treasury the duties paid on the salt so used in curing such exported meats in amounts not less than one hundred dollars. And provided, further, that imported salt in bond may be used in curing fish taken by vessels licensed to engage in the fisheries and in curing fish on the shores of the navigable waters of the United States, under such regulations as the secretary of the treasury shall prescribe; and upon proof that the salt has been used for either of the purposes stated in this proviso the duties on the same shall be remitted.' 22 Stat. 514. By the act of October 1, 1890, the order of the enactment is somewhat changed, but it is in substance the same, and is as follows: 'Salt in bags, sacks, barrels, or other packages, twelve cents per one hundred pounds; in bulk, eight cents per hundred pounds. Provided, that imported salt in bond may be used in curing fish taken by vessels licensed to engage in the fisheries and in curing fish on the shores of the navigable waters of the United States, under such regulations as the secretary of the treasury shall prescribe; and upon proof that the salt has been used for either of the purposes stated in this proviso the duties on the same shall be remitted. Provided further, that exporters of meats, whether packed or smoked, which have been cured in the United States, with imported salt, shall, upon satisfactory proof, under such regulations as the secretary of the treasury shall prescribe, that such meats have been cured with imported salt, have refunded to them from the treasury the duties paid on the salt so used in curing such exported meats, in amounts not less than one hundred dollars.' 26 Stat. 588.

"This is cited on the part of the government as illustrative of the method adopted and pursued by congress in the act of October 1, 1890, when providing for the retention of existing drawback rights in respect to imported articles passing into home consumption, and not thereafter exported. The answer to this is that in the case of the use of imported salt from the bonded warehouse in curing fish not exported, as permitted by the first provision of the above-cited paragraph of the act of 1890, there is a remission of duties, not the allowance of a drawback, which latter necessarily implies the former payment of duty; and, in the case of the drawback permitted by the second provision of the paragraph on imported salt used in curing meats afterwards exported, the provision is that there shall be refunded from the treasury the duties paid on the salt so used in curing such exported meats, in amount not less than one hundred dollars. It is manifest that these provisions could not be brought within the general language employed in the second proviso of section 25 of the act declaring that drawbacks allowed 'under existing law on any article shall be continued at the rate herein provided;' that is to say, the amount returned shall be that of the duty paid, less one per centum, and therefore a special provision in relation to salt became a necessity."

The judgment of the district court is affirmed.

HEULINGS et al. v. REID.

(Circuit Court, E. D. Pennsylvania. November 14, 1893.)

No. 51.

1. PATENTS—INVENTION—ANTICIPATION—MILK COOLERS.

The Evans & Heulings patent, No. 471,974, for a milk cooler, consisting of a combination of corrugated cooling plates and an intermediate filling of metal, limited to the space between and uniting the plates, is void, as to the sixth and seventh claims, for anticipation and want of invention.

2. SAME—JOINT PATENTS—VALIDITY.

A joint patent is invalid as to a feature previously invented by one of the patentees, and which is not a necessary part of the device jointly invented.

In Equity. Suit by Samuel M. Heulings and Elwood Evans against Alban H. Reid for infringement of a patent. Bill dismissed.

Strawbridge & Taylor, for complainants.

Philip T. Dodge, for defendant.

BUTLER, District Judge. The suit is on patent No. 471,974, issued to Evans & Heulings, dated March 26, 1892, for improvements in milk coolers. The sixth and seventh claims only are involved. They are as follows:

"(6) A cooling apparatus, comprising plates corrugated transversely and supported in operative position by means located between the plates, whereby the ends of the corrugations on their outer surfaces are left free and unobstructed for cleaning purposes, substantially as specified. (7) The combination of corrugated cooling plates and an intermediate filling of metal, limited to the space between and simultaneously uniting the plates, substantially as specified."

These claims cover the same matter. The plaintiffs' expert says so, and their counsel admit it.

In view of the former state of the art, we think they embrace nothing new in a patentable sense. The plaintiffs' description of coolers in common use previously may be adopted with slight alteration. Those of the general type of that disclosed in the patent consisted of two vertically erected plates of sheet metal correspondingly corrugated transversely to their height, and so connected at their top, bottom, and sides as to constitute a closed receptacle for a liquid refrigerant, with a milk distributing trough above the plates, and a collecting trough below them. In operation, liquid inlet and outlet pipes being in communication with the space between the plates, iced water or other cold liquid is caused to circulate through the said space so as to chill the plates, and the milk to be treated is delivered to the distributing trough, from which it escapes in small streams or drops, and descends upon and trickles in a thin film down and over the outside faces of the water-cooled corrugated plates into the collecting trough below, from which it is subsequently removed for use. Generally in milk coolers of the foregoing type as constructed prior to the invention of the patentees the means employed to support the corrugated plates in position, to secure them in proper relationship to each other, and to her-

metically close the space between the side edges or margins of the plates so as to prevent the lateral escape of the cooling fluid, consisted of straight-sided vertical end standards or plates, of width in excess of the breadth of the two corrugated plates from crest to crest, and butted against the ends of the plates. In this arrangement the closing up of the ends of the grooves of the corrugated plates by said standards occasioned the formation at the juncture of the standards and plates of angular recesses designated pockets; and in the use of such coolers it was found impossible, in cleaning the structure with ordinary appliances, to gain such access to the corners of the pockets as would enable the user to thoroughly cleanse them, with the result that such milk as in the cleaning of the device escaped removal remained to deteriorate and taint the milk subsequently subjected to the action of the cooler. To remove the difficulty of cleansing the grooves at the standards the plaintiffs severed the connection between the plates and standards, leaving a space between, and closed the ends of the plates by other means. They accomplished this by simply moving the standards back, and closing the openings thus left by solder or similar material, as described. In this we are unable to see any evidence of invention. Its accomplishment required nothing more than a slight mechanical change in the structure, such as any skilled workman in the art would have understood how to make. The same result would have been attained by simply cutting the standards down at the edges, so as to make them correspond with the corrugations of the plates, and leave the ends of the grooves open. The difference between this and placing the standards thus reduced *between* the ends of the plates would be immaterial. But the plaintiffs have not even the merit of being first to do what they did. The cooler described was the one in general use, but the art had advanced beyond it before the plaintiffs' alleged invention. In August, 1890, the defendant moved the standards back, and closed the ends of the plates; and coolers so made were sold and used. It is unimportant that he closed the space thus left open between the plates by folding their ends over, and sealing them. There is no substantial difference between this and closing the space with solder, as the plaintiffs describe. If folding the ends and sealing them down did not produce sufficient rigidity, as the plaintiffs urge, no invention would be required to increase it by the insertion of metal between the plates, or by other means. It further appears, however, that Heulings, one of the plaintiffs, did the same thing in 1890, by precisely the same means which the plaintiffs employ. Mr. Heulings himself testifies to this, and he is uncontradicted. The fact that his name is included in the patent is unimportant. Evans can derive no benefit from his invention, and a joint patent for it cannot be sustained. As he testifies, Evans had no connection with it. It was his own work exclusively. It is not a necessary part of the cooler which they jointly invented, but is as applicable to any other cooler as to this. If patentable, he alone was entitled to the patent. It was an independent invention, standing by itself, and could be applied to any

other description of cooler. The law respecting joint inventions and patents need not be discussed. Some pretty nice distinctions have been drawn by the courts in this regard, and a little confusion and uncertainty created. The facts involved here, however, seem to remove all doubt.

The Lawrence patent of 1876, and the Chambers patent of 1874, also, we think, suggest quite plainly all the plaintiffs have done.

The bill must be dismissed.

RODWELL MANUF'G CO. v. HOUSMAN.

(Circuit Court, E. D. New York. November 21, 1893.)

PATENTS—SUIT FOR INFRINGEMENT—DEMURRER.

A demurrer to a bill for infringement must be overruled unless the patent is so void on its face as to require no defense.

In Equity. Suit by the Rodwell Manufacturing Company against Moses Housman for infringement of a patent. Heard on demurrer to the bill. Overruled.

C. H. Duell, for plaintiff.

H. A. West, for defendant.

WHEELER, District Judge. This suit, brought upon letters patent No. 477,429, dated June 21, 1892, and granted to Arthur Martyn, for a method of making advertising signs by molding or stamping the letters or symbols in plastic or ductile material, and placing them under glass, the field of which is covered, leaving a similar pattern, has been heard on demurrer to the bill. Unless the patent is so void on its face as to require no defense to a suit upon it, the demurrer must be overruled, and the defendant left to make his defense according to the provisions of the statute governing such defenses and the principles of procedure. Rev. St. U. S. § 4920; New York, etc., Co. v. New Jersey, etc., Co., 137 U. S. 445, 11 Sup. Ct. 193; Blessing v. Copper Works, 34 Fed. 753; Indurated, etc., Co. v. Grace, 52 Fed. 124; Goebel v. Supply Co., 55 Fed. 825. The specification contains a disclaimer of similar signs, but not of this method of making them, which, as an art, is patentable separately from the signs themselves, if sufficiently new and useful. The several steps of the method are said to be and are old, but the combination of them producing this result is not known to be, nor even said to be. The disclaimer of signs made by carving is said to be a disclaimer of every obvious method of making similar signs, but the court cannot say that the method of this patent was so obvious before Martyn made it so.

Demurrer overruled; bill to be answered by December rule day.

FORGIE v. OIL-WELL SUPPLY CO., Limited.

(Circuit Court of Appeals, Third Circuit. November 21, 1893.)

No. 24.

1. PATENTS—WHO ENTITLED—INVENTION—WRENCH FOR OIL-WELL TOOLS.

Plaintiff, being interested in oil-well machinery, applied to an inventor and manufacturer of a patented lifting jack for information respecting the application of the principles of the jack to a wrench for oil-well tools. As the result, a modified jack was made by such inventor, stamped as patented by him, and introduced and sold by plaintiff, who thereafter surreptitiously obtained a patent on specifications embodying exactly the principles of the mechanism of the jack manufactured. During the sales by plaintiff, he effaced the patent stamp from the tools, and substituted his own, but on protest desisted, and agreed not to again offend. *Held*, that plaintiff was not the original inventor.

2. SAME.

Patent No. 422,879, granted March 4, 1890, to William Forgie, for a wrench for oil-well tools, is void, because the improvement covered by it is not the invention of the patentee.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Suit by William Forgie against the Oil-Well Supply Company, Limited, for infringement of a patent. Decree dismissing bill. 57 Fed. Rep. 742. Plaintiff appeals. Affirmed.

William L. Pierce, (Joseph R. Edson, on the brief,) for appellant.
James I. Kay, (Robert D. Totten, on the brief,) for appellee.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

GREEN, District Judge. The bill of complaint in this case was filed to restrain the appellee, the defendant below, from infringing certain letters patent numbered 422,879, granted to the appellant on the 4th day of March, 1890, for certain new and useful improvements in wrenches for oil-well tools. In the specification of the letters patent, it was stated that the invention related to an automatic wrench for coupling and uncoupling the sections of a drill rod for a well boring or drilling apparatus. The coupling for which the invention was especially adapted for use consisted of a tapering or conical screw, the sockets of which were fitted tightly and securely together.

The drilling of oil wells, especially in the state of Pennsylvania, has become an art, well defined, and perhaps unique. Originally, oil wells were drilled only two or three hundred feet deep; but, since the flow of oil has lessened from these comparatively shallow reservoirs, wells are now more commonly sunk to a much greater depth,—in not a few instances, to the depth of three thousand feet; and, as the depth has increased, so has it been found necessary to increase the diameter of the well. The earlier wells were not more than 4 inches in diameter. Now, they are scarcely less than 12 to 16 or 18 inches. It followed, of course, that in the drilling of these larger and deeper wells the tools commonly used would nec-

essarily have to be much increased in size, successfully to perform the excavation. The apparatus used in drilling these wells is composed of what may be termed a string of tools, or heavy iron or steel rods, having a sharpened end, operated by steam power. This string of tools is lifted to a sufficient height, by the action of the steam, directly over the excavation. When at its maximum height, it is dropped suddenly into the well, and the drilling is accomplished by the repeated pounding of the tools upon the bottom of the excavation. A string of tools weighs generally from two to three thousand pounds, and it is readily seen, with the momentum acquired in their fall, its operation is simply tremendous. Now, usually, the larger part of the excavation is drilled through solid rock, and hence the concussion of the tools with the rock not only rapidly dulls the lower or sharpened tool in the string, but, as well, causes dust to arise, which, entering the joints, makes it almost impossible to unscrew them. The lower part of the string of tools is technically called the "bit," and this is fastened by a screw joint to the tool next above it. At very short intervals, it becomes necessary, from the dulling effect of the concussion upon the bit, to draw the tools from the well, and remove the lower section, for the purpose of sharpening. This was always an exceedingly difficult operation. As stated, not only did the concussion dull the end of the bit, and cause dust and little particles of rock to fill the threads of the screw by which it was attached to the next tool above it, but, as well, the threads of the screw subjected to so great a blow would be battered and distorted by the concussion with the solid rock. The manner in which, in the earlier days of oil wells, the bit was originally unscrewed from the tool immediately above it was this: An arc-shaped track, about half an inch thick, called in the evidence a "circle plate," was secured to the floor of the derrick, and connected with the well. In the plate, two parallel lines of holes were made, nearly from end to end. At one end of this circle plate was rigidly secured a stout post, against which rested the end of a stationary wrench bar. The other end of this wrench bar was hook-shaped, to grasp the lower section of the drill rod. This was really, in effect, only a powerful hand, to hold stationary the lower section while the upper section was rotated. The upper section of the drill rod was gripped by the end of a similar wrench bar, called the "moving wrench bar." The other end of this wrench bar projected out over the circle plate. A pinch bar, or, practically, a crowbar, with the end slightly bent, and of suitable size at the lower end to enter the holes in the circle plate, was thrust in one of the holes. Two men, facing each other, grasped this pinch bar, and—one pushing and the other pulling—used it as a lever against the moving wrench bar. By this means, the moving wrench bar and the drill rod were swung through a short arc, about equal to the distance from one hole to another on the circle plate. The pinch bar then, of course, lost its bearing, in the first hole of the circle plate, and was removed to the next hole in advance; and so, by this crude, tiresome, and repeated application of force to the bar, the sections of the drill rod were at last uncoupled.

So difficult was the operation that it often required the united power of many men to accomplish it successfully.

Mr. Forgie, the appellant, was an oil-well driller, and in 1886 was in charge of a gang of men drilling oil wells in western Pennsylvania. As such operator, he was constantly meeting with this great difficulty caused by the want of effective means to couple and uncouple the various parts of strings of tools, and that difficulty evidently caused him to consider whether, in some way or other, the power generated or transmitted by a machine could not be utilized to overcome it. The evidence does not disclose how he came to consider whether the machine or tool generally known as a "lifting jack" could be so utilized, but it is apparent from what he did that such an idea was in his mind.

In 1885 Mr. Josiah Barrett, of Allegheny, Penn., had perfected a lifting jack, or invented certain new and useful improvements in lifting jacks, which very greatly increased the capacity of that tool, and perfected its operative power. Mr. Forgie had heard of Mr. Barrett, and probably of the success of his inventive efforts, and sought an interview with him at the office of the Duff Manufacturing Company, of which Mr. Barrett was superintendent. At that interview the difficulties which embarrassed drillers of oil wells in the manipulation of their drilling tools were stated by Mr. Forgie, and, apparently, were fully discussed. Evidently, the suggestion that the mechanism and operative power of a lifting jack could be in some manner utilized to couple and uncouple the sections of a drill rod was original with Mr. Forgie, but, beyond this mere suggestion, the evidence does not disclose any further action on his part tending to a solution of the problem involving the adaptation of the jack to the novel purpose. As a result of this interview, or of others which followed it, Mr. Barrett prepared plans and patterns, changing in some degree, and altering, not so much the mechanism of his jack, as its operation, and made therefrom an experimental tool, which successfully accomplished the object in view. Practically, that which had been done was nothing more or less than the adoption of Mr. Barrett's lifting jack to the movement of the wrench bar. A number of these tools or devices were made by Mr. Barrett for Mr. Forgie, and sold by Mr. Forgie. They became very popular in the oil regions. They clearly filled a vacant place, and successfully vanquished the difficulties which had been so hard to combat. In 1890 Mr. Forgie, without notifying Mr. Barrett of his purpose, applied for and obtained letters patent for this tool or device, as his own invention. As Mr. Barrett continued, after the issue of the patent, to manufacture the reconstructed jack, and put it upon the market for sale, Mr. Forgie filed his bill, charging infringement, and seeking an injunction and other relief. There is no dispute that the tool manufactured and sold by Barrett is exactly similar to that which had been previously manufactured for and sold by Forgie. If the letters patent are valid, or if Mr. Forgie is entitled to the credit of the invention, undoubtedly, the defendants have infringed.

In the answer filed by the defendant in this cause, two defenses

are interposed. The one relates to the patentability of the device in question. The second is much more important and serious. It is set forth in the answer in these words:

"But this defendant denies that the said William Forgie was the original, true, and first inventor of said invention, but on the contrary this defendant alleges that Josiah Barrett, of the city of Allegheny, county of Allegheny, and state of Pennsylvania, was the inventor and originator of all the material and useful parts of said improvement, and that he communicated the same to the said William Forgie, and that the said William Forgie surreptitiously applied for a patent upon the improvement of said Josiah Barrett, and unlawfully obtained letters patent therefor."

If that allegation be true, this cause is ended. Who, then, was the inventor of this device in question,—Forgie or Barrett? In considering this question, it may be well, at the outset, to understand who are the contestants for the honor of this alleged invention.

Forgie was born in Washington, Penn., about 45 years ago. He had probably but little education; certainly, none of a technical character. He appears to have begun life pretty early on his own account, and as a carpenter, or perhaps as an apprentice to a carpenter. Tiring, apparently, of this occupation, he became a sailor, and followed the sea for a period of two years. That seemed to weary him, as well, and he left that service to become a soldier, doubtless serving out his term of enlistment. He gained some knowledge as a sapper and miner in a military school in Canada, whither he had drifted. Returning to the United States, he again enlisted in the army, and served for a period of three years. At the end of that period, he went to the oil country in Pennsylvania, and began to work there as a carpenter. Then he became a driller of oil wells, and finally a contractor for the construction of oil wells themselves. Certainly, his life and occupations seem not to have been of that character which would carry with them a knowledge of mechanics, or of the operation of the laws of mechanics, even in their simplest form. So far as Mr. Barrett, the other claimant of this invention, is concerned, the facts are meager. He does not disclose in his testimony his earlier occupations, but it appears that for a long number of years he had been connected with an iron manufacturing company as a valued employe. He was an inventor, and had previous to the time in question invented several tools or machines, especially this lifting jack, which, it is said, ranks as one of the best known. He had advanced himself in life until he had become the superintendent of a large manufacturing company. Now, it appears from the evidence, as has been stated, that Forgie seems to have been impressed with the apparent inability of mere muscular force rapidly and properly to operate a wrench for the unscrewing of oil tools, and to have reached the conclusion that in some way or other a mechanical device could be substituted. But this notion, whatever it was, was extremely hazy, and without any well-defined limit. He does not, at least in the *prima facie* case as made by him, speak of or describe his alleged invention with particularity; and one of his own witnesses, who was called to substantiate his claim

that he was the inventor of the tool in question, is compelled to admit that, even after he had received from Mr. Forgie an explanation of mechanical details, he was utterly unable to explain intelligibly any of them, and could only say that Forgie had three or four ideas about the matter, but that he did not know whether any of them were practical or not; that the whole of Forgie's idea, as the witness recollected it, was that a jack was to be applied to the screwing and unscrewing of oil-well tools, in some way or other. He simply proposed, so far as the witness understood him, to get something that was easier to screw the joints, and unscrew them. The only conclusion which can be drawn from the testimony touching Forgie's knowledge or conception of the present device, which he afterwards patented, is that it was extremely indefinite, and utterly unpracticable; and it was because of his own inability to formulate his ideas definitely that he sought Mr. Barrett, for the purpose of suggesting to him the use of the lifting jack, and to discover from him if it could be so altered and changed and modified that it might accomplish the purpose desired. The accounts given by Mr. Forgie and by Mr. Barrett of the first interview which took place between them are not contradictory. Undoubtedly, Mr. Forgie did describe to Mr. Barrett the usual method of coupling and uncoupling the tools with the old appliances, and the great necessity for overcoming existing difficulties. He conceded the value and power of the jack invented by Mr. Barrett, and repeatedly said that, if it could only be made applicable to this work of coupling and uncoupling oil-well tools, he thought it would do the work with ease. But there was the rub. How could it be so applied? Evidently, Forgie had not the slightest idea as to this, for nowhere does it appear that he made the slightest suggestion, of any practical benefit, looking to this end. A lifting jack was to be used, primarily, for lifting perpendicularly; but the wrench bars, in the act of coupling or uncoupling oil-well tools, must be moved horizontally. To a most superficial observer, it must have been apparent that to accomplish the last result the position and plane of operation of a lifting jack must be materially changed. Yet this primary step towards success in solving the problem under consideration was taken by Barrett, and not by Forgie. At that very first interview, there is no dispute about the fact that Barrett put his jack in such position that it would operate horizontally, and then described to Mr. Forgie the changes that he would make in it, so that it would exert pressure upon the oil-tool wrench. Nor is there any serious dispute that at this interview Mr. Barrett also made various sketches or rough draughts of the proposed changes in the jack, and of the patterns that would be necessary to construct the tool in accordance therewith. Then, too, it is not denied that Mr. Barrett suggested to Mr. Forgie that a Mr. Rankin, who was a pattern maker, and made for him all the patterns for his lifting jack, had better be employed to change those patterns, or make new patterns according to the rough draughts that Mr. Barrett had made, which would be necessary for the making of the device, as it was to be altered. Mr. Forgie, in his account of this same conversation, while he takes

more credit to himself for suggestions than Mr. Barrett gives him, does not contradict Mr. Barrett in any particular point, but admits, among other things, that Barrett did say, referring to his lifting jack, "Why not go on and use this machine of mine, I have everything necessary to do the work with, and can do it much cheaper, and I know it will do the work;" and he adds, "and consequently we agreed upon that method, and I went to the pattern maker and got the patterns made accordingly." This is a corroboration of Barrett's statement, and, taking both accounts together, it clearly shows that when Forgie went to Barrett he had no definite plan in his mind; that he was in pursuit of information and aid; that various plans were talked about; and that finally the conclusion was that Barrett's jack, to be altered as Barrett suggested, was the one that would do the work. Nowhere is there the least intimation in the testimony that Forgie suggested any other mechanism than that which Barrett had described to him as part of his jack. It is a very remarkable feature of this case, and extremely suggestive of the power of Forgie to appropriate, that more than a year afterwards, when he applied for this patent, he embodied in the specifications of his invention every part of the mechanism of Barrett's lifting jack, without a change, or a shadow of a change.

If the statement of Mr. Barrett is true,—and it seems to be in harmony with and to be corroborated by other matters in the cause than those referred to,—it is quite clear that he should have the honor of this invention, if there be patentable novelty in it at all. Forgie had conceived of no practical tool or device. He had no theory or plan which would enable a lifting jack to be used as the motive power to couple and uncouple a string of tools used for boring an oil well. He simply stated, when he went to Forgie, the necessities of the case, and sought from him information whether a certain tool invented and patented by him could not be adapted to meet these necessities. If this were all the testimony in the case, we should have but little if any hesitation in giving the credit of this invention to Barrett. But there are other matters which still more strongly preponderate against the claim of Forgie; and one is that, for a long time after this modified jack of Barrett's was applied to the oil-tool wrench, the tool was stamped as Barrett's patent, with the full knowledge and consent of Forgie, and without protest or objection. This stamping of the tool continued for nearly a whole year. Forgie was the sole person employed to sell them during that time. Every tool passed under his eye, and yet he stands with his mouth closed, without a word of objection to the bold and unlawful appropriation by Barrett of this device as his invention, if he were not the inventor. Another corroborating circumstance is this: Rankin, the pattern maker, who was an entire stranger to Forgie, and who had no interest in this matter, states that, when Forgie came to see him about the pattern, he gave him express directions to see Barrett, and obtain from him instructions how to make the patterns; he told him that Barrett was to get up the plans; and that in fact Barrett did get them up, and give them to him to make. Another circumstance corroborating Mr. Barrett's con-

tention is found in this fact: It appears that after a year or more, during which time Mr. Barrett was manufacturing this tool for Mr. Forgie to sell, and during which time Barrett's name appeared as patentee upon the machine itself, it came to the knowledge of Barrett that Forgie, after the tool had left Barrett's factory, had chipped off or ground off his name, as patentee, and affixed his own name in place thereof; that Barrett immediately protested to Forgie that he could not permit such change to be made, and threatened, if Mr. Forgie did not instantly cease, he himself would stop manufacturing the tool in question for him; and that thereupon Mr. Forgie agreed that he would not again offend in this particular. How can such conduct on the part of Forgie be reconciled to his claim that he was the original inventor of the device in question?

Nor do we think that the facts stated by Mr. Forgie, when examined long after the close of the defendant's case, strengthen his position in the slightest. It was a perfectly well-defined issue in this case whether Barrett or Forgie was the inventor of this device, and whether Forgie had not surreptitiously, and in fraud of Barrett's rights, obtained letters patent therefor. When he was first examined by his own counsel, upon his direct testimony, he failed to give evidence which would raise a doubt as to Barrett's primary conception of the changes in the jack necessary to be made, prior to any suggestion which Forgie may have made. But after the close of the defendant's case, and not in rebuttal thereof, but as a part of the *prima facie* case which he should have made originally, and under the explanation or excuse that his counsel had failed to ask him proper questions to bring out the true facts, Forgie, in detail, claims that he was the first inventor of all the mechanism connected with the tool in question, and insisted that he had explained it in full to Barrett only for the purpose of obtaining from Barrett information where the necessary patterns could be made. Such testimony is interjected in the cause at too late a date to be of much weight. Besides, notwithstanding that claim of Forgie, which clearly was an afterthought, he utterly fails to produce any witnesses who had known of such a conception by him of the mechanism in that jack, or any sketches or any drawings or any patterns showing that he had materialized his knowledge, if he had any at all, into any practical plan. Admitting that he may have had some conception of what was wanted,—which, however, is very doubtful,—mere conception is not invention. It is the crystallizing of that conception into the invention itself, operative and practical, that entitled the inventor to the protection of letters patent. Nor can full weight be given to the testimony of Forgie, because he repeatedly contradicts himself, while upon the witness stand, in important particulars. This may have arisen from infirmity of memory, or from the peculiar position that he occupied as a witness in the case; but he cannot rid himself of the effect of the contradictions, nor ask the court to place that faith in his statements which, perhaps, otherwise might be given to them. It is unnecessary to go over any more of the evidence on this part of the case in detail. It is enough to say that the court are satisfied that Mr. Forgie was not the in-

ventor of this device, but that the real credit of the invention, if any there be, belongs to Mr. Barrett.

Counsel for the appellant insisted that, if the testimony left in the mind of the court a reasonable doubt upon this point, his client was entitled to the benefit of it. A large number of cases, both in the supreme court and in the circuits, hold that doctrine, nor do we propose to dispute it. If it were an open question, we might consider whether the presumption arising from the granting of the letters patent could not be overthrown, as any other presumption at law is overthrown, by the preponderance of evidence. But accepting it as settled that any doubt is fatal to a claim antagonistic to the validity of letters patent themselves because of fraud, we can but say that in this case the principle cannot afford the appellant any assistance. The evidence is too convincing to permit the shadow of a doubt.

Having arrived at this conclusion, it is not necessary to discuss the question of novelty, which was raised and ably argued by both counsel before the court. The result is that the judgment of the court below is affirmed.

EDISON ELECTRIC LIGHT CO. et al. v. DAVIS ELECTRICAL WORKS.

(Circuit Court, D. Massachusetts. December 13, 1893.)

No. 3,196.

PATENTS—INFRINGEMENT—RECONSTRUCTING ELECTRIC LAMPS.

The Edison incandescent electric lamp is an organic whole, which lasts only during the life of the carbon filament; and, if the bulb is thereafter broken open, the identity of the lamp as a structure is gone. Therefore it is an infringement of the patent to make a hole at the bottom of the bulb, insert a new filament having its ends inserted in platinum sleeves, close the hole by fusing a piece of glass over it, and then exhaust the air.

In Equity. Bill by the Edison Electric Light Company and others against the Davis Electrical Works for infringement of letters patent No. 223,898, granted January 27, 1880, to Thomas A. Edison for an electric lamp. Decree for complainants.

Frederick P. Fish and Wm. K. Richardson, for complainants.
John L. S. Roberts, for defendant.

COLT, Circuit Judge. If the Edison lamp were so constructed that a new burner could be placed in it, like a new wick in an ordinary lamp, or if it were made of two parts designed to be taken apart for the purpose of replacing the old burner with a new one, as in the Sawyer-Man lamp, I should hold that a purchaser of the Edison lamp had a right to renew the carbon filament, on the ground that this was an ordinary repair, contemplated by the patentee when the lamp was sold, and that the defendant in so repairing such lamps did not infringe the Edison patent. But the difficulty which meets me in this case is that the Edison lamp was not designed to be so repaired, and is incapable of such renewal.

The Edison lamp is constructed as an organic whole, and you cannot break open the all-glass chamber and insert a new filament without a substantial reconstruction of the lamp. The lamp is only intended for use during the life of the filament. In prior incandescent lamps the life of the burner was brief, and it was necessary to so build the lamp that this part could be renewed. Edison, by making an almost perfect vacuum in the all-glass chamber, and thoroughly sealing all the parts, constructed a lamp in which the filament or burner lasts from 600 to 1,000 hours. To attain this result the lamp assumes a form of construction which renders it impossible to replace a new filament in the glass bulb without building essentially a new lamp. When you take an Edison lamp with its filament destroyed, and break open the all-glass chamber, you have only left the broken pieces—the remains—of the original lamp. Its identity as a structure is gone. The only parts remaining which are not impaired or destroyed are the metallic head and the leading-in wires. When you build anew from such materials, it is like breaking up an old machine and constructing a new one in which some of the old parts are used.

The defendants first break off the tip of the glass bulb of the lamp, and ream out a hole about one-half inch in diameter. The broken filament is then removed. The new filament, having its ends cemented into platinum sleeves, is then inserted into the glass chamber, the sleeves being pushed down over the two platinum leading-in wires, and compressed upon them. A tube of glass, made into the shape of a funnel, is heated and placed over the hole in the lamp chamber. This tube is fused into the open end of the bulb, which brings it into the condition of the ordinary lamp bulb just prior to exhaustion. The air is then exhausted and the bulb sealed. It is evident that this operation covers many of the constructive features of the ordinary lamp. When we consider what is done by defendants in connection with the second claim of the Edison patent, it is made clear, I think, that the defendants do more than merely repair. The claim is for "the combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth." It will be seen that this claim consists of four elements,—a carbon filament, a receiver made entirely of glass, conductors passing through the glass, and a receiver from which the air is exhausted. It is apparent that defendants, by substituting a new filament, making over the glass receiver, and exhausting the air from such receiver, produce a lamp in which all the elements but one (the leading-in wires) of the patented combination are used either in a new or reconstructed form. The lamp thus produced is substantially a new lamp, and its voltage may be higher or lower than the old one. From the very nature of the Edison invention, I do not see how the glass bulb can be opened, and a new filament inserted, without making essentially a new lamp.

As to the new lamps which the defendants are charged with making I find no sufficient proof that the defendants make or

threaten to make them since the decision of this court sustaining the Edison patent. Their business seems to have been confined strictly to their so-called "repairing."

Injunction granted.

BALLARD v. McCLUSKEY.

(Circuit Court, S. D. New York. December 14, 1893.)

1. PATENTS—INVENTION.

Patentable invention is shown when the combination is new, and produces a machine which does more and better work than those which preceded it.

2. SAME—BOX MACHINES—EJECTORS.

Invention is shown in substituting, for the old rubber ejectors in the blank or pattern cutting roll of a box machine, sectional ejector plates which are actuated by springs, have a central support and rocking motion, and are more easily adjustable, more durable, and superior in operation to the old.

3. SAME—INFRINGEMENT.

A claim, in a box-machine patent, for "the scoring roll, S, and the pattern cutting roll, C, the former having a continuous series of scoring knives, and the latter a corresponding series of pattern knives arranged upon their peripheries," is infringed by a machine in which the scoring roll is but one-third the size of that of the patent, and has but one series of knives instead of three, but which is made to revolve three times as fast, thus equalizing the difference in dimensions.

4. SAME—EVIDENCE—WITNESS.

A court of equity should scrutinize with great care the statements of a patentee who, having taken the oath that he believed himself to be the first inventor, as required by Rev. St. § 4892, gives testimony inevitably tending to prove that such oath was false.

5. SAME—PARTICULAR PATENT.

In the Titus patent, No. 272,354, for improvements in machines for cutting box patterns, the first claim *held* to be too broad, and a disclaimer required; the other three claims *held* valid, and infringed by defendant.

In Equity. Bill by Charles W. Ballard against James J. McCluskey for infringement of a patent. Decree for complainant.

For prior report, see 52 Fed. 677.

Walter D. Edmonds, for complainant.

James P. Foster, for defendant.

COXE, District Judge. This is an equity suit for infringement, founded upon letters patent No. 272,354, granted to James M. Titus, February 13, 1883, for improvements in machines for cutting box patterns. The patent is now owned by the complainant. The invention relates to machines for cutting box patterns from continuous sheets of veneer which are first scored according to the desired pattern and are then passed under a cutting roll which cuts a series of patterns from the scored sheets and automatically removes them by means of ejectors. Although the scoring of the sheets and the cutting of the patterns may be effected in separate machines the inventor's method is to feed the scored sheets to the cutting roll directly they leave the scoring roll. In this way he saves time and labor and avoids the difficulty of causing the scored

sheets to register properly with the pattern cutters. The machine of the patent consists of three rolls, a bearing roll, a scoring roll and a cutting roll, the latter two being mounted in adjustable bearings and geared with the bearing roll which carries the driving-belt pulley. The scoring and cutting rolls may be changed according to the desired pattern. To prevent the pattern from sticking in the recesses formed by the projecting cutting edges, ejectors are provided consisting of plates actuated by coiled springs, or by any other means, and held within the recesses by headed guide pins. The operation of the machine is thus described:

"The bearing roll B being rotated through the medium of its belt pulley B' from any suitable prime motor or by means of a crank and hand power, the other rolls are rotated, a sheet of veneer is fed between the bearing roll B and the scoring roll S, that forms the scores of the patterns, and the scored sheet passes from the latter roll directly under the cutting roll C, that cuts out the patterns from the scored sheet, which, as fast as cut, are automatically ejected from the cutting devices by the followers or ejectors E, and from which patterns the boxes are then made, as hereinbefore described. The machine as constructed may be employed for cutting patterns or blanks from pasteboard, cardboard, or analogous material with equally good results."

The result is the production of a blank which can be readily bent into a completed "butter dish."

The claims are as follows:

"(1) In a machine for scoring and cutting out patterns for boxes or dishes from veneer or analogous material, the combination, with a scoring roll and a cutting roll of a single bearing roll, operating to feed the material first to the scoring roll and then to the cutting roll, as described, for the purpose specified.

"(2) In a machine of the class described, the combination, with a pattern-cutting roll having a continuous series of knives arranged upon its periphery to cut two or more patterns successively, of a corresponding series of spring-actuated ejector plates, arranged in sections, two or more for each pattern, said sections having the form, or nearly so, of the pattern cut, substantially as and for the purpose specified.

"(3) In a machine of the class described, the combination, with a scoring roll having a continuous series of knives arranged upon its periphery to score a given pattern, of a cutting roll having a corresponding series of cutters and spring-actuated ejectors, both having the form of the pattern, and a feed and pressure roll, operating to feed the veneer or analogous material directly from the scoring to the cutting roll, whereby the patterns are scored, cut, and ejected from the cutters in continuity, substantially as and for the purpose specified.

"(4) The combination, with the scoring roll S and the pattern-cutting roll C, the former having a continuous series of scoring knives and the latter a corresponding series of pattern knives arranged upon their peripheries, as described, of the bearing roll B, operating to feed a continuous sheet of veneer or analogous material first to the scoring roll and then to the pattern-cutting roll, substantially as and for the purposes specified."

The defenses are invalidity of title, anticipation, lack of invention and noninfringement. That the complainant's machine is an improvement over all similar machines which preceded it cannot very well be disputed. It is more easy of manipulation, more accurate in adjustment and operation and more economical in result. Upon the evidence here presented it is able to do more work than any other machine and has practically taken possession of the market. It is, of course, true that many elements of the claims considered

separately were old and several of them had previously been combined in similar machines. This is true in almost every instance where combinations are under consideration. It cannot be questioned that Titus was the first to construct the machine of the patent. His combination was new, and, though it may not produce a new result, it certainly produces an old result in a better way. It is not thought necessary to enter upon a discussion of the question how far invention lies in the various elements which make up the combination. An inventor should not be so treated. It is unfair. The combination should be considered in its entirety. If the machine is new and does better work than the machines which preceded it a strong presumption of patentability is presented. This machine consists of a scoring roll, a cutting roll and a bearing roll geared together, the cutting roll being provided with spring ejector plates arranged in sections so that the veneer is raised, without injury, from the knives. The three rolls synchronize perfectly in operation and preserve exact coincidence between the score and the cut, the result being that the machine produces more blanks and better blanks than any other. This is enough. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; *American Cable Ry. Co. v. City of New York*, 56 Fed. 149; *Loewer v. C. P. Ford & Co.*, 55 Fed. 62. So much for the combination.

Regarding the ejector plates, considered apart from the main combination and as covered by the second claim, there is, it is thought, little difficulty in establishing patentability. It is said truly that rubber ejectors were old and that rubber in many instances is an equivalent for a spring. It is argued, therefore, that there was no invention in substituting the spring ejector for the rubber ejector. It is not always fair to test a patent by a hard and fast rule like this. The improvement of Titus was not merely the substitution of one equivalent for another. The new ejectors are in every way superior to the old. They last longer, they are more easily adjusted and they do much better work. A skilled mechanic would hardly have hit upon the ingenious idea of making the plates sectional, giving them a central support and imparting to them the rocking or tilting movement so beneficial in operation. Surely there was here as much of the inventive faculty as was displayed in putting an elastic rubber back into the rubber packing of stuffing boxes, (*Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71,) or as was shown in the substitution of vulcanite for gold as a base for artificial teeth, (*Smith v. Vulcanite Co.*, 93 U. S. 486.)

The patent is not anticipated by the Indianapolis machines. *Imprimis*, the principal testimony comes from a somewhat discredited source—James M. Titus, the inventor. To say the least a court of equity should scrutinize with great care the statements of one who, having taken the oath required by section 4892, Rev. St., gives testimony the unavoidable effect of which is to prove that such oath was false. Even in the case cited in support of this testimony (*Greenwood v. Bracher*, 1 Fed. 856) the court, in answer to the ques-

tion whether a patentee is estopped from proving that the invention is not novel, said: "I think the answer depends entirely upon the fact whether the party has acted in good faith in the matter." If, however, this testimony came from a perfectly reliable source, it would hardly be sufficient to anticipate any of the claims. It is vague and uncertain. A person skilled in the art would have difficulty in constructing a machine from the description given. None of the machines were produced. Some of them were burned up and sold for old iron. Others did not work satisfactorily and were abandoned. They were all machines for making the staple-bound dish and no other. The rolls were not geared together, the scoring roll was made to turn by the veneer passing through and none of the machines were provided with spring ejector plates.

It is unnecessary to enter upon a discussion of the Lang, Baldwin, Jaeger, Percival, Fry and Waste patents further than to say that they have all been examined and no anticipation found. It is plain that the Percival ejectors operate upon a very different principle from the Titus ejectors.

As to infringement. There seems to be no dispute that the defendant, at Frankford, Del., operated several machines precisely similar to the patented machine, except that the scoring roll was one third the size of the patented roll and scored but one blank at each revolution; but as it was made to turn three times as fast the difference in dimension was equalized. Instead of using three series of knives the defendant uses one series three times. The function is the same. The result is the same. It is probable that when the patentee prepared his specification and used the words "a continuous series of knives" he did not have in mind the small scoring roll of the infringing machine, but it is plain what he meant. He intended that the scoring roll should be provided with knives which should feed a series of scores to the corresponding series of cutting knives on the cutting roll. There was nothing in the art requiring him to limit the patent to a scoring roll of the exact size of the cutting roll and a construction so limiting it would be harsh and illiberal. The court should not seek to destroy a patent by construction, but, rather, to uphold it. *Machinery Co. v. Sharp*, 54 Fed. 712. The patent describes a valuable combination to which the owner of the patent is entitled, even though the patentee may have attempted to claim too much and may have used loose and inartistic language in description and claims.

The complainant insists that all of the claims are infringed, and as the defendant attacks each claim separately it is necessary to examine them with some care. The complainant's expert witness says:

"The fourth claim of the patent is substantially similar to the first, with the simple exception that the scoring-roll element, the pattern cutting roll element, and the bearing roll are lettered to correspond with the lettering of the drawings of the patent for similar parts."

If this be so, and I think it is, it is plain that here are two claims for the same combination. The first claim must be limited to the elements described as the distinguishing features of the patented

machine. If broadly construed to cover three rolls geared together it is void in view of the Baldwin and other patents. If limited to cover only the improvements of Titus it is the same as the fourth claim. The first claim is too broad, and, under the arbitrary and, to my mind, unjust rule which obtains in this circuit, must be disclaimed. The fourth claim is clearly infringed, but it also may be too broad. In view, however, of the rule referred to, the doubt, if there be one, should be resolved in favor of the patent. No possible injury can result to the defendant from a decision which permits the appellate court to pass upon this question. The other claims are clearly restricted to the precise advancement made by Titus and are infringed. It is thought that a sufficient *prima facie* title has been established and that the action is maintainable in the southern district of New York.

It follows that, on filing a disclaimer of the first claim, the complainant is entitled to the usual decree upon the other claims, but without costs.

MEYER v. DR. B. L. BULL VEGETABLE MEDICINE CO.

(Circuit Court of Appeals, Seventh Circuit. November 6, 1893.)

No. 6.

TRADE-MARK—FRAUD—INJUNCTION.

Where complainant has established a trade in a cough mixture known as "Bull's Cough Syrup" and "Dr. Bull's Cough Syrup," and defendant has placed on the market, with the fraudulent purpose of causing it to be mistaken for complainant's article, a cough mixture inclosed in wrappers similar to those used by complainant, and designated as "Dr. B. L. Bull's Celebrated Cough Syrup," complainant is entitled to an injunction restraining defendant not only from using such name on such wrappers, but also from using such name on any kind of wrappers in a manner calculated to deceive the public.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

In Equity. Bill by Adolph Carl Meyer against the Dr. B. L. Bull Vegetable Medicine Company to enjoin the use of certain trade-marks and trade-names, and for an accounting. There was a decree for the complainant, but the decree was not as broad as the prayer of the bill. Complainant appeals. Modified.

Statement by WOODS, Circuit Judge:

The appellant asks us to extend the scope of the decree granted him by the circuit court. The nature of the action is sufficiently shown by the decree entered, whereby it was found and adjudged as follows:

"(1) That since about the year 1855 the complainant and his predecessors in business have been engaged in the manufacture and sale of a certain remedy of the nature of a cough syrup, which remedy has been put up, and is now put up, in packages of a characteristic form and appearance, the said characteristic form and appearance consisting essentially in the fact that the package has been inclosed in a white wrapper, printed in black, like that to the interlocutory decree herein attached, marked 'Complainant's Wrapper.'

"(2) That the complainant's said remedy, in the next preceding paragraph mentioned, was put upon the market by complainant's predecessors and introduced and popularized at great expense under the names of and as 'Bull's

Cough Syrup,' and 'Dr. Bull's Cough Syrup,' by which names it came to be widely known and identified by consumers and the public, and widely and favorably known, and which, before the acts of the defendant in the bill of complaint mentioned, had been used exclusively to designate and identify complainant's said remedy continuously for a period of more than thirty years.

"(3) That by reason of the exertions and outlay of the complainant and his predecessors there was created, and at the time of the acts of the defendant in the bill of complaint mentioned there existed, a great demand for the said remedy under the names of 'Bull's Cough Syrup,' and 'Dr. Bull's Cough Syrup,' and a large and important good will and business of manufacturing and selling the same had been created and existed, which was a source of great profit to the complainant."

(4) That the defendant, in or about the year 1888, knowing of the existence of complainant's said article, and of the names "Bull's Cough Syrup" and "Dr. Bull's Cough Syrup," by which it was and had long been sold and identified, and of the great demand existing for the same, and of the wrapper and package in the first paragraph hereof described, willfully and fraudulently prepared and put upon the market a remedy having the nature of a cough syrup, which was by it, the defendant, put up in imitation of complainant's said article, and marked and designated "Dr. B. L. Bull's Celebrated Cough Syrup," having procured from one Dr. B. L. Bull, who had previously for a short time and to a limited extent prepared and sold a cough syrup inclosed in a yellow wrapper, and marked and designated "Dr. B. L. Bull's Cough Syrup," all the claim and right of said Dr. B. L. Bull to the said recipe, mark, and designation, and inclosed in a white wrapper substantially similar to that of complainant aforesaid, whereby the article thus by the defendant put upon the market was fraudulently given a name and appearance substantially similar to the said remedy of the complainant. A specimen of the wrapper thus by the defendant used, showing the name and other features by it applied as aforesaid, is annexed to the interlocutory decree, marked "Defendant's Wrapper."

(5) That the name "Dr. B. L. Bull's Celebrated Cough Syrup," and the said wrapper, were each and both willfully and fraudulently devised, constructed, and arranged for the purpose of causing the defendant's said article to be mistaken and sold in the market for complainant's article, and for the purpose of creating an unfair competition, and of diverting to the defendant the trade and business of the complainant in the true and genuine "Bull's Cough Syrup," or some part thereof; and that the acts of the defendant in the premises aforesaid were calculated to mislead the public and consumers, and to cause the sale and acceptance of defendant's said article as and for "Bull's Cough Syrup," and as and for complainant's article.

(6) That an injunction issue herein perpetually restraining defendant, its servants and agents, and all persons in privity with it or them, from using, or causing to be used, the words "Dr. Bull's Cough Syrup," or "Dr. Bull's Celebrated Cough Syrup," or "Dr. B. L. Bull's Cough Syrup," or "Dr. B. L. Bull's Celebrated Cough Syrup," upon any label or wrapper for boxes, or any packages of cough syrup resembling or in imitation of the labels or wrappers or trade-mark of the complainant attached to this decree, whether in style of engraving, printing, lettering, or color thereof; and from vending or exposing for sale, or causing to be vended or exposed for sale, any article of cough syrup, having upon the boxes or other packages thereof any such labels or wrappers so made in imitation of or resemblance to the said labels or wrappers of the complainant.

(7) That an injunction issue, perpetually restraining the defendant, its clerks, attorneys, and all in privity with it, from making use, in connection with its said preparation, of the representation of a bull, or any part or parts thereof, as a mark or distinguishing feature or otherwise, upon its wrappers or labels, or as part of any circular or circulars, show card or show cards, advertisement or advertisements by it used, published, or put in circulation.

"(8) That, it appearing that no profits, gains, or advantages have accrued to the defendant by reason of the use of the simulated labels, in the fourth paragraph of this decree referred to, complainant is not entitled to any

recovery except the sum of one hundred and three dollars and ninety-six cents, the costs of the complainant, duly taxed by the clerk of this court; and that the complainant recover of the defendant the said amount, and, in default of payment of the same within ten days, that he have execution therefor."

In lieu of the sixth paragraph, the complainant asked, but the court refused, a substitution of the following: "That an injunction issue herein perpetually restraining the defendant, its servants and agents, and all persons in privity with it, from manufacturing and from selling, and from in any manner offering to sell, and from distributing and from in any way disposing of any remedy or preparation to which shall be applied in any form or manner, as the name and designation thereof, the words, 'Dr. B. L. Bull's Cough Syrup,' or the words, 'Bull's' and 'Cough Syrup,' with or without other words, and from making use of wrappers like that hereto annexed, marked 'Defendant's Wrapper,' and from making use of wrappers substantially like it, and from in any other form or manner using any name or designation which is calculated to cause its article to be known in the market and sold under the name of complainant's article, or as 'Bull's Cough Syrup.' But the writ of injunction thus to be issued shall not (except as to the name or part of the name thereof, as aforesaid) prohibit the defendant from in every fair and lawful manner stating in the wrappers or labels by it used and otherwise that its article is by it manufactured and sold, and from so fairly and lawfully stating any other fact which it may elect or desire to state."

Rowland Cox, for appellant.

C. J. Faber, for appellee.

Before HARLAN, Circuit Justice, and WOODS, Circuit Judge.

WOODS, Circuit Judge, (after stating the facts.) Our conclusion is that the appellant's motion for a modification of the sixth paragraph of the decree should have been sustained. As it is, the respondent is restrained from using the words, "Dr. Bull's Cough Syrup," and other forms of expression containing those words, "upon any label or wrappers for boxes or any packages of cough syrup resembling or in imitation of the labels or wrappers or trade-marks of the complainant," but not from using the words upon labels or wrappers of any style which could not be said to resemble or be in imitation of the labels or wrappers of the complainant. The finding of the court is explicit that the defendant devised, constructed, and arranged the name as well as the wrapper of its article for the fraudulent purpose of causing it to be mistaken and sold in the market for complainant's article, and that the tendency of the defendant's acts in the premises was to effect that result. The question presented, therefore, is not one of trade-mark strictly, but of fraud. Descriptive words, like "cough syrup," and proper names, of course, cannot be appropriated by one to the exclusion of another; nevertheless they may not be used for the purpose of perpetrating a fraud which affects the public. In *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, it is said:

"There are cases where the right to use a name to designate a product is so qualifiedly exclusive that the right to the protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. * * * The application of this principle is not necessarily dependent upon a proprietary right in a name, or the exclusive right to its use; but when another resorts to the use

of it fraudulently as an artifice or contrivance to represent his goods or his business as that of a person so previously using it, and to induce the public to so believe, the court may, as against him, afford relief to the party injured."

The same doctrine is recognized in *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Canal Co. v. Clark*, 13 Wall. 311. And in *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, it is said, upon the authority of a large number of cases cited:

"There can be no question of the soundness of the plaintiff's proposition that, irrespective of a technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe that he is buying those of the plaintiff. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right by imitative devices to beguile the public into buying their wares under the impression that they are buying those of their rivals."

In *Chemical Co. v. Meyer*, *supra*, the plaintiff's preparation was called "Brown's Iron Bitters," and that of the defendant "Brown's Iron Tonic," but, it appearing that no fraud was intended, that the two preparations were "known to the trade and purchasers as distinct and separate," and that the one was never mistaken for the other, an injunction was refused.

While it is the right of every producer or manufacturer to show by some form of statement or legend upon the label or brand of his article where it was made, the names of places being to that extent common property, and incapable of appropriation as trade-marks, yet he may not use the name in a manner and with the intent to make it appear that his article is the same as another, still on the market, which theretofore had been made at the same place, and had been known by the same or by a similar name. In *Wetherspoon v. Currie*, L. R. 5 H. L. 508, a starch made at Glenfield had come to be known as "Glenfield Starch," and the maker was granted an injunction against the use of the same name by another for his starch, of which the manufacture had been commenced more recently at the same place, and also against the use of the word "Glenfield" in large and dark letters upon the packets in a way intended to cause one article to be mistaken for the other. And in *Thompson v. Montgomery*, 41 Ch. Div. 35, 50, the proprietors of an ale brewed at Stone, and long known as "Stone Ale," obtained an injunction against the use of that name for another and later product of ale, which was also made at Stone. These cases are cited with approval in *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, *supra*, and the principle upon which they proceed is equally applicable to corresponding uses of personal names. While the right of no one can be denied to employ his name in connection with his business, or in connection with articles of his own production, so as to show the business or product to be his, yet he should not be allowed to designate his article by his own name in such way as to cause it to be mistaken for the manufacture or goods of another already on the market under the same or a similar name. Whether

it be his name or some other possession, every one, by the familiar maxim, must so use his own as not to injure the possession or right of another.

The appeal is therefore sustained, at the costs of the appellee, with instruction that the motion for a modification of the sixth paragraph of the decree be allowed; and it is so ordered,

BROWER v. BOULTON et al.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

1. TRADE-MARKS—INTENTION TO APPROPRIATE.

Complainant's predecessors, flour dealers, in 1873, furnished 220 barrels of flour to a commission firm for export to Venezuela, branding the barrels, at the firm's direction, with the name "La Venezolana." In 1884, defendants, in ignorance of the former use of the word, gave the same name to a particular grade selected by them for export to the same place, and from that time to 1891 shipped large quantities of flour so branded. In 1891, complainant registered the name as a trade-mark. *Held*, that the use of the name in 1873 was so transient and inconsiderable as to suggest mere experiment, and that the evidence of intention to appropriate it was repelled by the omission to use it until after its adoption by defendants. 53 Fed. 389, affirmed.

2. SAME.

Any right conferred by the use of the name in 1873 would inure to the benefit of the commission firm, and not to complainant's predecessors.

3. SAME—REGISTRATION—PRIMA FACIE EVIDENCE OF TITLE.

The prima facie evidence of title which, by the statute, the registry of the trade-mark gave to the complainant, was overthrown by the proof of the appropriation of the name by defendants in 1884.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by William H. Brower against William G. Boulton and others for alleged infringement of a trade-mark. Bill dismissed. 53 Fed. 390. Complainant appeals. Affirmed.

A. v. Briesen, for appellant.

Camillus G. Kidder, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a bill to restrain the defendants from using the words "La Venezolana" as a trade-mark applied to flour. The complainant is the successor in business of S. Oscar Ryder, who died in November, 1888, and A. V. Ryder, who carried on the business subsequently until the complainant purchased it. The complainant registered the words in the patent office as a trade-mark for flour November 17, 1891; his application having been made October 9, 1891. The complainant and his predecessors in business, and the defendants, were dealers in flour at New York city, exporting it to Venezuela. None of them were manufacturers, but their business consisted in buying flour, and selling it to foreign customers. According to the trade usage at New York city,

such dealers christen their flour by fancy names which represent the different grades, and denote respectively some particular quality, and brand the barrels or bags with the appropriate name. These names are respected by other dealers as the exclusive property of the dealer who first selects and applies them.

It appears that in 1873 the firm of Ribon & Munoz, commission merchants at New York city, having customers for flour at La Guaira, Venezuela, ordered five lots, consisting in all of 220 barrels, from S. Oscar Ryder, and directed Ryder to brand the barrels with the name "La Venezolana." Whether Ryder's name, or the name of Ribon & Munoz, appeared upon the barrels is not shown. The lots were forwarded by Ribon & Munoz to their customers at La Guaira. No further use of the name was made by anybody until after an interval of 11 years, and until after the defendants had used it upon flour sent by them to Venezuela, commencing in 1884. In 1884 the defendants, in ignorance of what had been done in 1873 by Ribon & Munoz and Ryder, and at the suggestion of Boulton & Co., of Puerto Cabello, Venezuela, selected a particular grade of flour, and named it "La Venezolana." Thereafter, the defendants continued to ship such flour in large quantities, branded with that name, to Boulton & Co., and various other commercial firms doing business in Venezuela, affiliated with Boulton & Co. They shipped 800 bags in the year 1884, over 6,000 bags in 1885, over 10,000 bags in 1886, over 15,000 bags in 1887, over 16,000 bags in 1888, over 26,000 bags in 1889, about the same quantity in 1890, and a considerably larger quantity in 1891. Altogether, they sent under this brand to their Venezuela correspondents about 130,000 bags of flour before the time when the complainant applied to register the trade-mark. The first intimation they ever received that any one else had sold flour under that brand previously was given to them in 1891, coming from the complainant about the time when he made application for the registry of the trade-mark. The proofs indicate persuasively that S. Oscar Ryder must have known that the defendants were sending large quantities of flour to Venezuela under the brand "La Venezolana," and it appears distinctly that Alfred V. Ryder knew that they were shipping flour there under that brand.

Upon this evidence, we are of the opinion that the decree of the circuit court dismissing the complainant's bill was correct. The use of the name in 1873 was so transient and inconsiderable as to suggest that it was merely experimental. Such evidence as it affords of an intention to appropriate the name as a trade-mark is met and repelled by the omission to use it thereafter, until it had passed into the category of forgotten things. But if the use of the name in 1873 conferred a right to it as a trade-mark upon anybody, it did not confer the right upon Ryder. Ribon & Munoz selected the name, and directed Ryder to apply it to flour which they had bought of him, and which they were sending to their customers. It is preposterous to suppose that they did this for his benefit. The reasonable inference from the circumstances is that they did it for their own benefit, and that it was their intention,

as well as his, to pre-empt the property in the name as their trade-mark in case they should conclude to appropriate it.

The statute makes the registry of a trade-mark *prima facie* evidence of title in the applicant. But the complainant's title is overthrown by proof of an earlier title in others; by that acquired by the appropriation of the name as a trade-mark in 1884.

The decree is affirmed, with costs.

THE SOPHIE WILHELMINE.

BANCA DI GENOVA v. THE SOPHIE WILHELMINE.

(Circuit Court of Appeals, Second Circuit. November 13, 1893.)

SHIPPING—BOTTOMRY—HYPOTHECATION OF FREIGHT.

A contract hypothecating "ship and freight" for a "loan on freight," assigning a proportionate part of the freight therefor, providing that "in case of total loss" the loan shall not be repaid, and expressly made subject to rules of the lender applying only to "loans on freight," one of which rules provides that "if there be no payment of freight, either total or partial," the loan shall not be repaid, is a bottomry of the freight only; and the words "total loss" refer to the loss mentioned in such rule, "if there be no payment of freight," and not to a total loss of the vessel and freight.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by the Banca di Genova against the Swedish bark Sophie Wilhelmine for the enforcement of a bond given by the master of the bark for a loan, with interest and penalties stipulated in case of nonpayment. The defense was that the bond was conditioned upon the earnings of freight on the voyage then contemplated, and that no freight was earned. The district court sustained this defense, and dismissed the libel. Libellant appeals. Affirmed.

Statement by WALLACE, Circuit Judge:

On March 19, 1888, the master of the bark, which was then lying in the port of Almeria, Spain, laden with a cargo of 1180 tons of white salt, bound for New York, applied to and obtained from the libellant a loan of £149, and executed a bond therefor, with interest and penalties. The transaction is evidenced by two instruments,—the application for the loan, and the contract of repayment. These instruments were printed forms, with blanks to be filled up as to details, prepared and furnished by the libellant:

"Banca di Genova, Genoa.

"The undersigned requests a loan of one hundred and forty-nine pounds upon the freight of £482.0.0. of the Sophie Wilhelmine, tons 976, built in the year 1878, classed A1, owned by M. Engelschien, Captain S. P. Bugge, insured at Christiania for the sum of £4,000, now lying in Almeria, which will be earned as freight in a voyage from Gabo de Gate to New York, according to the annexed regulations.

"For the owner or captain,

S. P. Bugge.

"Eight days after the arrival at the port of New York, or other intermediate ports at which shall end the voyage of my vessel denominated Sophie Wilhelmine, I promise to pay to the order of the Banca di Genova, of Genoa, the sum of one hundred and forty-nine pounds sterling, value received

in cash as a loan on freight for the last expenses necessary to the undertaking of the voyage from Gabo de Gate to New York; and I hereby assign therefor, to the said Banca di Genova, enough of the present freight to cover the sum of the above loan, with power to collect it when due; and I hereby hypothecate ship and freight for repayment of said loan, with priority over every other credit, and in case of total loss the amounts received as loan shall not be paid back; and I accept all the conditions set down in the regulations of the Banca di Genova relating to loans on freight, of which I received a copy.

S. P. Bugge."

"Banca di Genova, Genoa.

"Rules for Loans on Freight.

"The loans which the Banca di Genova agree to make on freight must be subject to the following rules:

"(1) Any owner desirous to obtain a loan on freight from Banca di Genova must make his request in accordance with the printed form which will be given him for the purpose. The form will indicate (a) the build, name, and tonnage of the vessel; (b) the port in which she is lying, and where and how insured; (c) the voyage she is about to make; (d) the amount of freight upon which the loan is asked; (e) the amount of loan asked for; (f) the signature of owner or captain.

"(2) The board of direction authorized by two delegated administrators, according to article 28 in the statute, accept or decline the demand.

"(3) The loan can never exceed a third of the whole freight the vessel may make.

"(4) The owner or captain, before he can obtain a loan, must produce the bills of lading signed by the shipper, in proof of not having received any previous advances on the freight.

"(5) The loan must be repaid within ——— days after the arrival of the ship in the port to which she is bound, or wherever the voyage may terminate, and the freight and vessel will be liable to the repayment of the loan, with priority over every other credit.

"(6) In the event of the vessel, on arrival at the port of destination, being ordered by the shipper of the cargo to any other port, the amount of the loan must be repaid to the agents of the Banca di Genova, and a further loan may be asked, which the agents have power to grant or decline.

"(7) Any captain leaving a port, in which he has to repay a loan, without having done so, will be subject to a fine of 30% upon the sum due, besides being liable for all trouble and expense caused to the Banca thereby.

"(8) If the loan be not repaid when it falls due as fixed according to article 7, the Banca will proceed to enforce payment, and will have the right to exact interest at the rate of 8 per cent. per annum until the payment is made.

"(9) A receipt will be given by the captain or owner when the loan is made, signed in accordance with the above rules, or with any others that may be established.

"(10) In the case of ships abroad, when the owner has not time to obtain the sanction of the directors of the Banca di Genova to a loan on freight, agents are authorized to grant the loan at the request of the captain, always subject to these regulations.

"(11) Loans on freight stipulated in foreign money shall be repaid at the current rate of exchange at sight at the port where the vessel discharges, or to the Banca di Genova in Genoa.

"(12) Loans shall always be exempt from any contribution to either general or particular average.

"(13) The premium and interest on the sums granted in loan on freight according to the list must be always retained on the loan itself, and in case of a total loss, if there be no payment of freight, either total or partial, the sums received as loan shall not be paid back, except that which has been taken beyond the third part of the freight.

"(14) Ships discharging in Italian and Adriatic ports shall repay the loan at the official rate current for sight bills.

"(15) The owner or captain shall not take any other advances upon the same freight at the port of loading, or, in such case, hold themselves bound to return the present loan, even though the vessel be lost.

"(16) The captain shall give immediate notice on arrival at port, discharge to the Banca di Genova in Genoa, or to their agents at the nearest port, incurring otherwise the penalty of 10% on the amount of loan."

The vessel sailed from Almeria on March 22, 1888. She had severe westerly gales in the Mediterranean, and did not pass Gibraltar till April 12th. On April 14th, in a heavy wind, the vessel sprang a leak. The pumps were kept going steadily, but the leak increased, and it became necessary to seek a port of refuge. Accordingly, on April 17th, the master directed his course to Lisbon, which was the nearest port. On the 19th they arrived there. Surveys were duly held, and in accordance therewith about 300 tons of salt was discharged, the vessel examined and repaired by a diver, the cargo reshipped; and on or about May 15th the vessel sailed from Lisbon for New York. On May 18th, when about 250 miles from Lisbon, in a heavy gale, the vessel began to leak again. The water in the hold was increasing, and the crew insisted on returning to Lisbon. Accordingly, the vessel turned back a second time, and on the 22d arrived in Lisbon, the pumps having been going continuously for three days and nights. Assistance was obtained in Lisbon to keep the vessel afloat. Surveys were duly held by the expert surveyors of the Tribunal of Commerce, and in accordance therewith the cargo was discharged into a lighter. As the estimated cost of repairing the vessel at Lisbon exceeded three-quarters of her value, the president of the Tribunal of Commerce duly condemned the vessel as unseaworthy, according to article 1831 of the *Codigo Commercial Portuguez*. The master and agents of the vessel made every possible effort to forward the cargo to its destination, but could not obtain a ship to carry it on. The shippers and charterers, and their underwriters, were duly notified of the disasters, and of the steps taken by the master in pursuance of the recommendation of the surveyors. After the vessel had been condemned as unseaworthy, and had been legally separated from the cargo, she made temporary repairs, and, taking on board additional pumps and an extra crew, on or about July 19th, proceeded in ballast, at the master's risk, to Appledore, in the Bristol channel, where the vessel was thereafter repaired. The voyage was broken up without fault on the part of the vessel or her master. The vessel could not have carried the cargo from Lisbon, and, had she remained there, could not have been repaired, but must have been sold, having been condemned as unseaworthy. No freight was earned. The cargo was given to the agents of the cargo owners, who contributed 250 milreis towards the cargo's share in general average. As the cargo was of little or no value, no average adjustment was made up.

Lorenzo Ullo, for libellant.

Harrington Putnam, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge, (after stating the facts.) If the contract was a bottomry on the freight of the vessel to be earned on her voyage from Gabo de Gate to New York, the libellant was not entitled to recover, because no freight was earned, and consequently there was a total loss of the subject of the maritime risk. It is not disputed that it was a bottomry loan. That it was so is clear, because the contract provides that "in case of total loss the amount received as loan shall not be paid back." The libellant insists that the subject of bottomry was the ship, as well as the freight, and the argument is that the words "total loss," mentioned in the hypothecation and in the rules which constitute a part of the contract, mean a total loss of the vessel and freight.

Unless it was contemplated that the freight, and the freight only, was to be the subject of bottomry, all the recitals in the application and contract of hypothecation in respect to a loan upon freight

are superfluous and meaningless. Apparently, the only object of these recitals is to distinguish the transaction from a bottomry of the ship, or of the ship and freight, and make it a bottomry of the freight alone. There is no conceivable reason why the application for the loan should have been confined to one upon freight, or why the transaction should have been denominated in the hypothecation a "loan on freight," and made subject to the "rules for loans on freight," if a bottomry upon the vessel had been in the minds of the parties. Nothing can be plainer than that they contemplated a loan in which the maritime risk was the contingency of earning freight, and a security payable only in the event of the safety of the interest pledged. A master has the same authority to hypothecate the ship that he has to hypothecate the freight. Whenever he may bottomry the one, he may the other, and the same circumstances must exist in either case to justify the security. If it had been the intention of the parties to bottomry the ship as well as the freight, there is no reason why that should not have been done, and the vessel assigned, as well as the freight, and it cannot be doubted that the intention would have been plainly expressed. It ought not to be inferred from the ambiguous terms embodied in documents prepared by the libellant.

The stipulation in the contract hypothecating "ship and freight for repayment of said loan" is not at all inconsistent with the intention to found the maritime risk upon the safety of the freight. That stipulation merely adds the security of the vessel for the performance of the bottomry contract. A bottomry bond gives no claim against the shipowner. If it bind him personally, it is not a contract of bottomry, and the lender has no insurable interest under it; and, in the absence of the express sanction of the owner, such a bond given by a master is not enforceable. But its validity is not affected by the circumstance that additional security is given for the performance of the bottomry contract.

The condition making the loan payable "eight days after the arrival at the port * * * which shall end the voyage of my vessel" is usual, whether the bottomry is on ship, freight, or cargo. Its purpose is to specify the time at which the obligation becomes payable, and when the marine interest will begin to run.

Our conclusion is that the total loss, in case of which the loan shall not be repaid, is the total loss mentioned in Rule 13, viz. "If there be no payment of freight, either total or partial, the sums received as loan shall not be paid back."

The decree is affirmed, with costs.

GALGATE SHIP CO., Limited, v. STARR & CO.

(District Court, N. D. California. November 27, 1893.)

No. 10,382.

1. SHIPPING—CHARTER PARTY—NEGOTIATION BY BROKERS—"BOUGHT AND SOLD NOTES."

Where the agents of a foreign ship, acting as brokers, negotiate an agreement, which, being communicated through their Liverpool house to the owner, results in the execution of a charter which is signed by the Liverpool house on behalf of the charterer, and thereupon the agents, to avoid complications from the necessary lapse of time before the charterer can inspect the instrument, notify him in writing of its terms, requesting confirmation, and at the same time send a similar notification to the owners, this is substantially a transaction by "bought and sold notes;" and where the charterer, by letter to the agent, confirms the terms stated, these two communications become complete evidence of the terms of the contract, and parol evidence is not admissible.

2. SAME—DUTY OF BROKERS.

If the agents, in their letter of notification, fail to particularly state a provision of the charter, which they have reason to believe will be objectionable to the charterer, merely including it in the expression "all other usual conditions," this, if a breach of duty at all, is a personal matter between them and the charterer, and does not relieve the latter from liability according to the legal construction of the letters of notification and confirmation.

3. SAME—CONSTRUCTION OF CONTRACT.

The expression "all other usual conditions" did not call for a provision in the charter for "charterer's surveyor," but was sufficiently fulfilled by a provision for "competent surveyor," qualified by a further provision that, if either party was dissatisfied with the survey, the matter should be submitted to two other regular port marine surveyors, with liberty to call in a third surveyor in case of disagreement.

In Admiralty. Libel in personam to recover damages for breach of charter party. Decree for libellant.

Page & Eells and Andros & Frank, for libellant.

Geo. W. Towle, Jr., and Joseph Hutchinson, for respondent.

MORROW, District Judge. In an opinion heretofore delivered in this case¹ I gave some weight to certain admissions contained in a letter written by Balfour, Guthrie & Co., of San Francisco, to Balfour, Williamson & Co., of Liverpool, and dated June 5, 1891. Portions of this letter, which referred to transactions not involved in this case, were properly omitted from the copy of the letter furnished the court; but one paragraph of this character was left in the letter by mistake, and, its irrelevancy being overlooked by the court, it was treated as containing an important admission against the libellant. This error being called to the attention of the court, a rehearing was granted, and the case reargued. In the light afforded by the review and the conclusions now reached a restatement of the case is necessary.

The action is to recover damages for the refusal of the respondent to fulfill the terms of a charter party alleged to have been entered

¹ Not reported.

into by it at Liverpool, England, about June 4, 1891, through its agents, Balfour, Williamson & Co., of Liverpool, with John Joyce & Co., agents of the owners of the ship Galgate. The answer of the respondent—

"Denies that on or about the 4th day of June, 1891, or ever, or at all, at Liverpool, England, or elsewhere, Messrs. John Joyce & Co., as agents for the owner of the ship Galgate or otherwise, or at all, made and entered into, or made or entered into, an agreement of charter party, in writing or otherwise, with Starr & Company, respondents herein, by Balfour, Williamson & Co., of Liverpool, as agents and under authority of Starr & Company, or otherwise, or at all, for the charter of said ship Galgate; * * * denies that Balfour, Williamson & Co., of Liverpool, were the agents of respondent for the charter of the said ship Galgate, or otherwise, or at all, or that they had any authority whatever from respondent to enter into said charter, or any charter."

The libellant is a corporation organized under the laws of Great Britain and Ireland, having its principal place of business in Liverpool, and is the owner of the ship Galgate. The respondent, Starr & Co., is a corporation organized under the laws of the state of California, having its principal place of business in San Francisco. It is engaged extensively in the purchase, sale, and shipment of wheat and flour. As the name of the corporation indicates a partnership of individuals, rather than a single body, it is constantly referred to in the testimony in the plural number, as though it was such an association, and for convenience this form of expression will be followed hereafter in this opinion in referring to the respondent. Balfour, Williamson & Co. are Liverpool merchants, who include in their business the chartering of vessels for themselves and others. Balfour, Guthrie & Co. are San Francisco merchants, engaged in business of a like character, and are intimately related to the Liverpool house by a community of partnership interests.

The charter party introduced in evidence, and the subject of the present controversy, is largely a printed form of conditions, with special matter written in blank spaces left for the purpose. It is dated at Liverpool, June 4, 1891, and is signed by John Joyce & Co., managing owner of the Galgate, as the party of the first part, and "by authority of Starr & Company, Balfour, Williamson & Co., as agents," party of the second part. It provides for the chartering of the steel ship Galgate to Starr & Co. for a voyage from San Francisco to certain ports in Europe, at the option of the charterer, with a cargo of wheat or flour, or other lawful merchandise, and recites that the vessel was then on a voyage from New York to Melbourne, with liberty to take cargo from Newcastle to San Francisco for owner's benefit, and contains, among other conditions, the following:

"Vessel to be properly stowed and dunnaged; and certificate thereof and of good general condition, draft of water, and ventilation, to be furnished to charterers from competent surveyor."

As the form of this document was originally printed it provided that the certificate was to be furnished to the charterers from "charterers' surveyor," but the word "charterers" had been erased by the pen, and the word "competent" interlined as a substitute for the word "charterers." The negotiations relating to the charter

of the ship Galgate had their origin in the following cablegram, dated June 2, 1891, from Balfour, Williamson & Co., Liverpool, to Balfour, Guthrie & Co., San Francisco:

"Galgate: We offer for reply here, to-morrow, 14s., Newcastle, N. S. W., to San Francisco, 39 U. K., Havre, Antwerp, and Dunkirk, 44, Continent 1s. 3d., less direct, 28 February canceling, 1s. extra freight 31 January canceling."

For the purpose of placing this charter, Robert Bruce, of the firm of Balfour, Guthrie & Co., called upon Alfred Bannister, the vice president and manager of Starr & Co., and offered the ship Galgate for charter, on the terms indicated, for the voyage from San Francisco to Europe. There appears to have been more than one interview upon the subject between these two parties, but how many meetings were had is not clear from the testimony, nor is it material. The interviews were all had in the office of Mr. Bannister, and resulted in an offer from him on behalf of Starr & Co., which was communicated under date of June 2, 1891, by Balfour, Guthrie & Co., of San Francisco, to Balfour, Williamson & Co., of Liverpool, on the following terms:

"Galgate: We offer for reply here noon to-morrow, Starr & Company 38s. 9d., U. K., H., or A., Dunkirk, 5s. extra, continent 2s. 6d., less direct San Francisco, canceling 29 February, 1s. 3d. extra freight for one month's earlier arrival."

To this cablegram Balfour, Williamson & Co. replied as follows under date of June 3, 1891:

"Galgate declined. We might arrange with firm offer in hand 38s. 9d., U. K., H., A., D., 43s. 9d., continent 2s. 6d. off direct, 31 March canceling, 1s. 3d. extra freight for one month's earlier arrival."

This last offer was accepted by Starr & Co., and the acceptance was transmitted by cablegram under date of June 3, 1891, by Balfour, Guthrie & Co. to Balfour, Williamson & Co., in the following terms:

"Galgate: Starr & Co. willing to accept your last quotation. Exceptional offer. We recommend acceptance."

Balfour, Williamson & Co. replied June 4, 1891:

"Galgate: We have arranged 14 Newcastle to San Francisco 38-9, U. K., H., A., D., 43-9 continent 2s. 6d. off direct, 31 March canceling, 1s. 3d. more for one month's earlier arrival. We are arranging and signing here homeward charter for Starr & Co."

This appears to have been the first intimation that the charter party was to be signed in Liverpool. The testimony of Mr. Bannister, on behalf of respondent, on this point is as follows:

"Mr. Towle: Q. Mr. Bannister, did you, in advance, and prior to the 5th of June, 1891, authorize or advise Mr. Bruce that you would authorize their firm in Liverpool to sign this Galgate charter for account of Starr & Co. over there? A. No, sir, I never did. I did so with another ship a fortnight before, but not this one."

Mr. Bruce, for the libellant, being interrogated by the court upon this point, testified as follows:

"Q. Did you consult Mr. Bannister as to whether the condition incorporated in the cable of Balfour, Williamson & Co. to you, 'arranging and signing

homeward charter for Starr & Co.,' were satisfactory or not? A. Yes, sir. Q. That was not a matter that had been previously agreed upon? A. No, sir; it had never been discussed. Q. In your conversation with Mr. Bannister nothing was said as to where the charter should be signed? A. No, sir. Q. Was that cablegram the first notice that you had that the charter was to be signed on the other side? A. Yes, sir; that was the first indication. Q. The first intimation you had that that would be the way the agreement would be put into writing? A. Yes, sir. Q. Did you then go to Mr. Bannister, and inform him, or Starr & Co., that the charter would be signed on the other side? A. Yes, sir. Q. Did he make any objection to it? A. He did not. Q. What did he say to you about authorizing some one to sign for him or them? A. I don't know that he said anything special on the subject. If he had objected to it then, the charter would either have fallen through, or it would have been signed here by him. Q. Whom did he or they authorize to sign? A. He understood we were cabling to Balfour, Williamson & Co. Q. What I want to know is, was anything said about Balfour, Williamson & Co. signing the charter for Starr & Co. or for Mr. Bannister? A. I must have told him or shown him this cable that the charter would be signed on the other side. I probably said that the owner wished the charter signed on the other side, and naturally would require his approval of it. That approval was given the same day. Q. Did you call his attention to that part of the cable which says, 'We are arranging and signing homeward charter?' A. Yes, sir. Q. And Mr. Bannister agreed to the arranging and signing of the charter on the other side? A. In Liverpool."

There is nothing in the testimony indicating that Mr. Bannister or Starr & Co. had previously given authority to Balfour, Williamson & Co. to sign the charter party. It appears, however, that on June 4, 1891, Balfour, Guthrie & Co., in San Francisco, sent the following cablegram to Balfour, Williamson & Co., Liverpool:

"Galgate: Confirm charter to be signed on your side. Be particular. Usual terms. Charters' surveyor."

And on June 5, 1891, the charter party was signed in Liverpool by Balfour, Williamson & Co., who assumed to act by authority of Starr & Co. It is not claimed that this cablegram of June 4th was brought to the attention of Mr. Bannister, or that he was at the time made acquainted with its contents. But it seems probable that its implied authority to Balfour, Williamson & Co. to sign the charter party for Starr & Co. was the result of the interview between Mr. Bruce and Mr. Bannister; for it is difficult to understand how a business house of any standing would assume to represent another firm in such an important matter as the signing of a contract of this character, unless there was express authority for such action. But, however the fact may be, it appears that Starr & Co. made no objection to the charter party on the ground that it was signed without their authority.

The controversy that has arisen in this case had its origin in the provision of the document relating to the surveyor. The contention of Starr & Co. from the first has been that the agreement between Mr. Bannister and Mr. Bruce required that the charter party should provide for the employment of the "charterers' surveyor," instead of "competent surveyor," and that Balfour, Williamson & Co. acted in excess of their authority when, as the agents of Starr & Co., they agreed to the substitution of a "competent surveyor" for "charterers' surveyor." The authority of Balfour, Wil-

Williamson & Co. to sign such a charter is therefore the real question in issue. The value of the provision contended for by Starr & Co. is explained by the fact that there are certain risks attending the stowage of a cargo of wheat or flour not covered by the ordinary insurance policy. If, for instance, any previous cargo has left any taint in the ship, the flour will absorb it, and thus become damaged. There is also a risk of loss and damage arising out of the stowage of certain goods and merchandise in contact with or in proximity to the flour. For the purpose of guarding against these and the like risks, Starr & Co. have a surveyor in their employ, whose duty it is to visit the ship as the cargo is being received on board, to see that the vessel is being properly lined and dunnaged, and go below into the hold of the ship, and personally supervise the stowage of the cargo. It is also his duty to see that all the ship's stanchions and parts composed of metal near the cargo are carefully wrapped in bags, gunnies, or other material to protect the flour from contact with rust. In short, he does whatever is necessary to reduce the sea damage to the cargo to the smallest possible amount. The marine surveyor, who represents the insurance companies, may be entirely competent for the services for which he is employed; but he is not required to render the special service secured by the charterer in the employment of his own surveyor. It has, therefore, become customary in the port of San Francisco for charterers to provide in the charter party that the certificate of the ship's condition shall be furnished by the charterers' surveyor, or they have it understood that he may be so employed. The blank form of charter party in general use in San Francisco had, however, in 1891, a blank space before the word "surveyor," into which could be written the name of the surveyor, or the word "charterers'," or, as it sometimes happened, the word "competent," as the parties might agree. This form of charter was adopted by Balfour, Williamson & Co. in Liverpool, and a short time prior to the transaction relating to the Galgate they had the word "charterers'" printed before the word "surveyor" in the form used by them. The Galgate charter is upon one of these forms, but, as before stated, the word "charterers," had been erased, and the word "competent" interlined above and before the word "surveyor." The testimony on the part of the libellant tends to show that the verbal agreement between Mr. Bannister and Mr. Bruce as to the conditions that were to be incorporated into the charter party had reference particularly to the rate of the charter, and that the clause relating to the surveyor was not a matter of discussion. In the course of the examination of Mr. Bruce, he was asked if he knew whether, in his negotiations with Starr & Co., the terms were expressed that "charterers' surveyor" should be incorporated into the charter party, to which he replied:

"I have no recollection of Mr. Bannister ever bringing the matter up. I am rather confirmed in my opinion from the fact that we sent on the original offer of Starr & Co. on the 2d of June, and there was not a single word in the cable conveying any such condition. If there had been any, it was our duty to have them sent forward."

The reason here given by Mr. Bruce for his belief that there was no understanding with respect to the surveyor clause is by no means conclusive, since the offer of June 2d appears to have been based upon the supposition that the charter party was to be signed in San Francisco, in which case, under the prevailing custom, the charter party would provide for the "charterers' surveyor." It was not until two days later that Starr & Co. learned that the charter party was to be signed in Liverpool, and then it was that Mr. Bannister claims to have had the understanding concerning this clause. His testimony upon this point is to the effect that after the agreement had been reached, on the 4th of June, as to the rate of charter, and, as Mr. Bruce was leaving the office, he said to Mr. Bruce: "Of course, this is as usual, with the usual understanding between your firm and us; this is on the San Francisco form of charter party, with all usual conditions and charterers' options;" to which Mr. Bruce replied: "Oh, yes; that is all right. It is always understood with you." Subsequently Mr. Bannister explained that "charterers' option" meant "charterers' surveyor," but in repeating this interview he varied his testimony, saying that he asked Mr. Bruce if the charter was to be drawn on the San Francisco form, giving the charterers the "usual conditions" and "charterers' surveyor," to which Mr. Bruce replied as above stated. There is manifestly some uncertainty about the exact terms of this interview, even in the mind of Mr. Bannister. We must therefore look elsewhere for further evidence on this point, since Mr. Bruce does not deny that there was such a conversation on June 4th. His belief that there was no understanding upon the subject has reference to the stage of the negotiations pending on June 2d. The cablegram of June 4, 1891, sent by Balfour, Guthrie & Co., at San Francisco, to Balfour, Williamson & Co., at Liverpool, contained the authority of the latter firm to sign for Starr & Co., and it is significant that, coupled with this authority to sign the charter party, is the express direction: "Be particular. Usual terms. Charterers' surveyor." Mr. Bruce was asked who originated this direction in the cablegram, and he somewhat evaded the question at first by saying that it would mean that there was to be no deviation in the conditions under which the ship should be loaded at this port, and that it should cover wheat, flour, and general merchandise; but, being again asked who originated the provision for "charterers' surveyor," he said that it was his impression that it originated with Balfour, Guthrie & Co., and not with Mr. Bannister; and it was "to try to get something to please Mr. Bannister, who would be extra well pleased that he was getting what you might call a straight charter." Being asked if he did not understand that Mr. Bannister generally desired the privilege of employing his own surveyor, Mr. Bruce replied: "All shippers in San Francisco appoint their own surveyors." In reply to questions he further explained the character of their business as follows:

"Q. Do you sometimes ask for conditions from your correspondents in Europe, which are not demanded or called for by the persons with whom you are dealing here? A. Sometimes, in case of charters to arrive. Q.

You ask for more favorable terms than the persons themselves apply for? A. Or might expect. Yes, sir. We have done so for one reason, and that is, we are also charterers of vessels, and engaged in the exporting business; and it is our interest as charterers to get as favorable conditions as we possibly can in chartering ships. For that reason we are naturally anxious to get the same conditions for other charterers,—favorable conditions for other charterers. Q. You think it to your advantage for other persons to have favorable conditions, as that would tend to give you the privilege of asking for the same? A. Yes, sir; I do."

The cablegram of June 4, 1891, from Balfour, Guthrie & Co. to Balfour, Williamson & Co., was therefore sent with the knowledge that in San Francisco charterers of vessels for cargoes of wheat or flour employ their own surveyor; that what is termed a "straight charter" would provide for such employment, and that Starr & Co. desired such a provision in the charter of the Galgate. But it is claimed that, while this is all true, Starr & Co. failed to incorporate this provision into the verbal agreement, and it was therefore not a part of the contract. The answer to this cablegram of June 4th is dated at Liverpool, June 5, 1891, and is as follows:

"Galgate: Charter signed here. Previously agreed competent surveyor. We cannot arrange otherwise."

In my previous opinion I commented on these last two cablegrams as indicating that there was a verbal agreement that the charter party should provide for "charterers' surveyor," and that the authority given by Starr & Co. to Balfour, Williamson & Co. to sign the charter party was coupled with this condition. These cablegrams do undoubtedly tend strongly in that direction, but in reviewing the testimony, and giving proper consideration to the established facts in the case, I am satisfied that the solution of the question in controversy must be determined by other evidence, and particularly by the construction to be placed upon the two following letters. The cablegram of June 5th, from Liverpool, was not communicated to Starr & Co., but Balfour, Guthrie & Co. wrote to them as follows:

"San Francisco, 5th June, 1891.

"Messrs. Starr & Co., San Francisco—Dear Sirs: We confirm having chartered to you Br. steel ship Galgate, 2,291 tons register, which sailed recently from New York for Sydney, on the following terms, viz.: To load as customary at this port, at 38/9 U. K., H., A., Dunkirk; 5/- extra other usual contingent; 2/6 less direct; cancelling 31st March; 1/3 extra freight should vessel arrive on or before 29th February; 30 lay days; all other usual conditions; owners having the liberty of loading the vessel with coals at Newcastle, N. S. W., for this port for their benefit; and, in accordance with your authority, our Liverpool friends advise that they have signed the charter in Liverpool on your behalf, copies of which will be handed to you so soon as received from them. Please confirm the foregoing, and oblige,

"Yours, very truly,

[Signed] Balfour, Guthrie & Co."

To which Starr & Co. replied as follows:

"San Francisco, June 5th, 1891.

"Galgate.

"Dear Sirs: We have your favor of this date advising charter to us of the above ship, and we hereby confirm said charter in terms of your letter.

"Yours, truly, [Signed] A. Bannister, Vice President and Gen. Mgr."

It is contended on behalf of the libelant that these two letters constitute the contract of charter, and that, the contract being in writing, it cannot be changed in any of its terms by parol testimony; to which reply is made that the present action is not brought upon the letters, but upon the alleged charter party, and that the letter of Balfour, Guthrie & Co. refers to the charter party as having been signed, and points to it as the contract. The construction to be given to these two letters is the important question to be determined in this case. In my former opinion I did not concede to them the conclusive legal character insisted upon by libelant, and hence it is urged that I arrived at the erroneous conclusion that the charter party did not conform to the agreement of the parties. After a careful review of the transaction in all its legal aspects, I am satisfied that it should be considered as coming substantially within some of the rules established for the dealings of brokers who deliver "bought and sold notes" as the evidence of the terms agreed upon in the sale of merchandise. Balfour, Guthrie & Co. were the agents of the owners of the ship Galgate, acting in the capacity of brokers in disposing of the charter of the vessel. Their negotiations with Starr & Co. had resulted in an agreement which, being communicated through their Liverpool house to the owners of the vessel, had resulted in the execution of the charter party in Liverpool on behalf of Starr & Co. for the charter of the vessel on certain terms, usual in some particulars and special in others; but Starr & Co., being in San Francisco, had no opportunity to inspect the agreement at the time of its execution, and it would be some time before it would reach them in the course of the mail. There would therefore intervene a period of more or less uncertainty, during which time the binding character of this contract on the part of Starr & Co. would depend upon the question whether it had been executed within the terms of their authority. To avoid possible future complications on this account, and in the orderly course of a business transaction, Balfour, Guthrie & Co. notified Starr & Co., in writing, of the execution of the charter party in Liverpool, and, reciting its terms, requested that it should be confirmed. This was done promptly by Starr & Co., and without objection. This letter of notification may properly be termed the "bought note." On the same day, Balfour, Guthrie & Co. notified Balfour, Williamson & Co., in writing, of the charter to Starr & Co., reciting the same terms, but, as this last letter contained other statements, it will be referred to again in another connection; for the present it will be considered only as having performed the office of the "sold note."

Now, what was the effect of the letter to Starr & Co., and their reply confirming the terms of the contract? *Iron Co. v. Foote*, 16 Fed. 646-649, is a case much in point supporting libelant's contention that Starr & Co. became bound thereby to the terms stated in the letter of notification. In the case cited, Judge Wallace, speaking of an agreement deduced from correspondence between a seller and a broker, in which it appeared "bought and sold notes" had been exchanged, said:

"It has been urged for the defendant that the correspondence was but a negotiation for a contract, and that the parties contemplated the exchange

of formal written instruments as a definite conclusion of their negotiation; and in this view of the case emphasis has been placed upon the facts that the defendant was acting as a broker, that the plaintiff's agents knew this, and that both parties regarded the credit which was to be supplied in London as a condition precedent to a final contract. Although defendant was buying the rails to sell to another party, and although his profit was to be derived from a commission of one per cent., to be allowed him on the purchase money by the plaintiff, there is no room to doubt that both parties contemplated a contract in which he was to be a principal, and by which he was to pay cash for the rails upon delivery. The bought and sold notes sent by the plaintiff's agents to defendant in their letter of February 5th, named the defendant as the purchaser, and conclude with the clause, 'An approved bank credit to be arranged when this contract is confirmed.' What was to be done to 'confirm' the contract? Certainly nothing after the bought and sold notes were exchanged. But could either party recant at any time before the notes were exchanged? Did they intend the period of uncertainty to intervene which would take place while the notes were crossing the Atlantic? Certainly not, because in the same letter plaintiff's agents asked defendant to 'cable confirmation of the contract.' Confirmation of the contract was to be signified by a cablegram. If confirmation was to be signified by cablegram, the parties must have regarded the exchange of bought and sold notes; not as the preliminary to a contract, but as evidence of a contract already concluded."

In line with this authority are the following rules governing "bought and sold notes" as stated by Mr. Benjamin in his work on Sales, (section 295):

"The bought and sold notes do not constitute the contract, but, * * * when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's books, or, what is equivalent, only an unsigned entry."

If we apply these rules by analogy to the case at bar, we must determine that this action was properly brought on the charter party, and that the letter of notification sent by Balfour, Guthrie & Co. to Starr & Co. was complete and sufficient evidence of the terms of the contract, and, coupled with Starr & Co.'s letter of confirmation, amounted to evidence of such a conclusive character as to exclude parol testimony. But it is urged that Balfour, Guthrie & Co. did not in their letter to Starr & Co. communicate all the information they had concerning the terms of the charter party. They had been advised that their efforts to secure the provision for "charterers' surveyor" had failed, and they suppressed this information. Now, it is contended on the part of the respondent that, whether this provision was a part of the verbal agreement or not, it was a provision desired by Starr & Co.; and, Balfour, Guthrie & Co. having undertaken, through their house in Liverpool, to act as the agents of Starr & Co. in signing the charter party, they were bound to disclose the fact that this provision had been rejected, and, failing to do so, Starr & Co. had the right to treat the contract as void on the ground of fraud. But to sustain this position it must appear that Balfour, Guthrie & Co. were under some legal obligation, binding them to make such disclosure. They were the agents of the owner of the vessel in the special character of brokers. "The broker is primarily the agent of the party who employs him, and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals, and is then only the agent of the third party in making the memorandum of

sale." 2 Amer. & Eng. Enc. Law, 577. See, also, Coddington v. Goddard, 16 Gray, 441-445.

The agency which Balfour, Guthrie & Co. undertook through their Liverpool house for Starr & Co. was, therefore, special, and limited to the single act of the signing of the charter party; and the business relation thus established by them did not differ materially in a legal sense from that of a broker with his principal who delivers "bought and sold notes" as the evidence of a sale of merchandise. It follows that such an agency did not of itself impose on Balfour, Guthrie & Co. any obligation to disclose to Starr & Co. the information they had concerning the surveyor clause in the charter party. Moreover, the libelant was not a party to the suppression of any information upon the subject. As far as it was concerned, the whole transaction was thoroughly understood, and so confirmed by the respondent. If there were any dealings or relations between Balfour, Guthrie & Co. and Starr & Co. that might be said to fairly give rise to an obligation on the part of the former to make a disclosure to the latter, it was a personal matter between them, and in no way involved the rights of the libelant in the contract now under consideration. To hold otherwise would be to open transactions of this nature to frauds of the most dangerous character, and the court establishing such a doctrine would, to use the language of Lord Thurlow in a leading case, (*Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq. 119,) "run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure." From these considerations I have reached the conclusion that the letter of Balfour, Guthrie & Co. of June 5th, having been confirmed by Starr & Co., must be accepted as stating the terms of the contract entered into by the parties in San Francisco to the exclusion of parol testimony.

We come now to the construction of the terms of this letter. It will be observed that, after stating the charter rates to certain ports, canceling dates and lay days, the letter contains the following words: "All other usual conditions." The question arises as to the meaning of this phrase. Does it include the condition providing for "charterers' surveyor," or was it so understood by the parties in arranging the terms of this charter party? In the interview between Mr. Bannister and Mr. Bruce, which took place the day previous to the writing of these letters, Mr. Bannister himself makes a distinction between "usual conditions" and "charterers' surveyor." He testifies that he asked Mr. Bruce at the interview if the charter was to be on the San Francisco form giving them "usual conditions" and "charterers' surveyor," and, being questioned as to his custom in asking for the San Francisco form of charter, and his object in doing so, he replied: "Because I often add 'charterers' surveyor,' about which there might be some doubt." Mr. Bruce, in his testimony, makes the same distinction. He says, "The usual charter, I consider, has nothing whatever to do with the term 'surveyor,'" and he explains that the conditions of the San Francisco form of charter relate to the cargo of the vessel, the option of the charterer to order the vessel on a direct voyage at a reduction of 2s. 6d. per

ton, the privilege of moving the vessel to and from various loading points in the bays of San Francisco and San Pablo; and it also has a clause relating to strikes, etc. He is asked if the phrase "usual terms" does not cover "charterers' surveyor," and he replies that it does not. This testimony is uncontradicted, and establishes the fact that neither the San Francisco form of charter nor the phrase "all other usual conditions" called for "charterers' surveyor." It may be said, however, that neither would it call for "competent" surveyor, but would leave a blank space preceding the word "surveyor," to be filled up by a subsequent agreement. There would be some force in such a claim but for the qualifying provision in the charter party immediately following the word "surveyor." The provision is as follows:

"If the captain or charterers be dissatisfied with the certificate given, the matter in dispute shall at once be submitted to two other regular port marine surveyors,—one chosen by the captain, and one by the charterers,—who, if they cannot agree, may call upon a third surveyor. A majority decision and certificate shall determine the matter in dispute, and the cost of the said special survey shall be borne by the party against whom said decision may be rendered."

This provision certainly qualifies the designation of a "competent surveyor" as appropriately as it would "charterers' surveyor," and was evidently designed to protect the rights of both parties to the contract. In the absence of an agreement to the contrary, the insertion of "competent surveyor" was a fair condition, and such as the law would imply.

I am therefore of the opinion that the charter party conforms to the terms stated in the letter of Balfour, Guthrie & Co. of June 5th; that, these terms having been accepted and confirmed by Starr & Co., they are bound by the conditions of the charter party; and that this action is properly brought on the extended and formal contract. These conclusions properly dispose of this case, leaving only the question of damages to be determined; but before proceeding to the latter question it may not be entirely out of place to say that in my former opinion I reached the conclusion that there was a verbal agreement providing for "charterers' surveyor." This conclusion was based almost entirely upon parol testimony, and upon certain admissions contained in the letter by Balfour, Guthrie & Co. to Balfour, Williamson & Co., dated June 5, 1891, the same day of the letter to Starr & Co. This letter commences by reciting the terms of the charter as follows:

"We confirm having fixed to Messrs. Starr & Co. the * * * Galgate, 38s. 9d. U. K., H., A., Dunkirk; 5s. extra other usual continent; 2s. 6d. less direct; canceling 31st March; 1s. 3d. extra freight for one month's earlier arrival; 30 lay days; all other usual conditions."

The letter then proceeds with the following statement:

"Messrs. Starr & Co., we may mention, are not in favor of charters being signed on your side, as they distinctly prefer to use their own form of charter, which, however, in all respects is identical with that used by ourselves and other shippers. They are, however, perfectly definite in insisting that the ship shall employ their surveyor, and that no change whatever shall be made in the usual stevedore clause; and we cannot meantime state how they may

view your having agreed to a 'competent' instead of a 'charterers' surveyor in connection with the Galgate, although probably we may not have any difficulty regarding this. You must, however, bear in mind that when charterers consent to your signing charter on their behalf they do not expect that the conditions will be different in any way from those which would be granted to them here, and it is essential, when cabling offers of vessels, that you should distinctly advise us where the owners insist upon any alteration in the form of the usual charter. We consider from the position of the Galgate that she is exceptionally well fixed, and may state that the best proposal we had from any charterers was only 37s. 6d., canceling 31st January, there being evidently a distinct indisposition to charter vessels which are likely to arrive at this port after 31st Decr."

This letter contained, among other paragraphs, one referring to what was termed an "unfortunate mistake," but in another charter. This paragraph was inadvertently read and construed as referring to the Galgate charter, and treated as important in the conclusion reached that there was an express agreement that the charter should provide for charterers' surveyor. The portion of this letter referring to the Galgate charter is, however, open to a different construction. It states the objection of Starr & Co. to charters being signed on the other side, and that "they were perfectly definite in insisting that the ship shall employ their surveyor," but it is nowhere stated that there had been any agreement to that effect with Starr & Co.; yet, if there had been, it would have been natural and businesslike for Balfour, Guthrie & Co. to have so stated in this letter. The same may be said with respect to the letter of Starr & Co., dated June 22, 1891, acknowledging the receipt from Balfour, Guthrie & Co. of two charters, one being the charter of the Galgate. The letter states that both charters were in order, except that "we shall require the word 'charterers' before 'surveyor' in the Galgate charter, which has been struck out to stand as printed." If there had been an agreement between the parties to this effect, why did not Starr & Co. say so in this letter? If such had been the fact, it certainly would have been the most natural and convenient expression for the writer to have said: "Our agreement called for charterers' surveyor; we shall, therefore, require," etc. This letter concludes as follows:

"Will you oblige us with any information you possess as regards the means and standing of the owners of these two ships? We presume that your Liverpool firm are satisfied that the signatures of the owners of these ships are correct, and under proper authority.

"Yours, truly, [Signed] A. Bannister, Vice President and Manager."

In response to this letter, Mr. A. B. Williamson, a clerk in the house of Balfour, Guthrie & Co., called upon Mr. Bannister with respect to the matters contained in his letter. Mr. Williamson testifies that Mr. Bannister expressed disappointment that the word "charterers" had been deleted and the word "competent" inserted. Mr. Williamson explained to Mr. Bannister that the Liverpool house had tried to exclude the word "competent," but had been unable to do so. Mr. Bannister said he wanted his own surveyor employed. He was then informed by Mr. Williamson that Starr & Co. could not expect to have their wish carried out in this respect if they chartered vessels through other firms accepting the word

"competent." Mr. Bannister is represented as having denied the acceptance of such condition until a letter was produced containing evidence of that fact, when he explained that in the case referred to he had an understanding with the San Francisco agent of the vessel that he would have his own surveyor. Mr. Williamson claims to have then assured Mr. Bannister that, as Balfour, Guthrie & Co. would have control of the captain when the vessel arrived, they would be able to arrange it so that Mr. Bannister should have his own surveyor. The testimony of Mr. Bannister as to what passed at this interview is as follows:

"Mr. Williamson came down to our office to see me, and tried to get me to waive the objection I had raised, and to allow 'competent surveyor' to stand in the charter. I told him I was very sorry I could not do this, although I had no doubt, as he said, his firm would see that there was no trouble in loading the ship for us. But I said my bid to Mr. Bruce was based on the San Francisco shippers' form of charter, and especially I named to Mr. Bruce, when I bid on the ship, that 'charterers' surveyor' was to be in the charter party, and if he wanted us to load the ship he had to complete the charter in terms of my bid. He argued with me a little, and tried to get me to waive that; but I insisted on it, and told him we should not change. He then agreed to get the word 'charterers' inserted in the charter party, and to cable that night to his Liverpool firm to have it done."

On June 25, 1891, Balfour, Guthrie & Co. wrote to Starr & Co. as follows:

"We duly received your favor of the 22nd inst., and we have since explained to you verbally the reason our Liverpool friends were unable to get the word 'charterers' surveyor' left in the charter party per Galgate. You may rest satisfied, however, that we will see that there is no trouble in this connection. You may be assured our Liverpool friends have satisfied themselves that the signatures under these charter parties are correct, and under proper authority."

To this letter there was no reply in writing. July 7, 1891, Balfour, Guthrie & Co. transmitted to Starr & Co., by letter, two additional copies of the charter of the Galgate. The receipt of the letter with its inclosures was on the same day acknowledged in the following terms:

"San Francisco, July 7th. 1891.

"Messrs. Balfour, Guthrie & Co., City—Dear Sirs: We have to acknowledge with thanks yours of even date, with stated inclosures.

"Yours, truly,

[Signed] H. M. A. Miller, Secy."

It is somewhat significant that in no letter or cablegram that passed between any of the parties at the time of this transaction is it stated that there was any agreement as to the surveyor clause. This feature of the case, and the testimony concerning the correspondence and conduct of the parties subsequent to June 5th, are referred to for the purpose of indicating that, aside from the conclusive character of the written evidence, I do not now, upon a review of the testimony, find, as I did before, that there was a verbal agreement providing for charterers' surveyor.

The Galgate arrived in San Francisco January 30, 1892, and on February 1, 1892, Balfour, Guthrie & Co. notified Starr & Co. of her

arrival. The correspondence relating to the final refusal of Starr & Co. to carry out the charter party is as follows:

"San Francisco, 1st February, 1892.

"Galgate.

"Messrs. Starr & Co., San Francisco—Dear Sirs: We beg to advise you of the safe arrival of the above vessel in this port on 30th ulto. under charter to your goodselves outwards. We are, dear sir,

"Yours, faithfully,

[Sig.] Balfour, Guthrie & Co.,

"Alex. B. Williamson,

"Agents."

To which Starr & Co. replied as follows:

"San Francisco, February 2nd, '92.

"Galgate.

"Messrs. Balfour, Guthrie & Co., City—Dear Sirs: We have your favor of the 1st inst., regarding above vessel, which, however, is not under charter to us.

"Yours, truly, [Signed] A. Bannister, Vice President and Manager."

Balfour, Guthrie & Co. responded in the following terms:

"San Francisco, 8th February, '92.

"Galgate.

"Messrs. Starr & Co., San Francisco—Dear Sirs: We beg to acknowledge receipt of your favor dated 2nd inst., and we will be obliged by your kindly informing us on what grounds you now for the first time make the assertion that you are not the charterers of above vessel. In your letter to us, dated 22nd June, 1891, you informed us that the charter party was in order, except that you wanted the word 'charterers' before 'surveyor' to stand as printed, to which we replied on the same date, assuring you that we would see that there should be no trouble in this connection. Now that the ship has arrived here, this assurance we are prepared to make good, by agreeing, as we are authorized to do, that, as requested by you, the word 'charterers' before the word 'surveyor' may stand as originally printed in the charter party, and that the word 'competent' before the word 'surveyor' be expunged.

"Yours, faithfully,

[Signed] Balfour, Guthrie & Co.

"pp. Alex. B. Williamson."

To which Starr & Co. replied as follows:

"San Francisco, February 9th, 1892.

"Galgate.

"Messrs. Balfour, Guthrie & Co., City—Dear Sirs: Your favor of the 8th inst., relating to the above ship, is to hand. We have never been the charterers of this ship, and do not desire, as proposed in your said favor, to charter her now.

"Yours, truly, [Signed] A. Bannister, Vice President & Manager."

From the foregoing it appears that on February 2, 1892, Starr & Co. refused to accept the vessel and load her in accordance with the terms of the charter party. On that day the rate of charter for the Galgate was 17s. 6d. for the voyage therein named. The measure of damages in this case is, therefore, the difference between 40s. per ton, the rate named in the charter party, and 17s. 6d. The difference is 22s. 6d. per ton. The carrying tonnage of the vessel was 3,508 tons. The rate of exchange was \$4.86. The difference in American money would therefore amount to the sum or \$19,180.

A decree will be entered in favor of the libellant for this amount, together with interest and costs.

THE SEGURANCA.

VANHOESEN et al. v. THE SEGURANCA.

(District Court, S. D. New York. December 5, 1893.)

MARITIME LIEN—WATCHMEN OF CARGO—CONTRACTOR.

A contractor, who, pursuant to his general business, furnishes watchmen to watch the cargo of a vessel before delivery, for a vessel in her home port, has no maritime lien where the workmen are not employed by the ship, and have no lien themselves to which such contractor can be subrogated. Such a case is similar to that of furnishing any other repairs or supplies in the home port.

Semble, such watchmen and stevedores, when employed by the ship's representative, on her credit, may have a lien for their wages in enabling the ship to earn her freight, even in the home port, as analogous to the wages of seamen, to pilotage, towage, or wharfage.

In Admiralty. Libel by P. D. Van Hoesen and another against the steamship Seguranca to recover for watchmen's services. Libel dismissed.

Wing, Shoudy & Putnam, for petitioners.

Carter & Ledyard and Mr. Bayliss, for respondent.

BROWN, District Judge. The petitioners carry on the business of employing and furnishing men as watchmen for vessels in this city. The petition and proofs show that in December, 1892, they supplied several different persons as watchmen to watch the cargo of the Seguranca, which was lying at Roberts' Stores in Brooklyn, until the cargo could be delivered to the consignees. Some of the cargo, as I understand, was on the dock, and some on board the vessel. New York was the vessel's home port.

The services, it is said, were substantially like those of stevedores, for which, as the claimants contend, there can be no maritime lien in the home port.

The ground upon which it was formerly held that a stevedore had no lien, was that his service was not a maritime service; and consequently no lien was allowed therefor, whether the vessel was foreign, or domestic. The weight of authority, however, now is, that such services are maritime. *The Windermere*, 2 Fed. 722; *The Canada*, 7 Fed. 119; *The Circassian*, 1 Ben. 209; *The George T. Kemp*, 2 Low. 477; *The Hattie M. Bain*, 20 Fed. 389; *The Scotia*, 35 Fed. 916; *The Gilbert Knapp*, 37 Fed. 209; *The Main*, 2 C. C. A. 569, 51 Fed. 954.

There are several cases in which it has been intimated, or might be inferred from the language of the court, that though the service is a maritime one, no lien arises therefor in the home port. *The George T. Kemp*, 2 Low. 483; *The Main*, 2 C. C. A. 569, 51 Fed. 954; *Norwegian Steamship Co. v. Washington*, 57 Fed. 224; *The Hattie M. Bain*, 20 Fed. 389. And in the case of the *Gilbert Knapp*, 37 Fed. 209, that view is directly expressed, upon the analogy of the rule as regards repairs and supplies; although the question there chiefly considered was the maritime nature of the service; and the case was decided on other grounds. I have not found, however, any

case actually adjudicated on this ground, where the maritime nature of the service was recognized.

On the other hand, a lien for watchmen's and stevedore's services, upon a domestic vessel, where their services were necessary to enable her to earn her freight, was upheld by Benedict, J., in the eastern district of New York, in the case of *The Trimountain*, 5 Ben. 247; and his ruling is quoted with approval by Judge Choate in *The Erinagh*, 7 Fed. 231; though in the latter case the vessel was foreign. In the cases of *The Onore*, 6 Ben. 564; *The River Queen*, 2 Fed. 731; and *The Senator*, 21 Fed. 191; similar services were held to create a maritime lien, without reference to the vessel's home port; and in the eastern district of Missouri, says Thayer, J., (*The Wyoming*, 36 Fed. 493, 495,) "a maritime lien is allowed for stevedore's services in the home port, when the service is shown to have been rendered on the credit of the vessel, or when such fact is fairly inferable from the circumstances under which the service was rendered."

These adjudications, it seems to me, are most in harmony with the maritime law as respects the wages of persons who render their services upon the employment of the ship's officers or agents, on the credit of the ship, and to enable the ship to perform her obligations. There is no true analogy, it seems to me, except in the maritime nature of the service, between the wages claims of such persons, and the furnishing of repairs and supplies in the home port. The latter are usually furnished by contract, not with the ship's officers, but with the owner, or his agent; they are often for large amounts, contracted for in the ordinary course of mercantile dealings, like other nonmaritime contracts; and they are not usually supplied in the course of any voyage, nor to enable the ship to perform any maritime duty already incurred; nor under any immediate necessity for the work, or for the supplies, or for the ship's credit to obtain them; and they are, therefore, presumptively furnished on the credit of the owner.

The personal services of watchmen or stevedores, on the other hand, in cases like the present, are necessary to enable the ship to discharge her maritime duty, to accomplish her voyage, and to earn her freight; they are rendered in the course of the voyage; since the voyage is not ended as regards the goods, until they are delivered, or ready for delivery. These men are mere substitutes for seamen, who formerly did, and often still do, the same work, and have a lien therefor. See *The Mattie May*, 45 Fed. 899, and *The Scotia*, 35 Fed. 916. It is but right that the same lien should be allowed for the wages of the substitutes, who are employed merely for greater safety, skill, and economy. The men live along the docks; they rarely, if ever, deal with the owners, or have any knowledge of them, or of their credit, or look to them for their pay. When directly employed by the agents or officers of the ship, under the necessity of immediate service, and to enable the ship to earn her freight, the wages of such workmen, though like repairs and supplies in being maritime, are not at all analogous, as it seems to me, as respects their status, to contracts for repairs and supplies in the home port;

nor do I perceive any reason why our anomalous exception as regards repairs and supplies should be extended to such wages claims. They seem to me more truly analogous to seamen's services, or to pilotage, towage, and wharfage, furnished to aid the ship to perform her duty, for all of which, liens in the home port are allowed. *The Kate Tremaine*, 5 Ben. 60, 68. *Chapman v. Engines*, 38 Fed. 671, 672; *The Allianca*, 56 Fed. 609, 613. In most maritime codes, indeed, the wages claims of watchmen, of ship or cargo, take precedence even over those of seamen. Code de Com. § 191; German Code, § 757; Italian Code, § 675; Netherlands Code, § 313.

If, therefore, the libelants were seeking to enforce a lien for wages for their personal services as watchmen, I should feel bound, both upon precedent, and for the reasons above stated, to sustain their claim. But such is not this case. The libelants are in the situation of contractors who supply the services of other persons as workmen, and presumably make a profit by it. There is no claim to any lien by subrogation or substitution; and no such claim could be sustained. For no lien ever accrued to the watchmen themselves, since they were not employed by the ship, but by the libelants only; and to the libelants only did they look for their pay. This distinction was anciently recognized, and it was acted on by this court in the case of *The Hattie M. Bain*, 20 Fed. 389. The libelants were employed by the owners; they cannot claim wages, since they rendered no personal services. They simply supplied the labor of other persons, whom they employed and paid. This differs in no degree, so far as I can perceive, from a contractor's supply of workmen to do repairs; and thus the present case falls strictly within the analogy of repairs and supplies in the home port; and, on this ground, the libel must be dismissed.

THE ENCHANTRESS.

HARD et al. v. THE ENCHANTRESS.

(District Court, S. D. New York. December 4, 1893.)

1. SHIPPING—BILL OF LADING—INACCURACY OF MARKS EXCEPTED.

Upon a bill of lading excepting liability for obliteration or inaccuracy of marks, the ship is not concluded by the marks stated in the bill of lading without further proof of the actual marks shipped, and is *prima facie* acquitted by the delivery of all the goods taken aboard.

2. SAME—SHORT DELIVERY OF COFFEE—SURPLUS BAGS REJECTED—APPLICATION OF PROCEEDS TO CHARTERER OF SHIP AS SURETY.

Though a chartered ship is liable in rem for the nondelivery of cargo, she has a reciprocal lien on the cargo, or its proceeds, to enable her to perform her obligation to deliver the goods or pay their value; and a purchaser of rejected bags, knowing the facts, cannot apply the credit to prior claims against other vessels, to the exclusion of his claim for short delivery against the vessel carrying the same cargo. The proceeds are first applicable to a discharge of the claim against the carrying ship.

In Admiralty. Libel by Anson W. Hard and another against the steamship *Enchantress* to recover for short delivery of cargo. Dismissed.

Cary & Whitridge and Mr. Butler, for libelants.
Convers & Kirlin, for claimants.

BROWN, District Judge. The libelants claim to recover the value of 35 bags of coffee, alleged to be a part of a consignment of 5,947 bags shipped on board the *Enchantress* at Victoria, Brazil, in September, 1892, and arriving at this port in the following November. Other coffee was on board the steamer, a part of which went to Europe upon through bills of lading. Upon the discharge of the *Enchantress* in this port, the tally showed a delivery of the whole number of bags called for by the bills of lading, and one more. The libelants, however, refused to accept 35 of the bags tendered them, on the ground that they did not correspond with the marks stated in the bill of lading, or that some of the marks were obliterated. They further claimed that their coffee at Victoria was put into bags of a peculiar character, used by them alone, and that there were 35 of that kind of bags short.

The proof as to the kind of bags, or the marks on the bags shipped at Victoria, is incomplete. It is not established by any competent testimony that all of the libelants' bags shipped at Victoria were of the libelants' peculiar make. Upon the discharge of the cargo, 57 bags were unclaimed or refused by the consignees, on a part of which the marks were obliterated. The claimants' testimony is to the effect that a number of those were of the peculiar Victoria bags; while the libelants' witnesses testify to the contrary. The bill of lading excepted any liability of the ship for "obliteration or inaccuracy of marks," etc.; and there are some discrepancies between the recitals of the receipts of shipment, and the bills of lading. There is no proof of the accuracy of the marks, or that the bags shipped were of the precise marks stated in the bill of lading, as the stipulation on that subject does not cover the marks. Exception as to "inaccuracy of marks," has the same effect as a similar exception in regard to weight; and the ship would, therefore, be discharged on proof of the delivery of all that was shipped. The *Pietro G.*, 40 Fed. 497. As the evidence leaves little doubt that the *Enchantress* delivered all that was put on board, the proofs seem insufficient to sustain strictly the libelants' case.

Aside from this, however, there are other grounds why the libel should be dismissed. On the 14th of December, the libelants having sent to the steamship company a bill for the value of the 35 bags, Mr. Ivins, on behalf of the company, on the same day, called upon the libelants, and made a sale to them of the 57 bags from the *Enchantress*, and 7 others, making 64 in all. The libelants, on the following day (the 15th) resold the 64 bags, which were delivered to the vendee. On the 16th, Mr. Ivins, who, as he testifies, expected to receive cash for the sale, sent to the libelants for payment, which was declined by the libelants; and the report brought back to Mr. Ivins by his employe was, that the libelants would apply the proceeds of sale to their claim for the 35 bags short on the *Enchantress*, and the balance of the proceeds to prior claims of a similar kind held by them against the company. Mr. Ivins acquiesced in this,

because, as he said, he could not help himself. These prior claims amounted to \$2,358.25, for alleged shortages on the cargoes of four other vessels between June and October, 1892. These claims had never been, and were not, admitted or adjusted up to the time of the failure of the company in March, 1893. The libel in this case was filed in the following month; and the libelants now claim the right to apply the proceeds of the 64 bags, amounting to about \$1,200, to the prior claims, excluding therefrom the present claim against the Enchantress for the 35 bags, which amounts to \$793.19.

The testimony of Mr. Ivins as to the report brought to him by his employe on December 16th, was objected to by the libelants. It was admitted, not as proof of the acts of the libelants, for which purpose it would be incompetent, as hearsay, but only as evidence of the nature of the subsequent acquiescence of Mr. Ivins, as affected by his understanding of the claim of the libelants at that time. Wholly aside from this report, however, I am quite satisfied that it was the intention of both parties that the proceeds of the 64 bags should be applied, first, to satisfy the claim against the Enchantress, and the balance to apply on the libelant's prior claim. Mr. Ivins, in effect, so testifies repeatedly; and the correspondence indicates that understanding. On the 16th of December, the same day on which payment was requested by Mr. Ivins, the libelant sent to the steamship company a memorandum, headed as follows: "Below we hand you memorandum of our unpaid claims against you." This was followed by a statement of the four prior claims, but no claim against the Enchantress. This shows that the libelants regarded the latter claim as practically paid; although in a letter of the same date they "return their claim against the Enchantress for the 35 bags," and dissent from the proposal of "adjustment at the cost of the merchandise." This was a question of detail, about which the parties never agreed; though the bill of lading stated that the price, in case of loss, should be the price at the port of shipment. Neither the letter nor the memorandum of the 16th makes any reference to the proceeds of the 64 bags, or gives any credit therefor. It is incapable of a strictly logical construction. While the letter alone might cast some obscurity on the intention of the libelants, I do not perceive that it weakens substantially the virtual statement of the written memorandum, that the only unpaid claims were the four prior ones named in it; and this for the reason, that on any mode of adjustment, the proceeds of the 64 bags were far more than sufficient to satisfy the claim against the Enchantress. The check which the letter meant to ask for must, therefore, have been for the balance of their claims after applying the proceeds of the 64 bags; and this is not incompatible with the statement of the memorandum.

The Enchantress was chartered by the steamship company, as was known to the libelants. The steamship company was bound to indemnify the ship and her owners against any such claim arising on bills of lading for the transportation of cargo. The ship and her owners were in the situation of a surety for the steamship company, the latter being the principal, and bound to indemnify. If

the ship was bound by a lien in rem for the delivery of the whole cargo, or to make pecuniary compensation for her defaults, she had a reciprocal lien upon the cargo, to enable her to perform that obligation; whether by a delivery of the cargo in specie, or by a payment of money, instead of the goods, for such as might be rejected. The lien was mutual. So much of the cargo as was thrown upon her hands through the refusal of the consignees to receive it, was a fund which the vessel, as surety, was entitled to have applied in discharge of her obligation to the consignees. The facts were all known to the libelants. Against this equitable right of the ship, the libelants had no legal right to apply the proceeds of this cargo upon prior claims against other vessels, to the exclusion of the Enchantress. I find no evidence that they had any such intention so to do, until the failure of the steamship company several months afterwards. No such act of appropriation is shown at the time, and what evidence there is negatives it. That it was the intention of both parties at the time to apply the proceeds pro tanto, to the extinction of the claim against the Enchantress, I have no doubt, as above stated; but whether intended or not, as the libelants knew the facts, they were disabled from lawfully applying it otherwise, to the prejudice of the Enchantress. The ordinary rule, giving the creditor a right to direct the application of the payment when the debtor does not do so, does not apply, because, first, this was not a payment; secondly, because that privilege would be incompatible with the rights of the steamship and her owners under the charter, of which the libelants had knowledge. See *The Stroma*, 41 Fed. 599, affirmed 3 C. C. A. 530, 53 Fed. 281.

The libel is dismissed; with costs.

THE CONCORD.

LUNNEY v. THE CONCORD.

(District Court, S. D. New York. November 29, 1893.)

SHIPPING—PERSONAL INJURIES—SHIP'S LADDER—DEFECT NOT DISCOVERABLE.

A vessel is not liable to workmen for latent defects in its ladders, not discoverable by examination, where there is no evidence of lack of diligence and care in the equipment. Accordingly, where the rung of the ladder, which was suspended from a rope, broke while the libelant was descending it, and the ladder was apparently sound, and had been in common use, and was apparently fit for the purpose, and no negligence in the ship or owners was proved or indicated, *held*, that the libelant could not recover.

In Admiralty. Libel by Thomas Lunney against the steamship Concord to recover damages for personal injuries. Dismissed.

Hyland & Zabriskie, for libelant.

Convers & Kirlin, for claimant.

BROWN, District Judge. On the 12th of November, 1892, as the libelant, a carpenter, was descending a ladder in No. 4 hatch, going to the lower hold of the steamship Concord, a rung of the ladder
v.58F.no.6—58

der broke, and the libelant fell to the bottom of the hold and sustained injuries for which the above libel was filed.

The vessel was under charter to J. M. Ceballos & Co., and her charter provided: "If more than one kind of grain is shipped, all extra expense to be paid by charterers." Desiring to ship more than one kind of grain, the charterers, under this clause, had engaged a carpenter to put up certain necessary partitions in the lower hold in No. 4 hatch, by whom four men, including the libelant, were employed to do the work. They went to the ship on the afternoon of Friday the 11th, and began work in hatch No. 3, under some misapprehension of orders; but they were soon stopped, and on the following morning they came to work at hatch No. 4. The steamer had no stationary ladders for the lower hold. All were of wood and movable. A fore and aft partition already divided the hold; and in order to work on each side of this partition in No. 4 hatch, a ladder was put down on each side. The workmen took the two ladders which they had used the day before in No. 3 hatch. One of the ladders was long enough to reach from the bottom of the hold to the coamings, and was placed on one side of the hatch; the other ladder was to be adjusted on the other side of the partition; but it was about four feet short, and instead of being lowered at once to the bottom of the hold, and allowed to rest at the top against the partition, as was done the day before in hatch No. 3, it was suspended in the hatch by a rope running from the winch above to the third rung from the top. The libelant then went down this ladder for the purpose of making it secure by a cleat at the bottom after he was down. When part way down the ladder, and below the rung by which it was suspended, the rung broke, and by the fall he was injured as above stated.

The ladder was about 18 feet long, weighing apparently from 100 to 200 pounds. An examination of the broken rung showed that where it enters the side beam, it is about an inch in diameter; and that about one-fifth of the diameter on one side was defective. The defect was not visible by any examination before the accident, but concealed inside of the beam.

I cannot sustain the contention of the claimant that the ship was under no obligation to supply any ladders for the charterers' use in making these repairs; on the contrary, I think that in making the repairs contemplated by the charter at their own expense, the charterers were entitled to all the ordinary movable appliances which belonged to the ship and were in customary use in going from one part of the ship to the other; and that the ship and her owners are responsible for any lack of diligence in supplying ladders suitable for the purposes for which they were intended.

On the other hand, it was not legal negligence that the ship did not use iron ladders, or stationary ladders, such as most ships of her class now more commonly use, instead of following the older fashion of movable ladders, provided they were reasonably sufficient. The Maharajah, 40 Fed. 784, affirmed 1 C. C. A. 181, 49 Fed. 111; The Serapis, 2 C. C. A. 102, 51 Fed. 91.

The evidence leaves no doubt that the rung broke in consequence of the addition of the weight of the ladder to the weight of the man descending it while it was suspended by a rope to the rung; and also in consequence of the defect on one end of the rung. The defect, from its appearance, seemed to be an old one; but the ladder was in common use by the seamen, and on the day before the accident, when in its ordinary position, leaning against the partition in hatch No. 3, it was used by all the carpenters, including the libelant, who went up and down upon it several times. While it cannot be said that the ladder was specially designed to be used in the way that it was used in this instance, viz., suspended from one rung while the man descended upon it, the evidence shows that it was not uncommon for short ladders to be used in this way temporarily, before being adjusted as intended. I do not feel warranted in finding, therefore, that the mode in which it was used was unauthorized, so as to constitute a negligent use. The libelant was not a heavy man, though the weight of the ladder, added to his own, would undoubtedly be somewhat greater, but not much greater, than that of persons who in the ordinary course of navigation might at times have to use such a ladder. I cannot find, therefore, that the weight to which the rung in this case was subjected was greater than ought to be provided for; or that the men using the ladder ought to have known that there was any risk of danger in adopting this method of going into the hold before adjusting this ladder in its intended position.

The case, therefore, seems to turn wholly on the question whether the ship is liable for the defect in the rung which made it unfit for this occasional use, to which it was liable. The ladder was apparently a firm and strong one. Examination, as the libelant's witnesses stated, would not, and could not, disclose this defect of the rung. There is no evidence of any lack of diligence or care on the part of the owners, or of any of the officers of the ship, in respect to these ladders; and this distinguishes the present case from all those cited for the libelant. There was not any insufficiency in the number of ladders supplied for the ship, and there was at least one other long ladder that might have been used.

The case is, therefore, really one of a latent defect, not discoverable by any ordinary care or diligence. By the law of common carriers, the ship is responsible for damage to goods in consequence of such latent defects. *The Rover*, 33 Fed. 515, and cases there cited; *The Bergenseren*, 36 Fed. 700. The liability of the ship and owners to employes as respects the sufficiency of equipment and appliances, is not that of warranty, as it is in regard to goods, but only for the exercise of "due diligence." *The Flowergate*, 31 Fed. 762; *The Dago*, Id. 574; *The Benbrack*, 33 Fed. 687; *Canter v. Mining Co.*, 35 Fed. 41; 27 Stat. 445, c. 105, § 3.

As there is no evidence of negligence in regard to the ladder, the libel must be dismissed.

NEW YORK CENT. & H. R. R. CO. v. BRITISH & FOREIGN MARINE
INS. CO.¹

(District Court, S. D. New York. October 16, 1893.)

MARINE INSURANCE — PAYMENT OF LOSS — DEDUCTION IN LIEU OF AVERAGE—
TWO VESSELS INJURED IN ONE COLLISION.

A policy of insurance covering several of libelant's tugs, and agreeing to "indemnify the insured for any loss or damage arising out of any accident caused by collision to any other vessels, their freights and cargoes, for which said tugs or their owners may be legally liable," contained also the following provision: "It is understood and agreed that in case of loss \$50 is to be deducted therefrom in lieu of average." A collision having occurred, by which two vessels belonging to different owners were injured, through the negligence of one of the insured tugs, the insurer claimed to deduct \$50 for each vessel injured. *Held*, that the intent of the policy was that only \$50 should be deducted for each accident, though more than one vessel were damaged.

In Admiralty. Libel to recover balance of insurance money. Decree for libelant.

Carpenter & Mosher, for libelant.

Butler, Stillman & Hubbard, for respondent.

BROWN, District Judge. A large policy of insurance issued by the respondent to the libelant, embraced insurance to the amount of \$165,000 against towage liability upon several of the libelant's tugs, including the New York Central Lighterage Company's tug No. 20, valued at \$20,000. The insurance ran for one year from December 30, 1891; and was "against such loss or damage as the tug may become liable for, for any accident caused by collision ^{and} or stranding;" and "to fully indemnify the insured for loss or damage arising or growing out of any accident caused by collision ^{and} or stranding * * * to any other vessel or vessels, their freights and cargoes (or each or any of them,) for which said tugs or their owners may be legally liable."

A subsequent clause provided as follows:

"It is understood and agreed that in case of loss \$50 is to be deducted therefrom in lieu of average."

On the 27th of July, 1892, as the tug No. 20, having four loaded canal boats alongside and bound for Dow's Stores, Brooklyn, was endeavoring to effect a landing, the port boat came in collision with the pier, whereby she was damaged, and another canal boat on the opposite side of the tug was, through the force of the shock, damaged by contact with the fender of the tug. The two canal boats belonged to different owners; and it was admitted that the tug, and the libelant, as her owner, were liable to pay the damages to each boat. It was claimed by the respondent, however, under the average clause of the policy last cited, that two sums of \$50

¹ Reported by E. G. Benedict, Esq., of the New York bar.

should be deducted from the whole loss; that is, one on account of each of the two boats injured; while the libellant contends that only a single sum of \$50 is to be deducted upon the whole loss. A similar question having frequently arisen on such policies, the proper construction of the policy in this regard has been submitted to the court.

In behalf of the respondent, it is urged that the purpose of the deduction of "\$50, in lieu of average" is in conformity with the ordinary practice in marine policies, the intent of which is to relieve the underwriters from the investigation of petty claims; and that the presumed intention of the parties in this case is that this clause should serve the usual purpose, so as to relieve the underwriter from the investigation of petty demands. This purpose, it is said, could not be fulfilled, if all small injuries of a few dollars each, happening to a number of boats in tow of the tug upon the same accident, could be aggregated so as to make upwards of \$50; since this would compel investigation of small claims whenever the aggregate should exceed \$50.

This argument is not, to me, convincing upon an insurance like the present, and for several reasons.

There is nothing in the policy itself to show that this assumed purpose is the real or the only one. It may be so in part; but evidently the clause is not applied in that sense only; for, if so, it should only take effect where the claims are less than \$50: where in excess of \$50, it should not apply at all. Plainly, this is not so. The clause gives the respondent the right to deduct \$50 no matter how large the loss may be. It applies to all losses, whether large or small. It is quite as reasonable to assume that its purpose is partly one of sound policy, and partly to cover a portion of the necessary expense of investigating the claims, whether they are large or small.

The contention of the respondent proceeds upon the assumption that the damages in the present case constitute separate losses. This is no doubt correct as between the tug owner and the several owners of the tows; but the different items of the "losses" upon this accident are not several and distinct claims as between the insurer and the insured. The several owners of the tows have no claim whatsoever upon the insurers; there is not the least privity between them. The assured, as respects this accident, for all the damages arising from it, has but a single claim against the insurer. He could not prosecute the respondent therefor in more than a single suit. The loss as between them, and under the policy, is legally a single demand.

A contrary construction of the average clause, so as to permit a deduction of \$50 in respect to the damages that might accrue to every one of the different persons who might be damaged through the same stranding or collision, would entail results which seem to me incompatible with the manifest object of the insurance. The policy, by its own language, shows that it contemplates the handling by the tug of the tows and cargoes of various owners at

the same time. It provides that the tugs "shall not take or tow a larger number of boats or craft than they can at all times safely handle and fully protect," which is a direct recognition of the ordinary practice for tugs to take a tow of numerous boats, which may all belong to different owners.

The insurance, moreover, is not only against the liability for other boats injured, but also for all "loss or damage arising to their freights and cargoes, or each or any of them." These freights and cargoes are often owned by still other persons, to each of whom severally the tug and her owners may be legally liable. It is frequently the case that from a single collision or stranding the tug and her owners become responsible to numerous different damage claimants. If the construction contended for by the respondent is correct, the deduction of \$50 could be made in respect to each and every one of such different damage claims, whether for boats or the different parts of the cargoes, and thus not merely the sum of \$50, but many times that sum, amounting in all to a very considerable proportion of the insurance, might be deducted. It seems clear to me that the language of the policy is not compatible with such a result, and does not contemplate it. On the contrary, in insuring "against such loss or damage as the tug may become liable for;" and in agreeing "to indemnify the assured for loss or damage arising out of any accident by 'collision' etc. to any other vessel, or vessels or their cargoes" etc., the policy seems to me plainly to contemplate the fact that there may be numerous items of damage to different claimants arising upon a single accident, and that all such as may arise upon "any (single) accident constitute but a single 'loss' as between the insurers and insured." The policy is the insurer's own instrument, and if the intent was to deduct \$50 for each damage claimant's loss, instead of for the one loss which the accident caused to the assured, it was for the insurer to express that intent in the policy. Not having done so, the policy must be construed according to the legal relation between the parties to it. As between them, the "loss" is but one, upon a single "accident;" and consequently there should be but a single deduction of the \$50. The case of *Hernandez v. Insurance Co.*, 6 Blatchf. 317, seems to me not to conflict with this decision, but rather to sustain it.

PROVIDENCE WASH. INS. CO. v. BRUMMELKAMP.

(Circuit Court, N. D. New York. November 29, 1893.)

1. REFORMATION OF CONTRACTS—MISTAKE—INSURANCE POLICY.

Where an insurance company is requested to issue a policy like a previous one to the same party, and in copying from the prior policy the word "thence" is inadvertently substituted for "there," equity will reform the policy to express the intention.

2. MARINE INSURANCE—POLICY—CONSTRUCTION.

A vessel insured for one year with the provision, "Confined to dredging in Shinnecock canal, L. I., with liberty to proceed there via Long

Island sound into Peconic bay," does not cover a loss of the vessel during the year, in Long Island sound, on a voyage from Shinnecock canal to New York.

In Admiralty. Libel by the Providence Washington Insurance Company against Peter J. Brummelkamp for reformation of a policy of insurance, and to restrain the prosecution of an action at law thereon. Decree for complainant.

Carpenter & Mosher, for complainant.

Hyland & Zabriskie, for respondent.

WALLACE, Circuit Judge. The complainant's bill is filed to reform a policy of marine insurance issued by the complainant to the defendant, whereby the defendant's dredge Pioneer was insured for one year against loss for the sum of \$4,000, subject to the provisions and warranties contained therein, and to restrain the further prosecution of an action pending at law in this court, brought by the defendant against the complainant to recover the amount insured. The policy, in describing the risk insured, contained this provision: "Confined to dredging in the Shinnecock canal, L. I., with liberty to proceed thence via Long Island sound into Peconic bay." The vessel was lost during the year while in Long Island sound, whence she had proceeded from the Shinnecock canal into Long Island sound on a voyage to the port of New York. The bill of complaint alleges that by a mistake of the scrivener the word "thence" in the provision quoted was substituted inadvertently for the word "there," so that the risk covered by the policy should read "confined to dredging in the Shinnecock canal, L. I., with liberty to proceed there via Long Island sound into Peconic bay."

It is entirely clear that the word "thence" was substituted for the word "there" in the provision by the inadvertence of the scrivener. The complainant had issued to the defendant a policy on the dredge Trojan, of which the defendant was the owner, which dredge at the time was about to go to the Shinnecock canal, and there engage in dredging. The dredge Pioneer subsequently proceeded to Shinnecock canal, to be employed in dredging there, and the defendant was requested by the insurance brokers acting for the defendant to issue a policy upon the Pioneer similar to the one which had theretofore been issued by it upon the Trojan. In copying the provision of the Trojan's policy into the policy upon the Pioneer the word "there" was written "thence." The language of the provision suggests a mistake upon its face, because it is geographically impossible to proceed from the Shinnecock canal through Long Island sound into Peconic bay. The policy upon the Trojan was intended to cover a risk arising not only while the dredge should be employed in the Shinnecock canal, but during her voyage going from the Hudson river through Long Island sound and Peconic bay. It did not extend to a loss which might arise subsequent to the employment of the vessel in dredging in the Shinnecock canal. It was the intention as well of the insured as the

insurer that both policies should cover a similar risk, and the policy upon the Trojan accurately expressed the understanding between the parties. The complainant had no knowledge whether the dredges were to be employed in the Shinnecock canal for a longer or shorter period than a year; but it carefully limited its liability to a loss arising during the employment of the vessels there, or while proceeding there. Very likely the defendant supposed that under a policy worded as this one was intended to be he could recover in case of a loss happening at any time within the year, although after the vessel should cease to be employed in the Shinnecock canal. But he had no justification for such a supposition, because the language of the condition could not warrant it.

There must be a decree for the complainant reforming the policy according to the prayer of the bill, and enjoining the further prosecution of the suit at law.

THE BERKELEY.

DEAS v. THE BERKELEY.

(District Court, E. D. South Carolina. November 18, 1893.)

1. ADMIRALTY—PROCEEDINGS IN REM—VOID PROCESS.

A warrant of arrest for seaman's wages, issued by the clerk in the absence of the judge, contrary to the provision of a rule of court, is void.

2. SAME—VOID PROCESS—WAIVER—RELEASE BOND.

Where a release bond is given after seizure of a vessel under an invalid warrant of arrest, the claimant being then ignorant of such invalidity, the recital in such bond that the claimant and his surety personally appeared, and submitted themselves to the jurisdiction of the court, is not a waiver of the illegality, and does not operate as an appearance to the suit, and any proceedings founded thereon are coram non iudice. The *Orpheus*, 3 Ware, 145, followed.

In Admiralty. Libel by George Deas against the steam tug Berkeley for seaman's wages. On motion to vacate a decree. Granted.

C. B. Northrop, for libellant.

Ficken & Hughes, for respondent.

SIMONTON, District Judge. This is a motion to set aside a decree in admiralty. On 18th August, 1893, the libel was filed for seaman's wages, and a warrant of arrest asked for. By the rule of this court, (rule 9,) process in rem may be issued without a mandate of the judge, except in foreign attachment or in suits for seaman's wages. The judge was absent from Charleston, holding the court at Greenville, when this libel was filed. The clerk issued the warrant himself under the seal of the court, without the mandate of the judge. The marshal served the warrant, and arrested the vessel. In an hour or two after the arrest, the master and claimant went to the marshal, and, with J. F. Hernholm as surety, en-

tered into a stipulation in the sum of \$100, under Rev. St. § 941. This stipulation ran in these words: "Personally appeared [the claimant and his surety, naming them,] who, submitting themselves to the jurisdiction of this court, bind and oblige themselves," etc. No formal appearance was entered, and no defense was put in. No advertisement of the vessel was made. On 17th October, 1893, proclamation was made, the respondent was found in default, decree was entered, and reference had to the clerk to ascertain the amount. His report was confirmed 26th October, 1893, and execution granted against the stipulators. They come in, and move to vacate the decree and all proceedings in the cause upon the ground that no warrant of arrest was legally issued, and upon the further ground that no advertisement was made, under rule 9, prescribed by the supreme court in admiralty.

There can be no doubt that the warrant of arrest was issued without authority. The rule expressly excepts cases for seaman's wages, when it allows a warrant to go without the mandate of the judge. This rule is founded on excellent reasons and sound policy. It is in close analogy with section 4546, Rev. St., which provides for a prior examination by the judge into a claim for seaman's wages. The question is, has the respondent not waived this objection by entering into the stipulation? It is not essential to the validity of a stipulation of this sort that the vessel should be actually in arrest. The language of the section, 941, shows this: "The marshal shall stay the execution of the warrant or discharge the property arrested if process shall have been levied" on receiving the stipulation. Judge Benedict, in *The Roslyn and Midland*, 9 Ben. 129, says it is a common practice, adopted for convenience and the saving of expense, to give a stipulation to secure a debt upon simple notice of the filing of the libel. A stipulation given under such circumstances is valid, although the vessel is not, and never was, in custody. Indeed, admiralty favors the stipulation. It serves all the purposes of security, and lets the vessel go free, fulfilling the purpose for which she was built; otherwise, she would lie idle at the wharf. But this is not precisely the case here. Respondents did not enter into the stipulation voluntarily on hearing of the libel filed, or to save expense. They stipulated because of the arrest, and to be free from it. The action was based on the belief that the warrant was good, and, as it bore the seal of the court, they had every reason to think so. The defect, the absence of the mandate of the judge, was not known to them, could not have been discovered by them on an inspection of the warrant, was probably not known to the marshal, and was known only to the clerk who affixed the seal of the court. Besides this, the judge was absent, was out of reach for several days, and the business of the steamer was interrupted. Under these circumstances, they entered into the stipulation. In this instrument they submit themselves to the jurisdiction of the court. The office of the stipulation is to release the vessel by substituting security in its place. Henry, *Adm. Jur. & Proc.* § 129. The bond stands for the vessel,—is instead of the res. *The Fidelity*, 16 Blatchf. 569.

But, says this case, the giving such stipulation to obtain a release of the vessel is not a waiver of any questions as to the original liability of the vessel. It only takes the place of the vessel for all the purposes of trial. But, while this is the law with regard to a defense on the merits, does not the stipulation amount to a submission to the jurisdiction of the court, and consequently to a waiver of all preceding objections? When we consider that such a conclusion would go far to destroy the very purpose of the stipulation, and that one claiming a maritime lien could wait until the last moment, and then, without lawful process, seize a vessel on the point of departing on her voyage, and so, from necessity, force her to stipulate, and thus make good invalid process, the argument *ab inconvenienti* would in such case have great force. The *Monte A.*, 12 Fed. 332, seems to be an authority for the position that the stipulation has not that effect. Process in rem had been issued against a vessel, and stipulation entered into. The libel was dismissed for want of jurisdiction,—the nonexistence of a maritime lien. Judge Brown adds: "As the vessel cannot be held, the sureties in the bond executed for her release, which stands merely as a substitute for the vessel, are also, necessarily, discharged." The owner, however, although a nonresident, appeared generally in the action, and contested the liability on the merits, without taking any exception to the form of the remedy, as he might and should have done at the commencement of the action. A decree was sought against him. After stating the rule that, in actions at law and actions in personam in admiralty, a general appearance cures any irregularities in the service of process, or even the want of any service, and showing that even in such actions, where the defendant's person or property has been arrested or attached irregularly, defendant may, by a special appearance, avoid committing himself to the jurisdiction, the learned judge adds: "But an action purely in rem is itself limited to a proceeding against the res, and a general appearance in such action should, it seems to me, be deemed no more general than the limited nature and scope of the action itself, and of no greater effect than a special appearance to vacate an unauthorized arrest or attachment upon a general suit in personam." In the present case the claimant entered no appearance, and judgment was had by default. His submission in the stipulation surely can have no greater effect than a general appearance would have had. In *The Orpheus*, 3 Ware, 145, this question was discussed: "It is further contended that whatever objection there may have originally been to the jurisdiction has been waived by the claimant's stipulation, by which he submitted to the jurisdiction,"—saying that, if this stipulation had been purely voluntary, it might perhaps be taken as a waiver of any other objection, as the subject-matter was clearly within the jurisdiction of the court, "but, with a consent extorted by duress, it may be otherwise." Then showing that under the circumstances of the case, the arrest of the ship, the danger of the voyage being broken up, the entry into the stipulation as the only means of liberating the vessel and saving the owner from heavy loss, he concludes that the stipulation was not

the voluntary act of the claimant,—so far voluntary, at least, as to deprive him of the right of objecting to its legality. “The clause in the stipulation by which the party submits to the jurisdiction of the court seems to be taken from the stipulation entered into in libels in personam, in *judicio sistendi*, or answering to the action, and I think should be held to have the same force and meaning as in that. That required the promisor to remain in court, and submit himself to its jurisdiction, so far as he was subject to it when the suit commenced; no further. If, after the service of the process, he acquired a new right of declining the former, that was waived. But it did not deprive him of any right of defense he had when the process was served. The object was to preserve the authority of the court as it then was, and not to enlarge it. Any right which the claimant had of objecting to the jurisdiction of the court when the stipulation was entered into, he still retains.” I am of the opinion that the original process in this case was void, and so continued notwithstanding the stipulation; that, as all the subsequent proceedings depended on this process, they were *coram non judice*.

Let the warrant of arrest issue on the libel as filed.

MEYER et al. v. PACIFIC MAIL STEAMSHIP CO.

(District Court, N. D. California. December 6, 1893.)

No. 10,316.

ADMIRALTY—EQUITABLE DEFENSES—REFORMATION OF CONTRACTS.

Admiralty cannot take cognizance of a defense based on mutual mistake, requiring the reformation of a maritime contract sued on; but the setting up of such defense does not oust the jurisdiction. On the contrary, the defense will merely be considered as irrelevant, and subject to exception.

In Admiralty. Libel in personam to recover damages for failure to carry and deliver freight in accordance with terms of bill of lading. Answer sets up mutual mistake in the terms of the bill of lading. Exceptions to answer. Sustained.

Andros & Frank, for libelants.

Ward McAllister, Jr., for respondent.

MORROW, District Judge. The libel alleges that on the 22d day of May, 1891, E. L. G. Steele & Co., of San Francisco, delivered to the Pacific Mail Steamship Company, at the port of San Francisco, state of California, 2,200 gunnies of wheat and 5,000 gunnies of corn, in good order and well-conditioned, to be carried and transported upon the steamer San Blas, or any of said company's steamers, or steamers employed by them, then lying in the port of San Francisco, and bound for Panama, unto the port of Champerico, in the republic of Guatemala, and there delivered in good order to the libelants, who were then and there the owners thereof, for the freight of \$3,726.88, to be paid by the said libelants; the said E.

L. G. Steele & Co. receiving therefor from the said Pacific Mail Steamship Company a bill of lading and contract of affreightment, which is annexed to the libel.

It is further alleged that, although the said freight was prepaid upon said merchandise, the said Pacific Mail Steamship Company did not carry all of said merchandise upon said steamer San Blas, or upon any of said company's steamers, or upon any steamer employed by them, then lying in the port of San Francisco; but, on the contrary, in violation of their said contract of affreightment, only carried a part of said merchandise upon said steamer San Blas, leaving behind 250 gunnies of wheat and 1,433 gunnies of corn, which said merchandise was not shipped or carried forward as in said bill of lading or contract of affreightment specified, but was delayed and carried forward by a steamer not in the port of San Francisco on said 22d day of May, 1891, but which arrived subsequently thereto, whereby the libelants lost the market for which said merchandise was destined, to their damage in the sum of \$692.30 in United States gold coin.

The answer of the respondents admits the delivery of the bill of lading, but alleges, among other things, that it was made and delivered by the mutual mistake of respondent and E. L. G. Steele & Co.; that it was the mutual intent and meaning of the respondent and E. L. G. Steele & Co. that no less than 300 tons of the corn and wheat should be carried and transported to the port of Champerico on the respondent's steamer San Blas, and that the balance of the corn and wheat should be carried and transported to the port of Champerico by the respondent's steamer then advertised to sail on June 3, 1891, and it should have been so stated in the contract of affreightment; and it was the mutual intention of the parties to the contract of affreightment that the bill of lading and contract of affreightment made and delivered to E. L. G. Steele & Co. by the respondent should fully express the contract made, but, through inadvertance and by mutual mistake of the parties thereto, the bill of lading and contract of affreightment were made and delivered as alleged in the libel, and failed to state the contract entered into between the parties thereto, and the bill of lading and contract of affreightment should be corrected so as to state the true contract made between the parties.

The libelants except to the answer on the grounds that it does not state facts sufficient to constitute a defense, and that it sets up an agreement on a contract of affreightment not contained in the provisions of the bill of lading, and inconsistent with and contrary thereto, in which particular the libelants insist that the respondent's answer is irrelevant and immaterial.

The portion of the respondent's answer excepted to by the libelants sets up an equitable defense, based upon the mutual mistake of the parties. A court of admiralty exercises its jurisdiction upon equitable principles, but it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake. *The Eclipse*, 135 U. S. 599-608,

10 Sup. Ct. 873. It has jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts. *Andrews v. Insurance Co.*, 3 Mason, 6-16. This principle of admiralty jurisdiction is not controverted by counsel for respondent, but he contends, as the court has jurisdiction of the action, it must determine the case upon the equity involved in the defense, or dismiss the libel without prejudice, that the party may bring his suit in a forum which would have jurisdiction to settle the matter upon the issues raised by the pleadings. When the original libel brought in a court of admiralty seeks to reform a maritime contract, it is the practice to dismiss the libel for want of jurisdiction over that particular action. *Andrews v. Insurance Co.*, supra; *Williams v. Insurance Co.*, 56 Fed. 159. But in this case the court has jurisdiction over the cause of action, as stated in the libel, and no case has been cited where the libel has been dismissed because the answer sets up an equitable defense. Reference to the numerous cases in which the scope and character of admiralty jurisdiction has been discussed would be out of place here. It is sufficient to say that the jurisdiction of United States courts in admiralty over maritime contracts has been established in the most explicit and comprehensive terms, and, while the precise question raised in this case does not appear to have been determined by the courts, nevertheless there are certain general principles of jurisdiction which warrant the conclusion that a court of admiralty is not ousted of its jurisdiction over a cause of action based upon a maritime contract, because one of the parties to the contract contends it should be reformed. If we admit this defense in an action in personam, we must admit it in an action in rem, and the result will be to withdraw the admiralty jurisdiction and its remedies from such contracts upon the mere allegation of an answer that there is an equitable defense. This practice would, in my judgment, be wholly inadmissible.

The remaining question is as to the relevancy or materiality of the matter set up in the answer as a defense to the action on the bill of lading. In the case of *The Delaware*, 14 Wall. 579, the Oregon Iron Company shipped iron on board the bark *Delaware* at Portland, Or., to be carried to San Francisco. The iron was not delivered, and on a libel filed by the iron company the defense set up by the owner of the vessel was that by a verbal agreement between the parties the iron was stowed on deck, and that the whole of it, except a small quantity, had been jettisoned in a storm. On the trial the owner offered proof of this verbal agreement, but the libellant objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellant, which was equivalent to a decree that the evidence offered was incompetent. The respondent contends that this case has no application to the question now under consideration because the claim made for equitable relief had not been raised by the pleadings. Admitting this to be so, nevertheless the supreme court has here declared a rule with respect to such a transaction as the one at bar

that excludes the evidence of a verbal agreement, and under this authority I am of the opinion that the evidence is irrelevant and immaterial. It follows that the exception should be sustained, and it is so ordered.

THE MARY SANFORD.

MITCHELL v. THE MARY SANFORD.

(District Court, E. D. South Carolina. November 25, 1893.)

SEAMEN—IMPLIED WARRANTY OF FITNESS—DISABILITY—WAGES.

There is an implied warranty that a seaman is bodily fit for the station for which he contracts, and if at the time of engaging he has a disease, though unknown to himself, progressive and fatal in character, which disables him for service during the whole voyage, he is not entitled to wages.

In Admiralty. Libel by William Mitchell against the schooner Mary Sanford to recover wages. Dismissed.

F. J. Devereux, for libelant.

J. N. Nathans, for respondent.

SIMONTON, District Judge. The libel is filed by the cook of the Mary Sanford for his wages. He shipped at Boston 3d August, 1893, for a voyage from Boston to Charleston, S. C., thence to Kingston, Jamaica, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding six calendar months; wages, \$40 per month. After the voyage began, Mitchell for a day or two attended to his duties, but thenceforward did no work at all until the schooner reached Charleston. On arriving at that port, the master got him in the Marine Hospital, where he still is. He suffered from intense pain in his chest and side, nausea, and a pain in his bones. The surgeon of the Marine Hospital examined him on his admission. He is of the opinion that at that time, and for some time previous, he was suffering from tuberculosis, and in his opinion he still suffers from the same complaint. This disease, in the opinion of this medical expert, incapacitated Mitchell for work, and still incapacitates him. The question is, is he entitled to his wages? His claim is for the wages \$240, the whole voyage. The rule, without doubt, is that, if a sailor is prevented without his default from performing full services, still he is entitled to the stipulated hire for the whole period for which he contracted to serve. The Harriet C. Kerlain, and cases quoted, 41 Fed. 223. But when a seaman enters into his contract of service, there is always implied as a warranty that he is fit, bodily and mentally, for the station for which he contracts. Curt. Merch. Seam. 29; The Richmond, Pet. Adm. 263. Indeed the liberality of the rule as to wages requires strictness in enforcing this warranty. The libelant says that he had been sick, from time to time,

before this engagement, but never seriously sick. On the other hand, it is evident that when he engaged his service he had, unknown perhaps to himself, a disease, progressive and fatal in its character. It not only disabled him from service during the whole voyage, it also kept him in hospital during the whole stay of the schooner in this port,—four weeks. Indeed he is still in hospital, not cured of this disease. It seems clear that there is a breach of warranty in this case, and the libel is dismissed.

THE PHOENIX.

CORNWELL v. ROGERS et al.

(Circuit Court of Appeals, Second Circuit. November 17, 1893.)

COLLISION BETWEEN STEAMERS CROSSING COURSES.

A steam barge in a fog heard the fog signals of a tug with tows on her starboard hand. Both vessels were proceeding slowly, and neither could be seen from the other at a greater distance than 400 feet. *Held*, that for the collision which ensued between the barge and one of the tows the tug was not in fault, she having reversed, in obedience to rule 21, when she saw the steam barge kept coming towards her on a course involving the risk of collision; but that the steam barge, on which rested the duty of avoidance, must be held in fault, on the finding of the trial court on conflicting evidence that she did not reverse promptly on discovering the tug.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by William L. Rogers, master and owner of the canal boat Bartholomew Brewing Company, against the steam barge Phoenix (Charles C. Cromwell, claimant) and the steam tug Atlanta, for damages from collision of the canal boat, while in tow of the Atlanta, with the Phoenix. The district court held the Phoenix solely in fault for the collision, and entered a decree for libelants against the Phoenix, dismissing the libel as against the Atlanta. The claimant of the Phoenix appeals. Affirmed.

Treadwell Cleveland, (Gherardi Davis, on the brief,) for appellant.

W. W. Goodrich, for the Atlanta, appellee.

Wilhelmus Mynderse, (Butler, Stillman & Hubbard, on the brief,) for libellant, appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the district court in the southern district of New York in favor of the libellant, as owner of the canal boat Bartholomew Brewing Company, against the steam barge Phoenix, and dismissing the libel as against the steam tug Atlanta.

The canal boat was the outer of two boats on the port side of the Atlanta, which had another boat on her starboard side. The

fleet was bound from the Morris Canal basin, Jersey City, to the Atlantic basin, Brooklyn. There was a fog, which had lifted a little before they started, but soon shut down again, somewhat thick near the water. While thus proceeding on their way, the fleet encountered the Phoenix, which was on her way from pier 1, North river, to Communipaw. The latter vessel came into collision with the libellant's boat, striking her a little forward of midships, nearly at right angles.

The testimony is conflicting. It is, however, conceded that when the fog signals of the Atlanta were first heard on the Phoenix, the former was on the latter's starboard hand. The duty of avoidance, therefore, was plainly on the latter. We are satisfied from the proof that the fog was so dense that neither vessel could see the other at a greater distance than 400 feet. Both vessels, after the fog shut down, proceeded slowly.

We agree with the district judge in holding that there "was no such clear case as required the Atlanta to disregard the twenty-first rule," which provides that steam vessels, when approaching another vessel, so as to involve risk of collision, shall slacken, and, if necessary, stop and reverse; and, as the evidence supports the conclusion that the Atlanta did reverse when she saw that the Phoenix kept coming towards her on a course involving risk of collision, she must be held free from fault. Were we further satisfied that the Phoenix also reversed promptly as soon as she saw the Atlanta, we would be strongly inclined, disregarding any minor faults of navigation or errors perpetrated in the brief space after collision seemed unavoidable, to hold the catastrophe to be an accident without fault. But the testimony is in conflict upon the question of fact whether or not the master of the Phoenix delayed reversing, and, as the district judge in this case saw the witnesses, we accept his conclusion, since there is not a clear preponderance of proof the other way.

Decree affirmed, with interest to libellant, and costs to the Atlanta against the Phoenix.

PENNSYLVANIA R. CO. v. NATIONAL DOCKS & N. J. J. C. RY. CO.

(Circuit Court, D. New Jersey. December 16, 1893.)

No. 13.

1. FEDERAL AND STATE COURTS—RES JUDICATA.

The decision of a New Jersey circuit court that, on an appeal in a proceeding wherein one railroad company has condemned a right of way across the tracks of another, it has power, under the state statute, to allow an amendment altering the plan of crossing, is, while unreversed, binding on the federal courts, and they cannot interfere on the ground that the state court was without jurisdiction to allow the amendment.

2. SAME—INJUNCTION BY FEDERAL COURTS—CONDEMNATION PROCEEDINGS.

A federal court has no authority, pending the determination of an appeal in condemnation proceedings in the state courts, to preserve by injunction the status quo between two railroad companies in respect to a crossing by one under the tracks of the other, when the condemning company has paid into the state court the assessed compensation, which, by the express terms of a state statute, whose constitutionality has been finally affirmed by the state courts, gives it a right to immediately proceed with the work. *Erhardt v. Boaro*, 5 Sup. Ct. 565, 113 U. S. 537, and *Great Western R. Co. v. Birmingham, etc., R. Co.*, 22 Eng. Ch. 597, distinguished.

In Equity. Bill by the Pennsylvania Railroad Company against the National Docks & New Jersey Junction Connecting Railway Company for an injunction to restrain the condemnation by defendant of a right of way for its road through the yard of the complainant company in Jersey City. Injunctions were denied in prior stages of the condemnation proceedings. 51 Fed. 858, and 56 Fed. 697. Motion is now made for a preliminary injunction to preserve the status quo pending final disposition of the condemnation proceedings on appeal. Denied.

James B. Vredenburg, Joseph D. Bedle, and Samuel H. Grey, for complainant.

Dickinson, Thompson & McMaster, J. R. Emery, and C. L. Corbin, for defendant.

ACHESON, Circuit Judge. The complainant invokes the equitable jurisdiction of this court to restrain the defendant corporation from entry upon the complainant's lands,—its terminal yard and premises in Jersey City,—and from constructing its railroad across the same, under condemnation proceedings, pending litigation upon a writ of error from the supreme court of New Jersey to the circuit court of Hudson county, which the complainant and its lessor have obtained, and also until the final determination of any writ of error from the court of errors and appeals, to the judgment of the supreme court which may be sued out by either side hereafter.

It appears that, upon appeal by both sides from the report of the commissioners appointed under the condemnation petition, the circuit court of Hudson county directed an issue, afterwards amended by the allowance of the court, which was tried by a jury, resulting in a verdict finding the value of the land taken, and the damages sustained, to be \$95,000. Thereupon, an application

was made to that court by the complainant and its lessor for a new trial, and a stay of all proceedings on the part of the condemning company, and that the cause be certified into the supreme court. But the application was refused; the court being of the opinion that it had no authority to prevent a tender of the amount found by the jury, or payment thereof into court on refusal of such tender, or to stay entry by the condemning company for the purpose of constructing its railroad. The condemning company, the defendant here, after tender to the attorney of record of the land-owning companies, and refusal by him, paid into court the amount found by the jury. Judgment having been entered upon the verdict, a writ of error, at the suit of the present complainant and its lessor, issued from the supreme court to the circuit court of Hudson county. Upon return of the writ of error, application was made by the plaintiffs in error to the supreme court for an order staying the defendant in error, the condemning company, from taking possession of the lands and crossing described in the issue brought up by the writ. This application, however, was denied; the supreme court holding that it had no power to grant such stay, and "that the right to enter into possession of said lands, and right of crossing, is conferred by the statute under which the proceedings of the defendant in error were taken."

These condemnation proceedings, at a preliminary stage, were before the court of errors and appeals of New Jersey. *National Docks & N. J. J. C. Ry. Co. v. United Companies*, 53 N. J. Law, 217, 21 Atl. 570. That court there adjudged that one railroad company may condemn a right to cross the lands of another company of the same character, although the lands be necessary for the railroad purposes of the latter company; that it is competent for the condemning company, in its petition, to define a lawful manner in which it will cross the lands of the other company, and that the projected plan of crossing the complainant's yard, railroad tracks, and lands, as designated in the petition, although attended with serious inconvenience and damage to the complainant, was a lawful crossing. By the plan of crossing defined in the condemnation petition, and which was the basis of the report of the commissioners, the condemning company proposed to cross the complainant's terminal yard and tracks by an under-grade crossing through a walled cut open at the top; the walls being of a specified thickness and height, and extending from the northerly side of Railroad avenue to, and uniting with, the walls which support the main tracks of the complainant's railroad. After appeal, and before trial, the circuit court of Hudson county, at the instance of the condemning company, and against the objections of the complainant, permitted an amendment of the plan of crossing, whereby, in lieu of the described walled cut, an under-grade archway or tunnel was substituted. The court was of the opinion that the proposed arched construction would least damage the complainant, and best promote the public use to which both railroads are devoted, and that the amendment was not only within the scope of, and warranted

by, the fourth section of "An act concerning the taking of property for public use," approved March 9, 1893, but that, independent of that statute, the court had authority to allow the amendment.

The bill of complaint charges "that there was no jurisdiction whatever in the said circuit court to make or permit the said amendment, and to subject your orator to a trial on appeal upon the issue as amended;" and the complainant seeks, by the preventive writ of injunction, to preserve the status quo until the legal rights of the parties shall be determined finally. In support of its claim to this equitable relief the complainant cites the cases of *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, and *Great Western R. Co. v. Birmingham, etc., R. Co.*, 22 Eng. Ch. 597, and other like cases, in which courts of equity have interposed to stay the hand of a defendant, and conserve the status of property, pending litigation in a court of law involving the title thereto. The bill virtually concedes that no such stay as is here sought is obtainable by super-sedeas in the courts of law of New Jersey. Indeed, it is because, in this regard, the complainant is remediless at law, that it has come into this forum. Under the circumstances of the case, is there any warrant for our equitable interference?

Now, it is to be noted, first, that there has been no change in the place of crossing the complainant's property, nor in the line of the defendant's adopted route. The amendment complained of related to the method of crossing,—the plan of construction. Moreover, the under-grade feature of the crossing has been retained; and the bill does not allege, nor is it shown, that the substituted plan of crossing is more detrimental to the complainant than the original plan. But a still more important consideration is that the circuit court of Hudson county is a court of general jurisdiction, and undoubtedly had rightful cognizance of the question of the allowance of the amendment. The court had control of the parties and subject-matter of controversy, and the question arose in the progress of the cause. The decision, then, and all the court's rulings during the course of the trial, so long as its judgment remains unreversed, must be accepted by this court as correct and binding. *Peck v. Jenness*, 7 How. 612, 624; *Cornett v. Williams*, 20 Wall. 226, 249; *Nougue v. Clapp*, 101 U. S. 551.

What, then, was the effect of the verdict and judgment, and the payment into court of the amount found by the jury? The statute—the general railroad law of New Jersey—gives no uncertain answer. Revision § 101, reads thus:

"But in case the party or parties entitled to receive the amount assessed by the commissioners in case there shall be no appeal, and in case of appeal the amount found by the jury, shall refuse, upon tender thereof being made, to receive the same, or shall be out of the state or under any legal disability, then the payment of the amount assessed or found as aforesaid into the circuit court of the county wherein the said lands lie shall be deemed a valid and legal payment; * * * and on such tender or payment of the money into court, in case it be refused as aforesaid, * * * then the said company, upon payment of the amount so assessed or found as aforesaid into said circuit court, shall be empowered to enter upon and take possession of the said lands and proceed with the work of constructing its road."

In view of this provision of the statute, it is quite plain that the principle of the cases of *Erhardt v. Boaro*, supra, and *Great Western R. Co. v. Birmingham*, etc., R. Co., supra, has no application here; for the defendant's right of entry, to the end that it may proceed to the performance of its public duty, is fully established, if this clause of the statute be constitutional. But under the decisions of the state courts the constitutionality of this legislation seems to be no longer an open question. *Doughty v. Railroad Co.*, 21 N. J. Law, 442, 452; *Cooper v. Railroad Co.*, 19 N. J. Eq. 199; *In re Drainage of Lands*, etc., 35 N. J. Law, 497, 507; *Mercer & S. Ry. Co. v. Delaware & B. B. R. Co.*, 26 N. J. Eq. 464; *Packard v. Railway Co.*, 48 N. J. Eq. 281, 287, 22 Atl. 227; *Jersey City*, etc., Ry. Co. v. *Central R. Co.*, 48 N. J. Eq. 379, 22 Atl. 728. The doctrine deducible from the unbroken line of adjudications is that payment into court, conformably with the terms of the statute, of the amount found by the jury, satisfies the requirements of the constitution of New Jersey, and that the condemning company, thereupon, is authorized to enter into possession of the lands taken for public use. Upon such a subject it is the undeniable duty of the circuit court of the United States to follow the authoritative decisions of the state courts.

It need only be added that if the pending writ of error should result in a reversal of the judgment of the circuit court of Hudson county, presumably, restitution of possession will be ordered; and it does not appear that the damages which, in the mean time, the complainant might sustain, would be of an irreparable character.

For the reasons thus expressed, and without considering the other objections made by the defendant, I am constrained to deny the application for an injunction.

The motion for a preliminary injunction is denied, and the restraining order heretofore granted is revoked.

HOLDEN v. SCUDDER.

(Circuit Court, E. D. Missouri, E. D. November 27, 1893.)

No. 3,763.

1. GUARDIAN AND WARD—INSANE PERSON—SALE OF PERSONALTY.

Under the laws of Ohio, which authorize a guardian of an insane person to sell personal property without an order of court, "when for the interest of the ward," (*Strong v. Strauss*, 40 Ohio St. 87,) such guardian has no authority to assign the ward's part interest in a chose in action then in course of litigation by the other part owner, in consideration of the assignee's promise to pay all costs and expenses of such litigation, it appearing that the guardian has been made a defendant therein because he refused to join as plaintiff, for as the guardian would not be liable to costs, and would be entitled to share in any recovery, the assignment is without any consideration and against interest of ward.

2. ASSIGNMENT OF CHOSE IN ACTION—WHAT CONSTITUTES.

A conveyance of lands purchased by the grantor through an agent does not operate as an assignment of a right of action against such agent for profits wrongfully realized by him in the transaction.

In Equity. Suit by Lee S. Holden against Charles Scudder, administrator of the estate of Robert H. Gardner, and A. P. Selby,

to recover a half interest in certain moneys deposited in court in satisfaction of a decree. Heard on motion for a preliminary restraining order. Denied.

Joseph T. Tatum, for complainant.
Willi Brown, for defendants.

THAYER, District Judge. Prior to the 9th day of June, 1887, there had been filed, and was then pending, in this court, a suit by Robert F. Burt against Thomas H. Warren and several other defendants. The suit grew out of a land trade which had been negotiated some years previously by Thomas H. Warren, acting as agent for Burt & Gardner, with Francis G. Flanagan and several other persons who were said to have been interested with Flanagan in the deal. Of the nature of that suit, it is sufficient to say that it was claimed by Burt that Warren, who had been employed to negotiate the trade, had acted in bad faith towards his principals; that he had realized large profits by a breach of his duty as agent; and that he had forfeited his right to compensation for the services rendered in behalf of his principals. As the agent's compensation for the services in question had not been paid, and consisted of a contingent interest in certain lands which Burt & Gardner had acquired by the trade, the bill prayed that an outstanding contract securing such contingent interest in the lands might be canceled, and that Warren might be compelled to account for the profits which he had realized by the alleged breach of duty. When Burt brought the aforesaid suit, his partner, Gardner, was under guardianship in the state of Ohio as a person of unsound mind. The guardian refused to join with Burt as complainant in the aforesaid action, whereupon he was made a party defendant to the original bill. Pending the suit, Gardner died, and Charles Scudder was appointed administrator of his estate in Missouri; and by an amended bill filed on April 7, 1888, the administrator was substituted as a party defendant to represent Gardner's interest. In this posture of affairs, the following assignment was executed by the Ohio guardian, on the day it bears date:

"In consideration of L. S. Holden, of St. Louis, Missouri, agreeing to pay all costs and expenses, whatsoever, that may be incurred by reason of any proceeding or proceedings being brought in my name, as guardian of Robert H. Gardner, an imbecile, in any of the courts of the state of Missouri, or of the United States, against B. F. Hammett, Francis G. Flanagan, and Thos. H. Warren, or either of them, I, as such guardian, do hereby assign and transfer to said Holden any and all judgments that may be obtained in my favor, as such guardian, against said Hammett, Flanagan, and Warren, or either of them, by reason of such proceeding or proceedings, together with all the right, claim, and interest that the said Robert H. Gardner or his heirs might or may have in such judgment or judgments. In witness whereof, I have hereunto set my hand and seal this 9th day of June, 1887.

"T. King Wilson. [Seal.]"

The suit by Burt v. Warren et al. resulted in a long litigation in this court and the United States court of appeals, in which Scudder, the administrator, took an active part, and employed counsel to represent his intestate's interest. It terminated in a decree in favor

of Burt and Scudder, by which they were adjudged to recover of Warren the sum of \$1,743.90, the same being the profits that he was shown to have realized. *Warren v. Burt*, 58 Fed. 101. It was further adjudged that Warren had forfeited his right to compensation for services rendered in negotiating the trade, and that the contract securing to him a contingent interest in the land of his principals be canceled and annulled. The sum of \$1,743.90 has been paid into court, in satisfaction of the decree aforesaid, whereupon Lee S. Holden appears by his counsel, and files a bill to recover one-half of the fund now in the registry. The complainant claims that he is entitled to one-half of the fund as assignee of Gardner under the aforesaid assignment executed by T. King Wilson as guardian on June 9, 1887. He further prays that an order may be entered directing the clerk to withhold paying the fund to Gardner's administrator pending the prosecution of his suit.

The first question that arises upon this motion is whether the Ohio guardian had authority, under the laws of that state, to dispose of his ward's property for the consideration stated in the foregoing assignment. Under the laws of Ohio, it seems that a guardian of an insane person has authority, without an order of court, to sell his ward's personal estate, "when for the interest of the ward." *Strong v. Strauss*, 40 Ohio St. 87, 92. It was only by virtue of such power, that the assignment now in question is attempted to be upheld. But the court is of the opinion that by the instrument in question the guardian did not make such a sale of his ward's property as is authorized by the Ohio statute, for the reason that the alleged sale was clearly detrimental to the interest of the ward. It is manifest from an inspection of the instrument that the guardian undertook to dispose of the property of his ward without consideration, and that the transaction really amounted to a gift to the assignee, Holden, of a portion of the ward's property. The assignment was made with especial reference to the suit of *Burt v. Warren et al.*, which was then pending in Missouri. The guardian had been made a party defendant to that suit, because, being jointly interested with Burt in the claim against Warren, he would not join as a party plaintiff. Under these circumstances the guardian could not have been held liable for costs, in any event. If the suit resulted in a verdict in favor of Burt, his ward would be entitled to share in the recovery; but, if the action failed, Burt would be alone responsible for costs. It is manifest, therefore, that the agreement by Holden to pay all costs in the pending suit was of no advantage to the ward's estate; that the assignment was made for the benefit of the assignee, to enable him to speculate on the outcome of the litigation; and that the ward's interest was wholly overlooked. It goes without saying that an agreement affected with such vices, which rested upon no meritorious consideration, so far as the ward was concerned, and was obviously to his disadvantage, cannot be upheld under the Ohio statute.

Realizing the invalidity of his title to the fund under the alleged assignment, which is the only title counted upon the bill, the complainant has attempted to fortify it by affidavits showing a differ-

ent title. The affidavits show, in substance, these facts: That Gardner, before the suit of Burt v. Warren was brought, and before becoming insane, had sold all of his interest in the land in which Warren had a contingent interest for his commissions to one Nathaniel Wilson; that on April 14, 1887, Wilson sold said interest to Holden, the complainant, for \$30,000; and that, in making such sale, Wilson agreed with Holden that he should be entitled to receive whatever sum might be recovered of Warren in the then pending suit of Burt v. Warren. But, assuming all that is stated to be true, the affidavits do not strengthen the complainant's title, for the following reasons: The sale and conveyance by Gardner to Wilson of his interest in the land which had been acquired by Burt & Gardner did not pass Gardner's interest in the profits that Warren had realized, and wrongfully withheld from his principals. That claim was a mere chose in action, which did not pass by the deed from Gardner to Wilson, and, as a matter of course, Wilson was without power to convey that claim to Holden. The fund in court did not issue out of the land which was conveyed by Gardner to Wilson, but was realized on the judgment against Warren for the profits which he had wrongfully withheld from his principals.

It is contended by the administrator that the assignment above mentioned was void on the ground of champerty, but, as the court is of the opinion that it was void for want of authority in the guardian to execute such an agreement, it has not found it necessary to consider whether it was also champertous.

The result is that title to the fund now in court must be held to be in Scudder, as administrator, and a restraining order will be denied.

CITY OF CADILLAC v. WOONSOCKET INST. FOR SAVINGS.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1893.)

No. 104.

1. MUNICIPAL BONDS—VALIDITY—NEGOTIABILITY.

Statutory power to issue "bonds" for loans lawfully made (How. Ann. St. Mich. § 2717) includes power to make the bonds negotiable. *Brenham v. Bank*, 12 Sup. Ct. 559, 144 U. S. 173, distinguished.

2. SAME—STATUTORY REQUISITES—RECITALS.

Bonds purporting to be "refunding bonds" issued to take up former bonds "falling due" sufficiently comply with the Michigan statute requiring each municipal bond to show upon its face "the class of indebtedness to which it belongs, and from what fund it is payable." How. Ann. St. § 2717; *Barnett v. Denison*, 12 Sup. Ct. 819, 145 U. S. 135, distinguished.

3. SAME—ESTOPPEL—RECITALS—BONA FIDE HOLDERS.

Recitals in bonds issued by a city council under statutory authority, that they are "refunding" bonds, issued to take up "old bonds falling due," estop the city from showing, as against bona fide holders, that the old bonds were invalid, and therefore insufficient to support the issuance of the new ones.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

At Law. Action by the Woonsocket Institution for Savings against the city of Cadillac to recover on certain municipal bonds. Judgment for plaintiff. Defendant brings error. Affirmed.

D. E. McIntyre, (F. A. Baker, of counsel,) for plaintiff in error.

John W. Beaumont, (W. H. Rossington, of counsel,) for defendant in error.

Before BROWN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge. This is a suit at law, brought by the appellee, a Rhode Island banking corporation, against the city of Cadillac, a municipal corporation of the state of Michigan, to recover upon certain bonds issued by that city. A jury was waived, and the circuit court, upon the facts, rendered a verdict for the plaintiff. The bonds involved are part of a series issued in place of other bonds about to mature. The bonds refunded were issued under and in pursuance of an act of the Michigan legislature passed March 2, 1885, and entitled "An act to authorize the city of Cadillac, in the county of Wexford, to borrow money to make public improvements." The first section of that act was in these words:

"Section 1. The people of the state of Michigan enact, that the common council of the city of Cadillac, in the county of Wexford, shall be, and is hereby authorized and empowered to borrow money on the faith and credit of said city, and issue bonds therefor to an amount not exceeding thirty-five thousand dollars, which shall be expended in making public improvements in said city of Cadillac, provided, that a majority of the qualified electors of said city, voting at an election to be called in compliance with the provisions of act number one hundred and seventy-eight of the session laws of eighteen hundred and seventy-three, shall vote in favor of such loan in the manner specified in such act, and not otherwise."

The bonds issued under that act were misapplied. They were used in the aid of the extension of a railroad. This, under the law of Michigan, was not a public improvement. *People v. Salem*, 20 Mich. 452; *Bay City v. State Treasurer*, 23 Mich. 499. At the time these bonds were refunded, they were in the hands of one James M. Ashley, Jr., who had received them from the city with full notice of their misapplication. In his hands they were void under the law of Michigan, as settled in cases cited above. The evidence, however, shows that the taxpayers of Cadillac did not wish to repudiate their obligations. They had received a substantial benefit by the performance of the contract in consideration of which they had been issued to Ashley. In this situation, the people of Cadillac, with great unanimity, petitioned their council to refund these bonds, which were about to fall due. The council, thus moved, passed an ordinance, authorizing new bonds to issue "in place of and to extend the time of payment of former bonds of the city." The bonds thus authorized, a part of which are now sued upon, were in words and figures as follows:

City of Cadillac. Refunding Bond.

"Know all men by these presents, that the city of Cadillac, in Wexford county, state of Michigan, is indebted to and promises to pay the bearer the sum

of one thousand dollars in lawful money of the United States of America, at the National Bank of Deposit in the city of New York, on the first day of April, A. D. 18—, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first day of April and October of each year, upon the presentation and delivery of the proper coupon hereunto annexed, signed by the clerk of said city, at the said National Bank of Deposit in the city of New York, for the payment of which sum and interest the said city of Cadillac is hereby held and firmly bound, and its faith and credit are hereby pledged. This bond is one of a series of thirty bonds of like date and tenor, amounting in the aggregate to thirty thousand dollars, issued under and in pursuance of the provisions of the general laws of the state of Michigan as found in chapter 80 of title 16 of Howell's Annotated Statutes, for the purpose of extending the time of payment of bonds formerly issued by said city. Also by virtue of, and in accordance with, an ordinance duly passed by the council of said city, and approved by the mayor thereof on the ninth day of May, A. D. 1888, entitled 'An ordinance authorizing new bonds of the city of Cadillac to be issued in place of, and to extend the time of payment of, former bonds of said city, falling due.' And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form, as required by law. In testimony whereof, we, the undersigned officers of the city of Cadillac, being duly authorized to execute this obligation on behalf of said city, have hereunto set our signatures officially, and caused the corporate seal of said city to be hereunto affixed, this first day of April, A. D. 1888.

[Seal]

"Wellington W. Cummer,

"Mayor of City of Cadillac.

"Ernest M. Hutchinson,

"City Clerk."

To each of said bonds were annexed the proper interest coupons. And the said bonds were duly numbered in the series, and the year when payable duly inserted in each.

1. The first defense interposed is that the city of Cadillac had no power to issue negotiable bonds, and that the holder of these bonds is not, therefore, protected against any defense which the city can make. The city of Cadillac, by the act incorporating it, was subject to all the provisions of the general act for the incorporation of cities; being Act No. 178, of the Public Acts of 1873, and being chapter 80 of Howell's Annotated Statutes of the state of Michigan. Section 2717 of the latter compilation is as follows:

"No loans shall be made by the council or by its authority in any year exceeding the amount prescribed in this act. For any loans lawfully made the bonds of the city may be issued, bearing a legal rate of interest. A record, showing the dates, numbers and amounts of all bonds issued, and when due shall be kept by the city clerk or comptroller. When deemed necessary by the council to extend the time of payment, new bonds may be issued in the place of former bonds falling due, in such manner as merely to change but not increase the indebtedness of the city. Each bond shall show upon its face the class of indebtedness to which it belongs and from what fund it is payable."

This act clearly authorizes the issuance of "bonds" bearing a legal rate of interest for any loans lawfully made. It also empowers the council to issue "new bonds," to extend the time of payment of "bonds falling due." That this contemplates, and by necessary implication authorizes, the issue of negotiable bonds, we have no doubt. The general power to issue "bonds" must be taken to authorize "bonds" in the usual form of such well-known commercial obliga-

tions. That usual form embodies a contract and obligation negotiable in its terms. The case of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, has no bearing upon this question. Nothing more is there decided than that an act empowering a city to "borrow for general purposes not exceeding \$15,000 on the credit of the city," did not authorize the issuance of negotiable obligations for the money so borrowed. Here the power to issue obligations, by necessary implication, in the usual commercial form of "bonds," is expressly given. But one meaning can be fairly deduced from the terms of the act. The question now presented was not discussed in the *Brenham Case*, and we have no doubt whatever as to the conclusion we have announced.

2. It is next insisted that, if the city had power to issue negotiable bonds, they do not on their face show compliance with the requirements of section 2717, in that they do not upon their "face show the class of indebtedness to which it belongs, and from what fund it is payable." The contention is that any defect in these particulars puts the purchaser upon his guard, and, if it shall turn out that the bonds were unauthorized and illegal, that the purchaser takes subject to all defenses, upon the principle decided in *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819.

These bonds upon their face purport to be "refunding bonds." The express representation on the face of the bonds is that they were not original obligations, but bonds issued to take up and extend the time of payment of former bonds "falling due." By section 2717 (How. Mich. St.) the city had the power to issue "new bonds," in place of former "bonds falling due." Does section 2717, above set out, require that a refunding bond shall show the class of indebtedness to which the original bond belonged? Bonds of many kinds might mature at the same time. Was it the purpose of this statute to trace each separate old bond into a new and distinct refunding bond? There might be grave difficulties in preserving such identity. To get at the meaning of this provision, we must look to certain other sections of the same chapter. Sections 2695 and 2701 bear upon the construction of section 2717. These sections are in these words:

"Section 2695, (section 3, c. 26.) The revenues raised by general tax upon all the property in the city, or by loan to be repaid by such tax, shall be divided into the following general funds: First. Contingent Fund: To defray the contingent and other expenses of the city, for the payment of which from some other fund no provision is made. Second. Fire Department Fund: To defray the expenses of purchasing grounds, erecting engine houses thereon, purchasing engines and other fire apparatus, and all other expenses necessary to maintain the fire department of the city. Third. General Street Fund: To defray the expenses of opening, widening, extending, altering and vacating streets, alleys and public grounds, and for grading, paving, curbing, graveling and otherwise improving, repairing and cleaning the streets, alleys and public grounds of the city, and for the construction and repair of sidewalks and crosswalks, and for the care thereof. Fourth. General Sewer Fund: To defray the expenses of sewers, drains, ditches and drainage, and the improvement of water courses. Fifth. Bridge Fund: For the construction and maintenance of bridges. Sixth. Water Fund: For constructing reservoirs and cisterns, and providing other supplies of water. Seventh. Public Building Fund: For providing for public buildings and for the purchase of

land therefor, and for the erection and preservation and repair of any such public buildings, city hall, offices, prisons, watchhouses and hospitals as the council is authorized to erect and maintain, and not herein otherwise provided for. Eighth. Police Fund: For the maintenance of the police of the city, and to defray the expenses of the arrest and punishment of those violating the ordinances of the city. Ninth. Cemetery Fund. Tenth. Interest and Sinking Fund: For the payment of the public debt of the city and the interest thereon. Eleventh. Such other general funds as the council may from time to time constitute."

"Section 2701, (section 9, c. 26.) The council may also raise such further sum annually, not exceeding three mills on the dollar of the assessed valuation of the property in the city, as may be necessary to provide an interest and sinking fund to pay the funded debts of the city and the interest thereon."

The refunded debt of the city, being new bonds issued to take up old ones, would constitute a "class of indebtedness." "This designation," as stated by the learned trial judge, "would show *ex vi termini* also that they are payable out of the sinking fund." The class of indebtedness does sufficiently appear. The bond is not an original bond, but a refunded bond, and its payment is referred to the sinking fund. One with the bond and the act would not have the slightest doubt as to the class of debt or the fund for its payment. The case of *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819, is not applicable. The act conferring authority to issue the bonds in question, in that case required that the bonds should show the purpose for which they were issued. This was held a reasonable requirement, and that the purchaser was bound to take notice of this requirement of the law. If the purpose stated was an unauthorized one, it gave him notice; if none was stated, "then the purchaser took the risk of their being issued for an unauthorized purpose." Here there has been a substantial compliance, whether the requirement be regarded as mandatory or directory. The act should not be construed as requiring refunded bonds to show more than that they are refunded bonds. The primary purpose of the requirement is such identification of the debt as will designate the fund out of which it is payable, having reference to the funds established by section 2695. In the *Barnett* Case the object in requiring the purpose for which the bond was issued to appear on the face of the bond, was to apprise the purchaser of the purpose, that he might inquire as to the lawfulness of the issue for that purpose. Under the act we are construing, "the requirement," as observed by the circuit court, "touches only the incidents of liquidation." The statement on the bond that it is a refunding bond,—a bond issued to take up bonds falling due,—sufficiently answers the requirement of the statute.

3. It seems to us that the representations made on the face of the bonds estops the city, as against a bona fide holder, from disputing the fact that these bonds were issued to take up old bonds falling due. Power was conferred by the act upon the common council to issue new bonds to take up bonds falling due. The question as to whether there were any such bonds is referred to the council. The old bonds, on the facts found by the circuit court, were at the least "colorable obligations." The council determined to issue new bonds, and take them up. It seems to us that upon these circumstances it did not devolve upon the purchaser of the new bond to

look into the validity of the funded old bonds. He might well rely upon the representation made to him on the face of the bond, as to the existence of "old bonds falling due."

This case comes under the class of cases of which *Town of Coloma v. Eaves*, 92 U. S. 484; *Hackett v. Ottawa*, 99 U. S. 86; and *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216,—are examples. The observation of Mr. Justice Campbell in *Zabriskie v. Railroad Co.*, 23 How. 381, and repeated by Mr. Justice Clifford in *Bissell v. City of Jeffersonville*, 24 How. 287, is applicable here. It is this:

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and thus defeat the calculations and claims their own conduct had superinduced."

The recitals in the new bonds, as to the fact of "old bonds falling due," and that the new bonds were issued to take up the old, would well lull an intending purchaser into security. The defense it might have made against the old bonds it elected not to make. It should not now be permitted to set up as against a bona fide holder of its refunding bonds.

The judgment must be affirmed.

PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK *v.* LLEWELLYN
et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1893.)

No. 85.

LIFE INSURANCE—APPLICATION—WARRANTIES.

When the statements in the application are made part of the policy, and declared to be warranties, it is a good defense to show that they were untrue, without further showing that the applicant knew or believed them to be untrue. *Motlor v. Insurance Co.*, 4 Sup. Ct. 466, 111 U. S. 335, distinguished.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee. Reversed.

Statement by TAFT, Circuit Judge:

This was a proceeding in error to reverse the judgment of the circuit court of the United States for the eastern district of Tennessee in favor of M. Llewellyn, guardian of Mattie C. McGaughey and Edith G. McGaughey, and of Sarah R. McGaughey in her own right against the Provident Savings Life Assurance Society of New York, upon a policy of insurance on the life of Edward W. McGaughey, the father of the persons for whose benefit the action was brought. The defense was that there had been breach of warranties contained in the contract.

The contract recited that "the Provident Savings Life Assurance Society of New York, in consideration of the stipulations and agreements in the application hereof and upon the next page of this policy, all of which are a part of this contract, and in consideration also of the payment of \$114.24, being the premium hereon for the first year, promises to pay Sarah R., Margaretta C., and Edith G. McGaughey, children of Edward W. McGaughey, share and share alike, or to their legal representatives or assigns, the sum of \$6,000, less any indebtedness on account of this policy, within ninety days after acceptance at the office of the society in the city of New York of satisfactory proofs of the death of Edward W. McGaughey, of Chattanooga, county of

Hamilton, and state of Tennessee, (the insured under this policy,) provided such death shall occur on or before the 13th day of October, A. D. 1891. And the said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment, on or before the thirteenth day of October in each such year, of the renewal premiums in accordance with the schedule rates, less the dividends awarded hereon, subject to the stipulations regarding payment of premiums and violations of law. Claim under this policy by death occurring two or more years after its date will be incontestable, except for fraud in obtaining this policy." On the third page of the policy appeared a copy of the application, in which was given the statement by the applicant of his name, occupation, residence, and other circumstances in respect to himself, at the conclusion of which was the following: "We further declare and warrant, jointly and severally, that all the foregoing statements and representations, as well as those made or to be made to the medical examiner, or in any certificate of health hereafter given to the society by me, are and shall be true and shall be the basis of the contract with the society if a policy be issued or renewed thereon; and that, if any untrue or fraudulent statement or representation shall have been made, or if at any time any covenant, condition, or agreement herein made shall be violated, said policy and insurance shall be null, void, and of no effect." Then follows a copy of the statements of the applicant to the medical examiner. The ninth question was: "Have you ever had any of the following?" under which was a list of 47 diseases, one of which was delirium tremens,—to which question the applicant answered "No." At the close of the medical examination this statement, signed by the insured, appeared: "I hereby further declare that I have read and understand all the above questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true, and that I am the same person described as above."

Edward W. McGaughey, the insured, died December 23, 1890, within the first year, about two months after the policy was issued, of heart failure and exhaustion, caused by a prolonged drunken spree.

The declaration was in the ordinary form, and among other pleas of the defendant was one that the deceased had falsely and fraudulently answered the ninth question as above, and had had delirium tremens before filing his application.

On the trial, evidence was introduced tending to show that the insured was not a constant drinker, but that he went upon periodical sprees,—the length of the period between the sprees being in dispute; and that whenever he went upon such sprees they were continued for several days, until he became sick, and medical aid was called in. It further appeared without contradiction that at least one of his sprees before the issuance of the policy had ended in delirium tremens. The court charged the jury that, in order to establish its defense, based on the falsity of the statements of the insured in the application, the defendant must show not only that he did not tell the truth in them, but that he knew he was not telling the truth at the time.

Eakin & Dickey, (Edwin B. Smith and W. L. Eakin, of counsel,) for plaintiff in error.

Clark & Brown, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the facts, delivered the opinion of the court.

The uncontradicted evidence showed that the insured had had delirium tremens before making his application for a policy. Two months after taking out his policy he died from exhaustion and heart failure, following a debauch. Even if the statements in the

application are to be treated, not as warranties but only as representations, in making which the applicant was merely bound to good faith, and even if the law requires that the materiality of the representations should appear to render their falsity a good defense, we think that it was the duty of the court in this case to direct a verdict for the defendant.

We think, moreover, that the court was in error in instructing the jury that, to constitute a good defense, the defendant company must show not only that the statements in the application were untrue, but also that the applicant knew or believed them to be untrue. The statements in the application are made part of the contract, and are expressly declared to be warranties, and they are referred to in the body of the policy as agreements and stipulations. In *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, it was held that when there was any reason to doubt the meaning of the contract of insurance, it would be presumed that the statements of the applicant were to be regarded as representations, and not as strict warranties, and the agreement would be presumed to be a warranty only that the answers were made in good faith, and true to the knowledge of the insured. In that case, however, the statements were referred to in the body of the policy as representations, and it was held that terms used in the policy controlled those used in the application. In this case, we do not see any room for doubt or construction. It is impossible to escape the meaning that the statements were intended to be warranties. Strict construction against the company cannot destroy the necessary effect of plain language. Parties have a right to contract in this wise if they will. *Clemans v. Supreme Assembly*, etc., 131 N. Y. 485, 30 N. E. 496; *Foot v. Insurance Co.*, 61 N. Y. 571.

The judgment of the circuit court is reversed, with instructions to order a new trial.

UNITED STATES v. WALLIS.

(District Court, D. Idaho, S. D. October 7, 1893.)

No. 27.

1. POST OFFICE—NONMAILABLE MATTER—LOTTERIES.

A scheme for increasing the circulation of a newspaper, whereby all paid-up subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a box by a blindfolded person, prizes to be given to the holders of certain tickets, is a lottery, (26 Stat. 465,) notwithstanding that every purchaser of a ticket is repaid its cost by receiving the paper.

2. LOTTERIES—DEFINITION.

The word "lottery" embraces the elements of procuring through lot or chance, by the investment of money or something of value, some greater amount of money or thing of value.

At Law. Indictment of James H. Wallis for mailing a lottery advertisement. On demurrer to indictment. Overruled.

Fremont Wood, U. S. Atty.

James H. Hawley, for defendant.

BEATTY, District Judge. The defendant has interposed his demurrer to an indictment based on section 3894, Rev. St., as amended by the act of September 19, 1890, (26 Stat. 465,) wherein is the provision: "Nor shall any newspaper, circular, pamphlet or publication of any kind, containing any advertisement of any lottery or gift enterprise of any kind, offering prizes, dependent upon lot or chance * * * be carried in the mails." Also it is further provided that any person who shall knowingly deposit in or send through the mail any such forbidden matter shall be deemed guilty of a misdemeanor. The indictment has two counts, by the first of which it is charged that defendant did knowingly deposit in the United States mail a newspaper called "The Post," which contained an advertisement as follows, to wit:

"Five More Days. Arrangements Completed for Thursday's Event. The Participants of the Drawing. List of Subscribers Entitled to Participate. Five More Days Left for Delinquents to Pay Up. Next Thursday the grand drawing for the elegant Eldridge sewing machine to be given away to subscribers to the Post will take place at noon that day at this office. The plan upon which the drawing will be conducted will be as follows: Tickets, upon which will be printed numbers corresponding with the numbers on the coupons held by the paid-up subscribers, will be placed in a covered box. The fifteenth number drawn from the box will be the lucky number, the subscriber holding which will be entitled to the machine. The person drawing the numbers from the box will be blindfolded, so as not to permit of any partiality, were such a thing possible. As the numbers are drawn from the box they will be called out, and then recorded. To make the drawing more interesting, the subscribers holding the last fifteen numbers taken from the box will each receive a copy of the World's Almanac. People indebted to the Post can receive a chance to the drawing any time between now and noon next Thursday by paying up their indebtedness. Herewith are the names of subscribers entitled to participate in the drawing, with numbers held by each. If there should be any errors, we would be glad to be informed of the fact."

The statute is directed against the use of the mails for the conveyance of any advertisement of "any lottery or gift enterprise of any kind." This language is sufficiently comprehensive to include any scheme in the nature of a lottery. It cannot be deemed necessary to here enumerate the many similar definitions given by lexicographers and courts of the term "lottery." It may be sufficient to say that it embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value. When such are the chief features of any scheme, whatever it may be christened, or however it may be guarded or concealed by cunningly devised conditions or screens, it is, under the law, a lottery. It has been said that "in law the term 'lottery' embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift exhibitions, prize concerts, raffles at fairs, etc., and includes various forms of gambling." What, then, is the scheme described by the advertisement referred to? It is therein denominated a "drawing," in which each paid-up subscriber for the paper is entitled to a numbered ticket, for which there is a corresponding numbered coupon placed in a covered box, which is to be drawn therefrom by a blindfolded person, and the person holding the ticket correspond-

ing to the fifteenth coupon drawn is entitled to the chief prize, and all the last 15 coupons drawn also represent prizes. It is suggested that, as each ticket holder pays therefor the subscription price of the paper, and gets the paper for a year, which is presumed to be an equivalent in value, the transaction is not a lottery. But the purchasers of tickets do not all receive the same; on the contrary, there are 16 who receive more than the others, and more, too, than the value paid for their tickets, and through the chance of a drawing. It cannot be supposed that the chief purpose in purchasing a ticket is to obtain the paper, for that could be done in the usual way without tickets. The evident object of the offer was to increase the number of subscribers by awarding prizes to those who should have the fortune to draw them, and the hope of so drawing them was the inducement to procure tickets by subscribing for the paper. Certainly we have here all the elements of a lottery,—the tickets, the prizes, and drawing them by chance. That the prizes may not be of great value does not change the principle, or make it less a lottery. The only difference between this scheme and the usual lottery is that in this every purchaser of a ticket is repaid its cost by receiving the paper for a year. That this does not make it any the less a lottery has been too long clearly determined by the courts to now merit discussion.

It is well settled that all so-called gift enterprises and all similar schemes in which each purchaser of a ticket is given something of value equal to its cost, when connected with a drawing by chance for prizes to be received by some and not others, are lotteries; and so is held even the familiar scheme of selling prize candy boxes. If any doubt can exist that this publication must be held one concerning a lottery, and within the inhibition of the statute, such doubt must be removed by an examination of the latest decision of the supreme court upon this subject,—that of *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409. The Austrian government, to facilitate the sale of its bonds, while selling them at their face value, fixed the time of their repayment and the awarding of prizes of different value to purchasers by drawings by chance, to take place at different stated times. The court, in holding this a lottery, took occasion to fully review the law upon the subject, and, among other things, held that the cases of *Kohn v. Koehler*, 96 N. Y. 362, and *Ex parte Shobert*, 70 Cal. 632, 11 Pac. 786, referred to by defendant's counsel, cannot be followed. This decision this court must follow, and under it, as well as by numerous others, it seems indisputable that the publication set out in the first count is such as cannot be transmitted through the mails.

It is not seriously disputed that the publication referred to in the second count is of the same class, but defendant contends that the word "prizes" is so written in such count that it may be read "purses," thus rendering the count uncertain; but such suggestion cannot be conceded. It is most probable that the public generally, including the proprietors of newspapers, have supposed that such publications—which have been common—may be lawful, and their transmission through the mails not prohibited; yet, after a careful

examination of the law and the decisions thereunder, the conclusion seems imperative that the demurrer must be overruled, and it is so ordered.

MANUFACTURERS' ACCIDENT INDEMNITY CO. v. DORGAN.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 72.

1. OPINION EVIDENCE—INFERENCES.

The opinion of a witness is not admissible where, by his detailing the facts to the jury, they can draw their own inferences therefrom.

2. SAME—EXPERT TESTIMONY.

A physician may properly be asked as to his judgment of the conditions found in the body of one deceased, and what they indicated as to the cause of death.

3. APPEAL—OBJECTIONS WAIVED.

Error in refusing to strike out plaintiff's evidence after he has rested is waived by the introduction of evidence by defendant.

4. OPINION EVIDENCE—EXPERT TESTIMONY.

A physician, merely from hearing testimony as to an autopsy by those who performed it, cannot be asked whether the autopsy was such as to enable a physician to state the cause of death with any degree of certainty.

5. SAME.

A physician who has made an autopsy may testify as to the necessity of making certain tests to ascertain the cause of death, where the sufficiency of the autopsy is questioned because of the failure to make such tests.

6. WITNESS—CORROBORATION.

Testimony by a physician who made an autopsy that he examined the stomach of deceased for traces of alcohol may be corroborated by showing that it had been intimated to him that deceased had been drinking that day.

7. ACCIDENT INSURANCE—ACTIONS ON POLICIES—PROVINCE OF JURY.

The issues in an action upon an accident insurance policy were whether the policy was void for breach of a warranty by the insured that he was not subject to bodily infirmity, and whether the manner and cause of death were within the policy. There was evidence that the insured had structural defect of the heart at the time of the issue of the policy, but the autopsy showed that, with the exception of a slight cold, his vital organs were in a normal condition; and one explanation of his death was consistent with the absence of disease as a moving or contributory cause, and brought the case within the terms of the policy. *Held*, that both issues were for the jury.

8. SAME—"BODILY OR MENTAL INFIRMITY."

An anaemic murmur, indicating no structural defect of the heart, but arising simply from a temporary debility or weakened condition of the body, is not within the meaning of the term "bodily or mental infirmity," in an application for accident insurance, in which the applicant states his freedom from such infirmities.

9. SAME—"VOLUNTARY EXPOSURE TO UNNECESSARY DANGER AND HAZARDOUS OR PERILOUS ADVENTURE."

"Voluntary exposure to unnecessary danger and hazardous or perilous adventure," in an accident insurance policy exempting the insurer from liability for death produced from such exposure, means wanton or grossly imprudent exposure.

10. APPEAL—HARMLESS ERROR.

Failure of the charge to cover a hypothetical case which there is no evidence to support is not prejudicial.

11. ACCIDENT INSURANCE—ACCIDENTAL DROWNING.

A drowning caused by a temporary trouble to which the insured was not subject, but which was entirely unusual and uncommon, whereby he fell into the water, is "accidental," within the meaning of an accident insurance policy.

12. SAME—PROXIMATE AND SOLE CAUSE OF DEATH.

Under a provision of an accident insurance policy that the risk shall not extend "to any case except when the accidental injury shall be the proximate and sole cause of disability or death," if the insured suffer death by drowning, the drowning is the proximate and sole cause of death, no matter what the cause of falling in the water, unless death would have been the result without the presence of the water.

13. SAME—INDIRECT CAUSE OF DEATH.

Under a provision of such a policy that the risk shall not be extended to "accidental injuries or death resulting from or caused, directly or indirectly," by fits, vertigo, or other disease, an accidental death by drowning results from and is caused indirectly by fits, vertigo, or other disease if the fall into the water from which drowning ensues is caused by such disease.

14. SAME—BODILY INFIRMITIES OR DISEASE.

A provision in such a policy that the risk shall not extend to death caused by bodily infirmities or disease does not include fainting produced by indigestion or a lack of proper food, or any other cause which would show a mere temporary disturbance or enfeeblement.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

At Law. Action by Susan E. Dorgan against the Manufacturers' Accident Indemnity Company on an accident insurance policy. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Statement by TAFT, Circuit Judge:

This was a writ of error brought to reverse a judgment of the United States circuit court for the western district of Michigan, southern division, in favor of Susan E. Dorgan, for \$5,200, on an accident insurance policy or certificate of membership issued by the defendant company upon the life of Thomas Dorgan, husband of the plaintiff. By the terms of the policy, \$5,000 was payable to Susan E. Dorgan, the plaintiff below, "within ninety days after receipt of satisfactory proof to this company of the death of the above-named member, effected through external, violent, and accidental means, within the extent and meaning of this contract and the condition hereunto annexed, and such injuries alone shall have occasioned death within ninety days of the happening thereof."

The evidence tended to show the following facts:

Early in May, 1890, Thomas Dorgan, the insured, left his home in Kalamazoo, Mich., with three or four companions, on a fishing excursion to a place not many miles distant. The party took with them wine, whisky, and beer, and provisions. They arrived at their destination in the afternoon, made a camp near the brook in which they intended to fish, slept on cots under a tent, and arose early the next morning, about 3 or 4 o'clock, to go fishing. They fished from that time until shortly before noon, when the members of the party came into camp for lunch. The weather was not very cold, and there was some sunshine in the middle of the day. Dorgan spoke of having some difficulty with his throat and chest before going out on the trip. He took something for breakfast. He came in to lunch. The evidence does not disclose how much he ate, if anything. He went back to an island in the brook, where, shortly afterwards, he was seen playing a trout. Twenty minutes later he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The bank was about eighteen inches above the water, and there were in the water stones, egg-size and smaller, upon which he might have struck his head. There were two bruises

on his forehead. There was some little froth of a yellowish color about his mouth, and his face was purple. His tongue was somewhat inflamed. An autopsy was held on the evening of the day following the death. The blood in the corpse at the autopsy was rather fluid, and had not coagulated. The brain, the heart, and other vital organs were found in a normal and healthy condition. The autopsy was performed by one physician in the presence of two others. Evidence was introduced by the defendant tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The autopsy failed to reveal any such structural defect, but all the tests were not applied. The evidence as to the defective action of the heart was given by the physician who had examined the deceased during his lifetime, and who testified to a murmur accompanying the beat of the heart, which was said to reveal such structural defect, though he admitted such a murmur is sometimes present when the action of the heart is normal, but the beat and circulation are feeble. There was also some evidence tending to show that the deceased had suffered from dizziness caused by this defective action of the heart.

Section 8 of the certificate of policy provided "that the benefits under this certificate shall not extend to hernia, orchitis, nor to bodily injury of which there shall be no external and visible mark upon the body of the member; nor shall they extend to or cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of this certificate, or by blood poisoning, or by coming in contact with any poisonous substance, or by poison in any form, or by inhalation or otherwise of any form of chloride gas, nitrous oxide gas, or any other form of gas or gases of chloroform or ether, or by or in consequence of any surgical operation or medical or mechanical treatment, or by lockjaw, nor to any cause excepting where the injury is the sole cause of the disability or death. No claim shall be made under this certificate * * * where the death or injury may have happened in consequence * * * of voluntary exposure to unnecessary danger, hazard, or perilous adventure, * * * or where death or injury may have happened while the member was, or in consequence of his having been, under the influence of intoxicating drinks. * * * And that these benefits shall not be held to extend to disappearances, nor to any cause of death or personal injury, unless the claimant under the certificate shall establish by direct and positive proof that the said death or personal injury was caused by external, violent, and accidental means, clearly within the intent and scope of this policy, and was not the result of design, either on the part of the member or any other person."

In the application which Dorgan made for membership in the company, (that is, for a policy,) he used this language: "Inclosing \$5 for admission fee, I hereby apply for membership, to be based upon the following statement of facts, which I hereby warrant to be true. Certificate to be subject to all its conditions and provisions. * * * (13) I have never had, nor am subject to, fits, disorders of the brain, or any bodily or mental infirmity, except as herein stated. * * * (15) My habits of life are correct and temperate, and I understand that the certificate will not cover any accidental injury which may happen to me either while under the influence of intoxicating drinks, (or any other narcotics,) or in consequence of having been under the influence thereof. (16) I am aware that the insurance will not extend to hernia, orchitis, nor to any bodily injury of which there shall be no external and visible sign; nor to any bodily injury happening directly or indirectly in consequence of disease; nor to death or disability caused wholly or in part by bodily infirmities, or by disease, or by the taking of poison, or by any surgical operation or medical mechanical treatment; nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death."

At the end of the application, Dorgan signed the following: "Declaration: I, Thomas Dorgan, being desirous of becoming a member of the Manufacturers' Accident Indemnity Company, do hereby warrant the above statements to be true; and I hereby agree that this declaration and warranty shall be the basis of the contract between me and the said company, and that

the certificate hereby applied for is accepted subject to all the conditions, classifications, and provisions contained or referred to therein."

The company pleaded the general issue, and gave notice of the intention to prove, under that issue, that Dorgan was, at the time he made the application for the policy, subject to fainting spells or fits, disorders of the brain, heart disease, disease of the throat and chest, and that the statement to the contrary in paragraph 13 of his application above was false and untrue, rendering the policy void. The defendant also gave notice of the intention to prove that Dorgan did not die in consequence of any bodily injury in which there was any external and visible sign, but he died in consequence of disease, and that his death was not caused by any accident or accidental injury which was the proximate and sole cause of his death.

The jury, under charge of the court, returned a general and special verdicts. The special verdicts were as follows: "First. Was Thomas Dorgan afflicted with heart disease at the time he made his application for the insurance policy issued by the defendant company, and at the time the policy in evidence in this suit was issued? Answer. No. Second. Was the death of Thomas Dorgan occasioned solely by accident, or was it occasioned or contributed to by disease or undue and imprudent exposure? Answer. Solely accidental. Third. Was Thomas Dorgan conscious at the time his body entered the waters of Spring brook, where he was found dead? And, if unconscious, was such unconsciousness occasioned by disease or undue and imprudent exposure? Answer. First, unconscious; second, occasioned by some temporary affliction, without undue and imprudent exposure."

Osborn & Mills, for plaintiff in error.

Irish & Knappen, (E. M. Irish, of counsel,) for defendant in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

There are 25 assignments of error. Of these, 11 relate to rulings upon evidence. The court refused to permit defendant to ask this question of a witness who found the body of the deceased in the water: "If he had been standing, in your judgment would it have been possible for him to have fallen in the water in the position in which you found him?" We think the objection to this question was properly sustained. It asked for an opinion of the witness on facts which it was quite possible for the witness to have detailed to the jury, so that the jury might have drawn its own inference. That there are cases where the judgment of a witness as to distance and other circumstances may be directly asked him is true, but such questions are not permissible when it is practicable to draw out with exactness the data upon which such judgment must be founded. *Parker v. Steamboat Co.*, 109 Mass. 499. It must be left somewhat to the trial court, and in the exercise of its discretion upon this question we do not think the court erred. The same objection was properly sustained to the question: "Had Mr. Dorgan rolled from the position that he was found sitting in at the point of the island to the right in the stream, what would the position of his body have been with reference to the position it was in when you found it?" This was to ask the witness the question whether, in his opinion, Dorgan might have rolled from the place where he was sitting to the place where he was found, and called for an inference which it was proper that the jury alone should draw.

On the other hand, the following question was properly allowed to be put to the physician who performed the autopsy: "Supposing a person to have fallen and been stunned in shallow water, where he made very little struggle, state whether what you found to be the condition of the lungs would be what would be expected where a man came to his death in that manner." Answer: "I say, yes. It was precisely what we would have expected under all the circumstances. We all agreed to that." The witness was an expert, and it was proper to ask his judgment of the conditions which he found in the body of the deceased, and what they indicated as to the cause of death.

The fourth assignment of error was that the court erred in refusing to strike out the testimony of the plaintiff below when the plaintiff rested her case. This was equivalent to a motion to direct a verdict for the defendant on the plaintiff's evidence. It has been decided a number of times by the supreme court of the United States that if, after making such a motion, the defendant introduces evidence, he waives any error which the court may have made in not sustaining the motion. *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534.

The sixth and seventh assignments of error are based on the refusal of the court to permit questions which had been previously answered, and which were leading in form. We fully approve the action of the court in refusing to allow these questions to be put after a similar one had been once answered. The practice of counsel in repeating the question for the purpose of emphasizing the answer with the jury is not to be encouraged.

The eighth assignment of error is based on the action of the court in refusing to allow the following question: "You have heard the testimony in this case about the autopsy? Answer. I have. Question. In your judgment, from that testimony, doctor, would you say that the autopsy was such as to enable a physician to state with any degree of certainty the cause of the death of Mr. Dorgan?" This question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based. The difference between this question and the one put to the physician performing the autopsy is that here the witness was asked to weigh other men's evidence, a function peculiarly belonging to the jury, while there the witness was asked an expert opinion of bodily conditions which he saw with his own eyes. Had the physician whose judgment of the autopsy was asked been present at the autopsy, a question calling for his opinion as to its evidential weight in determining the cause of death would have been a proper one.

The ninth and tenth assignments of error are based on the ruling of the court allowing the physician who made the autopsy to answer the question whether there was any occasion for making what was called an air or water test with the heart of the deceased. He stated that there was no need of such a test. We think that this was competent, because the sufficiency of the autopsy to show the normal or abnormal condition of the heart had been questioned by evidence introduced for the defendant, and it was, of course, proper to show that the tests suggested by the defendant's witnesses were in this case not necessary.

The eleventh assignment of error was based upon the action of the court in sustaining the objection to this question put to the physician making the autopsy: "Had it been intimated to you in any way that Thomas Dorgan had been drinking that day?" Answer: "It had." The witness had stated previously that he had examined the stomach to see if there was any trace of alcohol in it. It was an issue of fact as to whether he cut open the stomach or not. He said that he did, and, as a circumstance tending to corroborate him, it was here sought to show that his attention had been directed to the question whether Dorgan had been drinking that day. This question was clearly admissible and relevant. It was no more than to ask the witness what the purpose and scope of his investigation was.

The twelfth assignment of error was based on the refusal of the court to instruct the jury that on the undisputed evidence in the case the plaintiff was not entitled to recover. We are very clear that this request was rightly refused.

The defendant made two issues. The first issue was that the policy was void by reason of the alleged misrepresentation by the insured that he had not had, and was not subject to, fits, disorders of the brain, or any mental or bodily infirmity. The evidence of the autopsy at the time of his death was that his vital organs were in a normal condition, though he was suffering from a slight cold in the bronchial tubes. The evidence of two witnesses introduced by the defendant was that he had a structural defect of the heart which caused dizziness. The normal condition of the heart, as testified to by the physician performing the autopsy, tended to rebut this evidence, and the question of fact was for the jury, the burden being upon the company to show a breach of the warranty.

The second issue was as to whether the manner and cause of the death brought it within the policy. The burden of proof on this issue was upon the plaintiff. The deceased was found in the water, with his face in such a position that death might have come from suffocation by drowning, if he had been rendered unconscious before or after striking the water. There were bruises upon the forehead of the deceased, indicating that his head had struck something hard, and the bruises were of a character sufficient, as testified to by an expert witness, to have produced unconsciousness. The circumstances surrounding the death, therefore, were consistent with the theory that the deceased had slipped and fallen in such a way as to strike upon his head against

a hard substance, producing unconsciousness, in which helpless state suffocation by drowning followed. This was one explanation of the death consistent with the absence of disease as a moving or contributing cause to the accident, and certainly brought the case within the terms of the policy. Then there was another possible view which the jury in fact took, and which will be discussed hereafter. Whether one or the other theory, or still another, satisfied the circumstances of the case, it was for the jury to decide. The court had no right to usurp the functions of the jury in this respect.

The sixteenth assignment of error is based on the following charge to the jury:

"I have been requested by the plaintiff's counsel to instruct you something in regard to the inferences to be drawn from the condition of Dorgan at the time of this insurance, or about that time, as disclosed by the testimony about the condition of the heart, as is covered by the physicians, as giving out the alleged rattle or murmur. Now, gentlemen, if the murmur or sound of disordered action which were indicated at or before the time when Dorgan made this application for insurance was simply an occasional consequence or mere debility,—an 'anaemic condition' they term it in scientific language, (which means the same thing, more or less;) no more or less than a debilitated, enfeebled condition, lacking of strength and vitality,—if that was the case, if what Dr. Pratt heard, and afterwards what Dr. Osborn heard, was simply an anaemic murmur, an occasional result only of a weakened and enfeebled condition of the body, that would not be such a disease or bodily infirmity as is warranted against. This is but an amplification of what I have already explained to you, and is a mere continuation by parts of the general proposition which I have laid down to you, namely, that the defect or disease must be one of a definite and somewhat permanent character."

The charge was in relation to the warranty that the insured had never had, and was not subject to, fits, disorders of the brain, or any bodily and mental infirmity.

The court had charged the jury previously that it was not material whether the insured knew his actual condition or not at the time he made his application, if in fact his warranty was not true. The court told the jury that in determining the question whether the insured was or not inflicted with any disease or bodily or mental infirmity they were to inquire whether he had some specific ailment; that it would not come within the scope of this warranty that he might, like other men or the generality of men, have been subject to occasional attacks of the kinds that are specified, "but there must have been some specific determination towards such condition of the body, or some part of it, as would amount to a disease or a bodily infirmity."

It seems to us that the court accurately stated the legal effect of the contract contained in the application and the policy. An anaemic murmur, it was admitted, indicated no structural defect of the heart, but arose simply from mere temporary debility or weakened condition of the body. We do not think that this comes within the definition of "bodily or mental infirmity," as the term is used in the application. The statement in the application by the insured did not, either in his contemplation or that of the company, refer to any mere temporary ailment or indisposition which did not

tend to weaken and undermine the constitution at the time of taking membership. *Pudritzky v. Supreme Lodge*, 76 Mich. 428, 43 N. W. 373; *Brown v. Insurance Co.*, 65 Mich. 306, 32 N. W. 610; *Insurance Co. v. Daviess' Ex'r*, 87 Ky. 541, 9 S. W. 812; *Life Ins. Co. v. Francisco*, 17 Wall. 672.

The seventeenth assignment of error is based on the following charge of the court:

"If the condition of Dorgan contributing to his death was produced by imprudent and wanton exposure of himself to the perils of the day,—the cold,—and such exposure was grossly imprudent, in consequence of any physical condition that he may have been in, then his death, if that imprudence contributed to his death, would not be within the scope of his policy or entitle a recovery."

This should be taken in connection with the part of the charge recited in the twenty-second assignment of error:

"It is not such exposure as men usually are going to take; such as is incident to the ordinary habits and customs of life. Such an exposure as that does not come within the range of a defense. An exposure, in order to have been a contributing cause, and so defeat the plaintiff's right to recovery in this case, must be something beyond the ordinary, or a wanton, a piece of gross, carelessness, as we would term such in our designation of a person's conduct in the usual walks of life. If Dorgan was at the time in an enfeebled physical condition, that circumstance may be taken into account in determining whether he was making an imprudent, wanton, and reckless exposure of himself,—of his life and health; but if the exposure to which he submitted himself was of a less degree than that, and such as I have described, then it is not within the terms of the policy."

We think the language of the court properly explained to the jury what was meant by the words "voluntary exposure, unnecessary danger, and hazardous adventure." It is questionable whether there was anything in the evidence requiring the plaintiff to exclude the possibility that death might have occurred by reason of exposure.

The eighteenth assignment of error was based on this charge of the court:

"If you are satisfied from the evidence that he was at the time intoxicated, so as not to be able to manage himself,—that is, not the result of simply taking a drink, one or more, perhaps, but if he was so intoxicated as that he was not fairly able to take care of himself prudently and properly,—and that contributed to the result, then such a result would not be within the scope of the policy."

It is objected to this charge that by the policy, if the death happened while the insured was under the influence of intoxicating drinks, no recovery could be had, even if such condition did not contribute to the result. It is not necessary for us to answer the question of construction thus suggested, because of the evidence as to intoxication. There was no evidence that the insured was intoxicated, except so far as two circumstances tended to show it. These were—First, the opportunity to drink afforded by the liquor which the fishing party brought with them; and, second, the circumstances of the death, which were of such a character that the result might have been contributed to by the intoxication of the deceased. Without this latter possibility there would have been

no evidence of any intoxication which the court could have submitted to the jury. Unless the intoxication did contribute to the death, therefore, no ground existed for saying that insured was intoxicated at all. Hence the plaintiff in error was not injured by the failure of the court to cover in his charge a hypothetical case which there was no evidence to support.

The twentieth and twenty-first assignments of error are based on exceptions taken to the following charge of the court:

"If you find that branch in favor of the plaintiff, you will then pass on to the second, and inquire whether or not this death resulted from some accident; simply as from, well, being in the brook, stumbling there and falling down, and becoming unconscious, and then drowning. Was that the fact, or was it, or might it with equal probability have been, the truth that from some condition that he was in, either one of considerable long continuance or short duration, it is no matter which, he fainted away, and fell into the brook? Whether he fell in before or after his death would be of no consequence. Inquire what was the fact in reference to that. You must be satisfied by a preponderance of the evidence, gentlemen, before you can render a verdict for the plaintiff in this case on that branch of the case; you must be satisfied that a preponderance of the evidence establishes the fact that the death was the result of an accident only, without the concurrence of any cause resulting from any disorder or disease or infirmity or deformity of Dorgan's vital organs."

We think this correctly stated the law of the case. The language expressly excepted to, namely, "Whether he fell in before or after his death would be of no consequence," had application to what the court stated immediately before, namely, that if his fainting away and falling into the brook had been the result of his bodily condition, whether of considerable long continuance or short duration, the death would not be within the policy, and that, no matter whether he fell in before or after his death, he could not recover. As the charge is printed, the sentence is separated from that to which it evidently belongs, and a different sense at first is given to it. We have no doubt that in the charge to the jury the sentence was put where it really belongs, as a mere qualification or explanation of the sentence immediately preceding.

The twenty-third assignment of error is based on the language of the court given to the jury in answer to the question put by them. The language was as follows:

"Gentlemen of the jury, I received a communication from your foreman that you wish instructions upon this question of whether deceased, when he was on the bank of the brook, was overtaken with some temporary trouble that caused him to fall in and was drowned, would that be considered only accidental? I instruct you, if he was at that moment overtaken with a trouble of which he was subject,—that is, from a recurrence of a trouble to which he was subject,—and he then fell in the brook and was drowned, that that would not be a case where a recovery could be had upon the policy, because his physical condition was a part of the causes contributing to the death; but if the temporary trouble spoken of in this question was one of which he was not subject, but was something entirely unusual and uncommon with him, and that he at that time fell into the brook and was drowned, that would be an accident, and the death would be accidental only."

The jury found that the insured was unconscious when he fell into the brook, and that the unconsciousness was due to a temporary affliction, in accordance with this charge.

The twenty-fifth assignment of error is based on the refusal of the court to vacate and set aside the verdict on the ground that the three special findings of the jury could not sustain their general verdict.

Upon these two assignments of error arises the main, difficult, and doubtful question in the case. The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to "any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death."

It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew v. Assurance Co.*, 6 Hurl. & N. 838; *Winspear v. Insurance Co.*, 6 Q. B. Div. 42; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820.

We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

In *Winspear v. Insurance Co.*, 6 Q. B. Div. 42, the terms of the policy provided "that it should cover any personal injury caused by accidental, external, and visible means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease." The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

In *Lawrence v. Insurance Co.*, 7 Q. B. Div. 216, the policy provided:

"This policy covers injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, * * * or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury."

The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the railway, when an en-

gine and carriages which were passing went over his body, and killed him. It was held that "the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable."

Mr. Justice Watkin Williams said in this case:

"The true meaning of this proviso is that, if the death arose from a fit, the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation."

After giving some illustrations, the learned justice continued:

"I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff."

These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the supreme court in case of Insurance Co. v. Crandal, 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death.

We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been "caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease." In our opinion the adjective "accidental" qualifies not only "injuries," but also "death," and therefore an accidental death by drowning does result from, and is caused indirectly by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The exception is broader than the exceptions in the policies considered in the Winspear and the Lawrence Cases, and is made so by the use of the word "indirectly." As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence Case, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable.

We are therefore finally brought to the question what the words "disease and bodily infirmity" include. We think the charge of the court below upon this point must be sustained. In a broad, generic sense, any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or a lack of proper food for a number of

hours, or from any other cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words "disease and bodily infirmity," as used in this policy.

It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer. *Fitton v. Insurance Co.*, 17 C. B. (N. S.) 122; *Insurance Co. v. Crandal*, 120 U. S. 527-533, 7 Sup. Ct. 685; *Association v. Newman*, 84 Va. 52, 3 S. E. 805; *Healey v. Association*, 133 Ill. 556, 25 N. E. 52. Our view of what the word "disease" must be limited to in this policy is sustained by the decisions of the supreme court of Michigan in *Pudritzky v. Supreme Lodge*, 76 Mich. 428, 43 N. W. 373, and *Brown v. Insurance Co.*, 65 Mich. 306, 32 N. W. 610, and also by *Insurance Co. v. Daviess' Ex'x*, 87 Ky. 541, 9 S. W. 812.

In *Life Ins. Co. v. Francisco*, 17 Wall. 672, a physician testified that the person, who had died 24 days after the policy issued, had the disease of indigestion, torpid liver, and colic, and that he died from acute hepatitis; whereas several acquaintances of the deceased testified that they had never known him to be unwell, or if so more than very slightly, and that they considered him to be a healthy man. The defense of the insurance company was that the decedent had answered, in reply to the usual questions, that he had no sickness or disease. In reference to this issue the court instructed the jury that it was for them to determine from the evidence whether the person whose life was insured had, during the time mentioned in the questions propounded on making the application, any affliction that could properly be called a "sickness or disease," within the meaning of the term as used, and said:

"For example, a man might have a slight cold in the head or slight headache, that in no way seriously affected his health, an affliction which might be forgotten in a week or a month, which might be of so trifling a character as not to constitute a 'sickness or disease,' within the meaning of the term as used, and which the party would not be required to mention in answering questions."

This charge was held good.

The point made under the twenty-fifth assignment of error is that there was no evidence to sustain the finding of the jury that the unconsciousness of the deceased, during which drowning ensued, was caused by a temporary affliction. There certainly was no direct evidence of this cause. No one was present to see how the death in fact did occur. The conclusion of the jury in any case must be based upon inference from circumstances, and not from direct evidence. There was the circumstance that the deceased was found dead, with his face submerged in water, in such a position that

drowning might have caused his death. There was the expert evidence of the physician who performed the autopsy to the effect that the condition of the body of the deceased after death indicated death by drowning, and was what might be expected if the deceased had been drowned. There was the evidence of the same physician that the vital organs of the deceased were normal, and indicated the presence of no disease. Assuming these facts proven, (and, there having been evidence to prove them, the jury had a right to conclude that they were facts,) it would be a very reasonable inference that a man would not drown in water only six and a half inches deep unless he were unconscious as he lay in the water. Something must have produced the unconsciousness. It was not produced by disease, because the autopsy tended to show that the deceased was not suffering from disease likely to cause unconsciousness, and the jury might well have inferred that the bruises upon the head did not indicate a sufficient concussion to produce unconsciousness. Reasoning by exclusion, therefore, the jury might from the circumstances properly have found the verdict which they did find, namely, that the unconscious and helpless condition of the insured in which drowning ensued arose, not from disease, but from indigestion or want of food, or some other temporary cause.

The judgment of the court below is affirmed, with costs.

SEYMOUR v. MALCOLM McDONALD LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1893.)

No. 79.

1. APPEAL—DISCRETION OF TRIAL COURT.

The refusal of the trial court to allow a defendant in an action on an acceptance, who has been examined by plaintiff to prove the fact of acceptance and the performance of a condition thereof, to give evidence on cross-examination to sustain his defense, is not reviewable.

2. NEGOTIABLE INSTRUMENTS—DEFENSES—CLAIMS OF THIRD PERSONS.

In an action on an acceptance payable out of the proceeds of certain notes, evidence that such proceeds are claimed by third persons is irrelevant.

3. SAME—BONA FIDE PURCHASERS—FRAUD.

Evidence of fraud in procuring an acceptance is inadmissible, in an action thereon against a holder in good faith for a valuable consideration.

4. SAME—ACCOUNTS BETWEEN DRAWER AND ACCEPTOR.

As to the holder of a draft in good faith and for a valuable consideration, the acceptance of which is made payable out of the proceeds of certain notes, no inquiry can be made into the state of accounts between the drawer and acceptor as to such proceeds, after the same have been paid.

5. SAME—CONSIDERATION.

To procure an acceptance, the drawer exhibited a telegram from the assignee of his interest in notes, out of the proceeds of which the acceptance was payable, which stated that a reassignment of such interest to the acceptor had been mailed, but which statement was in fact untrue. *Held*, that there was sufficient consideration for the acceptance, notwithstanding the false statement, as the assurance that the assignment had been mailed was equivalent to its actual delivery, and transferred to the drawer the acceptor's obligation to the assignee.

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan.

At Law. Action by the Malcolm McDonald Lumber Company against Richard A. Seymour on an acceptance. A verdict for plaintiff was directed by the court, and judgment for plaintiff was entered thereon. Defendant brings error. Affirmed.

Statement by SWAN, District Judge:

This is an action of assumpsit brought upon defendant's acceptance of the following instrument, viz.:

"\$3,250.

Manistee, Michigan, August 21, 1889.

"At sight pay to the order of myself thirty-two hundred and fifty dollars, value received, and charge same to account of

[Signed]

"H. A. Tiffany.

"To R. A. Seymour, Manistee, Mich."

Defendant's acceptance on the face of the draft is in these words:

"Accepted. Payable out of the proceeds of the J. E. Potts notes when discounted by me. R. A. Seymour."

The draft has the following indorsements:

"Pay to the order of C. B. Osborne.

[Signed]

"H. A. Tiffany."

Again:

"Pay to the order of the Malcolm McDonald Lumber Company without recourse at any time on me. C. B. Osborne."

The execution of the draft, the indorsements, and the acceptance were proved. Defendant pleaded the general issue, to which was appended, under the Michigan practice, a notice of special matter which would be insisted upon in defense. The matters offered to be shown under this plea and notice were that plaintiff was not a bona fide holder for value and without notice of defendant's rights and equities of the draft and acceptance sued upon; that, at the commencement of this suit, defendant was not indebted to Tiffany, the drawer, or to the plaintiff, upon any proceeds of said Potts' notes, or upon any other matter, but, on the contrary, Tiffany owed defendant a large amount of money upon this and other unsettled matters of account; and that there is pending and undetermined in the circuit court of the United States for the western district of Michigan a suit in equity commenced December 3, 1891, wherein the identical subject-matter of this action is in controversy, in which both the parties to this cause are defendants; and that a determination of the issue in said suit in equity will decide the whole issue in the present action at law.

The facts which culminated in the execution of this draft and acceptance, and consideration for the same, condensed from the record, are that the defendant and H. A. Tiffany, Frederick Seymour, and N. R. Smith were copartners in the ownership of certain land and other property. They sold the lands to one Potts for \$55,000, receiving \$18,333 in cash, and, for the remainder of the purchase money, Potts' four promissory notes for \$9,166.66 each. Tiffany's interest in the copartnership was three-eighths. On June 26, 1889, Tiffany, for the expressed consideration of \$7,000, sold and assigned to James Frazer all his (Tiffany's) right, title, and interest in the said Potts' notes and the collaterals, and this was known to defendant when he accepted the draft in suit. Tiffany had also previously assigned a part interest in said notes and collaterals to one Cartier. In August, 1889, Tiffany went to Manistee, Mich., as the agent of Frazer, and presented for defendant's acceptance a draft drawn by Frazer on defendant for \$3,250, which was indorsed by Frazer generally, and which Seymour, the defendant, "accepted, payable out of the proceeds of the Potts notes when discounted by me." For ulterior purposes of his own, Tiffany, after the receipt of this acceptance from Seymour, tele-

graphed Frazer, his principal, that Seymour had refused to accept the draft, and instructed him to "reassign my assignment to you to R. A. Seymour, Manistee, and send to him by first mail. Wire Seymour when you have mailed it." Upon receipt of this dispatch, Frazer sent defendant a telegram in these words: "R. A. Seymour. Have mailed reassignment Tiffany's interest in Potts' papers to you. J. Frazer,"—and Tiffany then applied to defendant to change the acceptance accordingly. Seymour, on the faith of Frazer's telegram, thereupon destroyed the first draft and acceptance, and executed the acceptance in suit in favor of Tiffany for the same amount, \$3,250. Frazer, however, failed to mail the reassignment, nor was it ever delivered either to Seymour or Tiffany. Tiffany went to Milwaukee next day, and was there met by Frazer, who demanded the draft, but Tiffany refused to surrender it. Tiffany testified that defendant delivered to him the draft and acceptance in consideration of Frazer's reassignment of the interest in the Potts' notes, and his (Tiffany's) interest in several other deals. Seymour, on the contrary, says that the only consideration was the reassignment to him of Tiffany's interest in the Potts notes held by Frazer, and this was merely nominal. The draft was indorsed by Tiffany to Osborne, his brother-in-law, and by the latter, at Tiffany's instance, indorsed and delivered to plaintiff, who credited it at its face value upon Tiffany's indebtedness to plaintiff, to whom he was then owing \$5,400. There is no evidence that plaintiff had notice of the circumstances under which the acceptance was given, the consideration therefor, or of any other infirmity in Tiffany's or Frazer's title thereto. At the conclusion of the testimony, the court directed a verdict for the plaintiff.

McAlvay & Grant, for plaintiff in error.

Niram A. Fletcher and George P. Wanty, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SWAN, District Judge.

SWAN, District Judge, (after stating the facts.) Although the court below directed a verdict for the plaintiff on the ground that no defense cognizable at law had been shown to the acceptance, the defendant is still at liberty to show either that there was sufficient evidence to go to the jury, or that questions of law apparent upon the record would control the case in opposition to the direction. It is claimed here not only that the evidence adduced by the defendant and received by the court required the submission of the cause to the jury, but also that the court excluded competent and material evidence which might fairly have changed the result. This contention makes it necessary for us to pass upon the sufficiency of the evidence admitted below, and the admissibility of that tendered and excluded.

1. A preliminary question arises upon the ruling of the court made upon the cross-examination of defendant, who was examined as a witness for the plaintiff. Upon his direct examination he had testified substantially that he signed the acceptance, and that the Potts notes, from the proceeds of which it was payable, were paid to him before this suit was commenced. This was the extent of his examination in chief. Upon cross-examination, defendant's counsel then sought to show by the witness that Tiffany obtained the acceptance from Seymour by misrepresentation and fraud; that Tiffany came to Manistee, and saw Seymour as the agent of Frazer, and in Frazer's interest procured defendant's acceptance of the first draft, which was destroyed upon the delivery

to Tiffany of the draft and acceptance in suit. The court excluded the evidence as not proper cross-examination. There was no error in this ruling. The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the case. *Houghton v. Jones*, 1 Wall. 706; *Railroad Co. v. Stimpson*, 14 Pet. 461; *Wills v. Russell*, 100 U. S. 621, 625. In the case last cited it was further held that a judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination in chief was applied and enforced. The course and extent of cross-examination, when directed to matters not inquired about in the principal examination, is very largely subject to the control of the court, in the exercise of a sound discretion which is not reviewable on a writ of error. *Rea v. Missouri*, 17 Wall. 542; *Johnston v. Jones*, 1 Black, 216. A further answer to the argument upon this point is the fact that defendant was allowed to introduce evidence of most of the matters excluded as improper cross-examination. This ruling, therefore, worked defendant no injury.

2. It is argued that the court below erred in refusing to admit in evidence the files and records in the suit in equity brought by John A. Holmes against the parties to this action and others, and then pending in the court below. The avowed purpose of this evidence was to show that Holmes, the complainant in the suit in equity, claimed that Seymour was liable to him as assignee of Frazer, under Tiffany's assignment to Frazer, for the amount of the acceptance in suit here, or whatever may be found due Holmes, as such assignee, from the defendants on an accounting. The evidence tendered was clearly irrelevant to the issue in this cause, and incompetent to affect the plaintiff's right of action. The question here is whether the defendant had become liable to the plaintiff on his acceptance. His possible liability to complainant in the equity suit could constitute no legal defense to the express engagement upon which he was sued here. Whether or not Holmes has an equitable title to the proceeds of the draft superior to that of the Malcolm McDonald Lumber Company is an issue to be determined in the suit in equity, and, however it may be decided, its pendency cannot in this action affect the status of the plaintiff suing upon the express contract of the acceptor. It is open to Seymour, by a cross bill in the suit of Holmes, if necessary, or by a bill of interpleader against his codefendants and Holmes, to compel the several claimants of the fund to litigate their claims to it inter sese, and thus shield himself against either plaintiff's or Holmes' claims, as either may be concluded by the decree. Even that course may be unnecessary, as suggested by Judge Severens, since the federal courts, "sitting as courts of law, have an equitable power over their own process to prevent abuse, oppression, and injustice, which may be invoked by a stranger to the litigation as incident to the jurisdiction already vested, and without regard to his

own citizenship." *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379. Nor is the pendency of the suit in equity ground for abatement of the action at law. *Kittredge v. Race*, 92 U. S. 116; *Graham v. Meyer*, 4 Blatchf. 135; *Paul v. Hurlbut*, 5 Reporter, 738. Whether the pendency of a prior suit in equity in the same court or in a state court is ground for abatement of a suit in a federal court of the same district is a question not presented by this record. The subject is discussed at length by Judge Love in *Brooks v. Mills Co.*, 4 Dill. 524, and the note appended. See, also, *Hughes v. Elsher*, 5 Fed. 263. In all cases, however, to sustain a plea of the pendency of another action in abatement of a second suit, two things must generally concur: First, that the second suit should be by the same plaintiff against the same defendant; secondly, that it should be for the same cause of action. "All the authorities agree," says Judge Story, "that the plaintiff must be the same, for otherwise the cause of action cannot in a just and legal sense be the same." *Wadleigh v. Veazie*, 3 Sumn. 167. The court therefore properly excluded the files and records offered in evidence.

3. The 3d, 4th and 5th assignments of error may be considered together. Defendant's witness Frazer was asked if, in his interview with Tiffany at Milwaukee, the day after the acceptance was executed, he supposed that the draft Seymour accepted was that which he (Frazer) had given Tiffany. This was clearly immaterial. Frazer's supposition as to the identity of the draft could in no degree affect Seymour's obligation on that accepted, nor could it avail for Seymour's defense in this cause to show what amount Frazer expected to receive on the draft he had drawn and intrusted to Tiffany. The grounds on which the admissibility of this evidence is urged is that the matters offered are part of the *res gestae*, and indispensable to show the fraud practiced on Frazer by Tiffany; but as the plaintiff was in no way connected with that fraud, nor can the defendant invoke it to defeat plaintiff's right of action on the facts of this case, the fact sought to be shown had no relation to this controversy; it is *res inter alios acta*. Equally incompetent was the state of the accounts between Tiffany and Seymour which the court excluded. While defendant's acceptance was undoubtedly conditional in form, the condition had been performed by the collection of the Potts notes, and the acceptance became absolute. The defendant was bound to express in his acceptance all the conditions upon which it depended, and he could not add to them against a holder who had acquired it in good faith, and for a valuable consideration. *U. S. v. Bank of Metropolis*, 15 Pet. 377, 396, 397. See, also, *Burnes v. Scott*, 117 U. S. 582, 586, et seq., 6 Sup. Ct. 865.

4. The court held that there was sufficient evidence of consideration for defendant's acceptance arising out of the assignment, and this ruling is assailed as erroneous. Whether the testimony of Tiffany or that of defendant be taken as to the consideration for the acceptance is of no consequence. Tiffany says that the consideration was his assignment to Seymour of all his interest in various joint bills in which they had been engaged, including his in-

terest in the Potts notes. Defendant's testimony admits that, in giving the acceptance, defendant acted on the assurance contained in Frazer's telegram that he had mailed the assignment of Tiffany's interest. On either view, both Seymour and Tiffany regarded the assignment of the latter's interest in the proceeds of the Potts notes as of some value, and dealt on that basis. It matters not, therefore, what was the extent of Tiffany's interest in that fund, or whether, as he states, there was an additional consideration which induced Seymour's action. Nor did Frazer's failure to mail the assignment to Seymour deprive the contract of consideration. For his own reasons, Seymour desired the assignment, and was content to act upon Frazer's assurance that it had been sent. By his telegram, Frazer invited Seymour to deal with Tiffany for the reassignment, and Frazer's assurance that he had sent that instrument was itself a sufficient consideration, and equivalent to its actual delivery. It transferred Seymour's obligation to Frazer over to Tiffany, where Seymour evidently wished it to be. *Philpot v. Gruninger*, 14 Wall. 577.

5. Upon the facts shown, the instruction of the court directing the verdict for the plaintiff was clearly right. Admitting every inference in defendant's favor that could properly be drawn from the evidence, no legal defense to plaintiff's action was established. Seymour's good faith in the transaction is unquestionable. Tiffany's action is indefensible, and was a fraud upon Frazer, but of that Seymour had no right to complain. He must seek protection against double liability in a court of equity. His defense is purely equitable; a court of law can no more take cognizance of it than a court of equity can entertain a suit upon a purely legal title. *Burnes v. Scott*, 117 U. S. 582, 587, 6 Sup. Ct. 865. *Hendrick v. Lindsay*, 93 U. S. 148.

The judgment of the circuit court must be affirmed, with costs.

In re BENSON.

(Circuit Court, N. D. California. November 23, 1893.)

1. INDICTMENT—SUFFICIENCY—WORDS OF STATUTE—CONSPIRACY.

It is not sufficient to charge a conspiracy to defraud the United States in the general language of Rev. St. § 5440. *U. S. v. Hess*, 8 Sup. Ct. 571, 124 U. S. 483, applied.

2. SAME—SUFFICIENCY OF FACTS ALLEGED.

An indictment for conspiracy to defraud the United States is insufficient, which charges, in substance, that defendants, knowing the terms of a contract whereby a certain deputy surveyor agreed to survey certain public lands for an agreed compensation, made fictitious surveys and false field notes, and deceived the surveyor general into approving the same and certifying accounts for money payable to the said deputy surveyor, but which does not charge that defendants acquired, or pretended to have acquired, any interest in said contract, or that they personated said deputy surveyor, or that he was a party to the conspiracy, for this fails to show that the scheme could have resulted in defrauding the United States.

At Law. Petition by John A. Benson to be discharged on writ of habeas corpus from the custody of the United States marshal for the district of California, in which he is now held awaiting trial in the United States circuit court for said district upon an indictment. Petitioner discharged.

J. C. Campbell, for petitioner.

Chas. A. Garter, U. S. Atty., and F. S. Stratton, Special Asst. U. S. Atty., for the United States.

HANFORD, District Judge. To give a clear understanding of this case and of my reasons for granting the petition, it is necessary to make a brief statement of the proceedings connected with the indictment set forth in the petition, as the same appear of record. The acts for which the government prosecutes the petitioner, M. F. Reilly, George H. Perrin, and others were committed in the state of California prior to the act of congress dividing the district of California, and creating the southern district of said state, and establishing United States circuit and district courts for said new district, and continuing the previously existing circuit and district courts as circuit and district courts for the northern district of California. The act contains the following saving clause:

"Sec. 11. That all offenses heretofore committed in the district of California shall be prosecuted tried and determined in the same manner and with the same effect to all intents and purposes, as if this act had not been passed." 24 Stat. 310.

To give effect to this provision, the courts have held that for the prosecution, trial, and decision of all cases for offenses committed within the state prior to the date of the act, and for the purpose of issuing and enforcing judicial writs and process in such cases, the courts for the district of California continue to exist. *U. S. v. Benson*, 31 Fed. 896, 12 Sawy. 477. In November, 1887, a grand jury presented to the circuit court for said district a number of indictments, including the indictment against Benson and Reilly set forth in the petition, and a similar indictment against Perrin, McNee, and Benson, to which further reference will be made. Indictments in kindred cases were also returned to the district court in December, 1886, and to the circuit court in February, 1888. The defendants, upon being arraigned, by pleas in abatement and demurrers denied the jurisdiction of the courts, and questioned the validity of each of the several indictments on various grounds, but in most of the cases their pleas and demurrers have been overruled. The prosecution of these cases has necessarily caused great expense to the government. The successive incumbents of the office of United States attorney for the district and special counsel on behalf of the government have been vigorous and untiring in their efforts to succeed, and those now in charge of the cases are still uncompromising and zealous. Among other causes for delay in the final determination of the cases have been changes in the judiciary by the death of the circuit judge for the ninth circuit and of the district judge for the northern district of California. The present circuit judge residing

in the district and district judge for the northern district of California are both disqualified in these cases by reason of having been, in the performance of official and professional duties previous to their respective appointments to the bench, required to act in matters connected with the prosecution of these cases. To facilitate the proceedings, the district judge for the district of Washington has been, pursuant to section 592, Rev. St., designated and appointed to have and exercise the powers of district judge for the district of California, and to hold a circuit court for said district, commencing on a day set for the trial of the case upon the indictment set forth in the petition and another similar case. Thereupon the defendants in the two cases for which trials had been so arranged, by their attorneys, applied to said district judge for leave to withdraw their pleas of not guilty, and to again present the questions as to the validity of the indictments by demurring thereto. After hearing full arguments, I found the objections to the indictments to be serious. I entertained grave doubts whether the defects in the indictments would be cured by verdicts against the defendants, and deemed it to be inexpedient for the government to go to trial in said cases unless such verdicts, if secured, could be lawfully sustained. Therefore, said applications were granted, and afterwards the demurrers were argued before Hon. William B. Gilbert, circuit judge, and myself, and taken under advisement. Upon consulting together, the judges found it impossible to render a decision sustaining said indictments without disregarding the rules of pleading in criminal cases under the laws of the United States, as given and repeatedly affirmed by the decisions of the supreme court, and we were reluctant to sustain the demurrers, because these indictments, with others, had been previously demurred to, and the court had sustained them, and, no opinion having been filed, we were in the dark as to the reasons for the court's ruling. We therefore announced that the order fixing a date for the trials would be vacated, and that we would hold the demurrers under advisement until the justice of the supreme court allotted to the ninth circuit, the only surviving judge of the circuit court who had previously considered the demurrers, could be induced to hear a reargument, or at least be consulted. The trials being thus postponed indefinitely, the defendant Benson was by his sureties surrendered into the custody of the marshal, and he then filed his petition for a writ of habeas corpus in the circuit court for the northern district of California.

Having regard to the right of the defeated party, whether it be the government or the prisoner, to appeal from the judgment of the circuit court to the circuit court of appeals, and as Judge Gilbert would be disqualified from sitting as a member of the appellate court if he should decide the case in the circuit court, he deemed it expedient and necessary to make an order designating the district judge for the district of Washington to hold said circuit court during the pendency of the habeas corpus proceedings. The writ having been issued, the marshal made return thereon, showing that he holds the petitioner awaiting trial upon the indictment set forth in the peti-

tion under a mittimus issued by the circuit court for the district of California, after the surrender of the petitioner by his bail, and not otherwise. Thereupon the prisoner's attorney moved for his discharge on the ground that the return is insufficient, inasmuch as it admits that the prisoner is detained in actual custody for no cause other than to hold him for trial upon the indictment set forth in his petition; that said indictment does not charge the commission of any acts constituting a crime under the laws of the United States,—and hence the petitioner is deprived of his liberty without due process of law, in violation of the provisions of the fourteenth amendment to the constitution. This is the only ground for the motion which I have considered, although the petition states that the imprisonment is illegal for other reasons.

The indictment is set forth in *haec verba* in the petition. It is founded upon section 5440, Rev. St., and attempts to charge an unlawful conspiracy to defraud the United States. The first count charges:

"That John A. Benson and M. F. Reilly, late of the district of California, heretofore, to wit, on the 17th day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, state and district of California, and within the jurisdiction of this honorable court, did unlawfully, corruptly, and wickedly conspire, combine, and agree together, and with divers other persons to the said grand jurors unknown, to defraud the United States of a large sum of money, to wit, the sum of twenty-five hundred, lawful money of the United States, by the means and in the manner following: That is to say, that they, the said John A. Benson and M. F. Reilly, well knowing that a certain contract had, before the date last hereinbefore stated, been procured, secured, and entered into by and between John W. Fitzpatrick, then and there being a United States deputy surveyor in and for the state of California, on the one part, and W. H. Brown, then and there being the United States surveyor general in and for the state of California, on the other part, whereby the said John W. Fitzpatrick, in his capacity aforesaid, in substance and effect undertook, agreed, and promised."

Following the foregoing quotation is a minute statement of the stipulations, terms, and conditions of a contract to survey certain public lands which are described, with repeated allegations that said Benson and Reilly each had full knowledge of each of said stipulations, terms, and conditions, the substance of which are as follows: Said Fitzpatrick agreed that he would in person, and in his official capacity as a United States deputy surveyor, truly and faithfully survey the lands described, and establish and mark all the lines and corners thereof, in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other surveying instructions issued by the commissioner of the general land office, and with such special instructions as he should receive from the surveyor general in conformity therewith; that said Fitzpatrick would not commence said surveys until he should be officially notified of the approval of the contract by the commissioner of the general land office; and that he would complete the same, and return true field notes thereof to the surveyor general on or before the 30th day of June, 1885. Compensation for making said surveys was to be at specified rates, and no accounts

therefor to be paid unless properly certified by the surveyor general in his official capacity, nor until approved plats and certified transcripts of the field notes should be filed in the general land office, and no payments to be made for surveys not executed by said Fitzpatrick in his own proper person. After alleging that said contract was on December 17, 1884, duly approved by the commissioner of the general land office, and that Fitzpatrick was officially notified thereof, the indictment, in the first count, then proceeds as follows:

"In pursuance of the aforesaid conspiracy, combination, confederacy, and agreement among them, the said defendants, made and entered into as aforesaid, to defraud the United States as aforesaid, and the said John A. Benson well knowing that the aforesaid contract had been made and entered into by and between the said John W. Fitzpatrick, United States deputy surveyor, as aforesaid, and the said W. H. Brown, United States surveyor general, as aforesaid, at the time and in the manner aforesaid, for a survey of the lands in the aforesaid contract and hereinbefore described, and full well knowing the terms and conditions of the said contract thereafter, (meaning after the 17th day of December, 1884,) and before the date next herein-after mentioned, for the purpose and with the intent to effect the object of the aforesaid conspiracy, did cause and procure a fraudulent, fictitious, and pretended survey of the lands described in the aforesaid contract, and hereinbefore described, to be made; and he, the said John A. Benson, defendant herein, then and there well knowing said survey of the aforesaid lands, so caused and procured by him said John A. Benson to be made as aforesaid, had not been made in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the commissioner of the general land office; and he, the said John A. Benson, defendant herein, well knowing that the said John W. Fitzpatrick, United States deputy surveyor aforesaid, had not executed the said survey of the lands in the aforesaid contract, and hereinbefore described, in his own proper person, or at all; and he, the said John A. Benson, defendant herein, well knowing that said survey of the lands hereinbefore described, so caused and procured by him, the said defendant, John A. Benson, to be made as aforesaid, was fraudulent, fictitious, and pretended,—for the purpose and with the intent of imposing upon and deceiving the said W. H. Brown, United States surveyor general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid; and for the purpose and with the intent of securing the approval of said pretended survey by the said W. H. Brown in his official capacity as United States surveyor general as aforesaid, and by his (meaning the said W. H. Brown) successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid; and for the further purpose of procuring the said W. H. Brown in his official capacity as United States surveyor general aforesaid, and his successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, to properly certify to the accounts and amount accruing to the defendant under and by the terms of the aforesaid contract; and for the further purpose of securing approved plats and certified transcripts of the field notes of said pretended survey to be filed in the general land office; and with the intent for the purpose of securing the payment from the United States of the contract price for said survey agreed to be paid under and by the terms of said contract made and entered into, as aforesaid, by and between the said John W. Fitzpatrick, United States deputy surveyor, and the said W. H. Brown, United States surveyor general, aforesaid; and with the intent to corruptly, wickedly, and unlawfully defraud the United States out of a large sum of money, to wit, the sum of twenty-five hundred dollars,—the said John A. Benson, defendant herein, heretofore, to wit, on the 6th day of May, in the year of our Lord one thousand eight hundred and

eighty-five, at the city and county of San Francisco, state and district of California, and within the jurisdiction of this honorable court, did cause and procure false, fictitious, and fraudulent field notes of the aforesaid false, fictitious, and pretended survey to be made of the following lands in the aforesaid contract, and hereinbefore described, to wit:

"The retracing of the west boundary of Tp. (meaning township) 12 S., (meaning south,) R. (meaning range) 40 E., (meaning east;) the subdivision lines of Tp. (meaning township) 9 S., (meaning south,) Rs. (meaning ranges) 40 and 41 E., (meaning east;) Tp. (meaning township) 10 S., (meaning south,) Rs. (meaning ranges,) 40 and 41 E., (meaning east;) Tp. (meaning township) 11 S., (meaning south,) Rs. (meaning ranges) 40 and 41 E., (meaning east;) and Tp. (meaning township) 12 S., (meaning south,) Rs. (meaning ranges) 40 and 41 E., (meaning east,)—of the Mount Diablo base and meridian in the state of California, which said lands are more definitely described as follows, to wit: * * *

"And which said lands were public lands of the United States, and were and are situate within the district and state of California, which said false, fictitious, and fraudulent field notes represented that the aforesaid survey had been made by the said John W. Fitzpatrick, United States deputy surveyor, in his own proper person, whereas, in truth and in fact, the aforesaid survey had not been made by the said John W. Fitzpatrick, United States deputy surveyor, or otherwise, in his own proper person, or at all; and which said false, fictitious, and fraudulent field notes purported to be true field notes of the actual work done in the field in making the aforesaid survey of the lines of the lands in the aforesaid contract, and hereinbefore described, whereas, in truth and in fact, said field notes were not true field notes of the work actually done in the field; and which said false, fictitious, and fraudulent field notes represented that the aforesaid pretended survey of the lands last hereinbefore described had been made in strict conformity with the laws of the United States, and the printed manual of surveying instructions, whereas, in truth and in fact, the aforesaid survey had not been made in strict conformity with the laws of the United States, and the printed manual of surveying instructions, or in conformity therewith at all; and which said false, fictitious, and fraudulent field notes represented that all the corners of the aforesaid survey of the lands last hereinbefore described had been established and perpetuated in strict accordance with the surveying manual of printed instructions, and in the specific manner therein described, whereas, in truth and in fact, all the corners of the aforesaid survey of the lands last hereinbefore described had not been established and perpetuated in strict accordance with the surveying manual of printed instructions, and in the specific manner in the aforesaid field notes described; and which said false, fictitious, and fraudulent field notes represented and purported to be true field notes of the aforesaid pretended survey of the lands last hereinbefore described, whereas, in truth and in fact, they were not true field notes of the said survey, but, on the contrary, were false, fictitious, and fraudulent field notes of said survey,—all of which said defendants John A. Benson and M. F. Reilly then and there well knew.

"And so the jurors aforesaid, upon their oath aforesaid, do say that said defendants John A. Benson and M. F. Reilly, on the 17th day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, state and district of California, and within the jurisdiction of this honorable court, did knowingly, unlawfully, corruptly, and wickedly conspire, confederate, combine, and agree together to defraud the United States of a large sum of money, to wit, the sum of twenty-five thousand dollars, and the unlawful and fraudulent acts, in manner and form, and by the defendants in this count hereinbefore set forth, were done to effect the object thereof.

"Against the peace and dignity of the United States of America, contrary to the form of the statutes of the United States of America, in such case made and provided."

The second count is in all material particulars a repetition of the first, except that in specifying the overt acts committed to effect

the object of the conspiracy it alleges, in substance, that the defendant Benson, on the 6th day of May, 1885, falsely pretending that the surveys had been properly made by Fitzpatrick according to said contract, and with knowledge to the contrary, with intent to impose upon and deceive the surveyor general, and for the purpose of fraudulently obtaining his official approval of said pretended survey, and procuring the surveyor general, in his official capacity, to certify fraudulent accounts for said pretended survey and amounts accruing to Fitzpatrick under said contract, and for the purpose of securing approved plats and certified transcripts of the field notes of said pretended survey to be filed in the general land office, and for the purpose of defrauding the United States by securing the payment to him (Benson) from the United States of the contract price for said survey, did make, and cause to be made, false, fictitious, and fraudulent field notes of said pretended survey, which falsely represented that said survey had been made by Fitzpatrick according to the contract, which false and fictitious field notes purported to be true field notes of the work as actually done in the field; and it is further alleged in this count that the surveyor general was by the said unlawful conspiracy of Benson and Reilly, and the fraudulent acts of Benson aforesaid, "deceived into approving the said pretended survey and the said fictitious and fraudulent field notes, and into stating and certifying the amounts accrued to and earned by the said John W. Fitzpatrick under and by the terms of the aforesaid contract."

The third count is a mere repetition of the second. I am unable to discover any difference between them except in phraseology.

In this proceeding, all defects in the indictment which are merely formal, and all clerical errors and omissions and defects not prejudicial to the defendant, must be disregarded. Section 1025, Rev. St. The defendants are not entitled to go free without a trial, if by a fair construction of the pleading, as a whole, it can be understood as charging them with commission of acts which are by a law of the United States made criminal and punishable, with a sufficient statement of the particular facts to identify the offense, and enable the court to judge whether the acts alleged amount to a crime in law. I will therefore notice only the most substantial and glaring defects in this indictment. It does not in either count aver that the defendants agreed to make any use whatever of the contract referred to, or of accounts or vouchers for money earned, or pretended to have been earned, by the contractor as a means of defrauding the United States. It does not in either count connect the contractor or the surveyor general with the conspiracy, or aver that by any assignment of the contract, or any accounts or vouchers for money earned under it, or any power of attorney, or other means, the defendants, or either of them, ever acquired control of the contract or any interest therein, or possession or control of any accounts, vouchers, or claims for money earned under it, or that they were ever so related to the contract as to have been able to commit a fraud in connection therewith. It does not in either count aver that the defendants ever agreed to any scheme or

plan of operation whereby a fraud upon the United States could possibly have been consummated. I do not assume that it was essential to the validity of this indictment that it should appear therefrom that the conspirators were to be the beneficiaries of the successful execution of their own agreement. This indictment fails to specify any scheme or attempt to do anything which could have resulted in the payment by the United States of money to the defendants, or either of them, or the contractor, or any other person. The full strength of the case to be gathered from all that is alleged in all the counts, disregarding all formal and technical defects and mere legal conclusions, is no more than this: That a contract was entered into by Fitzpatrick and the surveyor general for the state of California, whereby the former agreed to survey specified townships of the public lands of the United States, and return true field notes, within a specified time, for compensation to be computed at specified rates, to be paid to him only after completion of the work and approval thereof, and the filing in the general land office of approved plats and certified transcripts of the field notes, and upon presentation of accounts for the amounts earned duly certified by the surveyor general, the work to be done by Fitzpatrick in person, and in his official capacity as a United States deputy surveyor; that Benson and Reilly knew of said contract, and of all the terms and conditions thereof; that said contract was not executed; that Benson and Reilly knew that the surveys had not been made; that Benson, a stranger to the contract, for the purpose of deceiving the surveyor general and defrauding the United States, and with intent to secure payment to himself from the United States of the money payable under the contract, made a fictitious survey of said townships, and manufactured false field notes; that without co-operation of the contractor, and without personating him, Benson did, by such fictitious surveys and false field notes, so deceive and impose upon the surveyor general that, without collusion on his part with Benson, he (the surveyor general) did approve such fictitious surveys and false field notes, and did certify accounts for money payable to Fitzpatrick under the contract. Upon this state of facts the government could not have been defrauded. Benson could not obtain money on such vouchers, because there was no money payable to him, and no false certificates for money payable to him were made or intended; and it is not pretended that it was his purpose to make any use of certified accounts for money payable to Fitzpatrick, and no money could be paid to Fitzpatrick upon the accounts so certified without his becoming a party to a crime by accepting the fruit of Benson's meddlesome acts, which is not to be presumed to have been contemplated, because not alleged. The indictment does not charge a conspiracy to defraud the United States by palming off fictitious surveys of public lands and false field notes as and for lawful surveys and genuine field notes. It only attempts to charge a conspiracy to defraud the United States out of a sum of money by acts and intents wholly inadequate for the purpose. There would be less difficulty in sustaining this indictment if it simply alleged that

the defendants conspired and agreed together to defraud the United States out of a specified sum of money, and that one of them, to effect the object, did the acts charged in this indictment to have been done by Benson, with like intentions, or any similar vain and impotent acts and intents, for the reason that this indictment, instead of charging a conspiracy or agreement to defraud which might have been afterwards developed and perfected by adoption of practicable means whereby to accomplish a fraud, is so framed as to limit the evidence admissible under it to such facts as might have a tendency to prove a conspiracy to defraud the United States out of a sum of money in the particular manner, and by the particular means, therein specified, which is equivalent to saying that the defendants conspired and agreed to do, and cause to be done, only such things as could not result in any fraud whatever, with the intent, however, of thereby perpetrating a fraud upon the United States. Greater effect must be given to a particular statement of facts repugnant to a general statement of a mere conclusion than to the general statement thus contradicted. This indictment itself negatives the only accusation of crime which it contains. In their endeavor to sustain the indictment, counsel for the government ignored the words, "by the means and in the manner following, that is to say," in that part of each count charging the conspiracy; and they cited text-books and decisions in support of their contention that an indictment which charges a conspiracy in the words of the statute or other words of equivalent import, and specifies any act done by the conspirators, or either of them, to effect the object, is sufficient. The words which I have quoted, however, are in the indictment. The use thereof necessarily limits by particularizing the charge made in general terms. The court cannot ignore them. But even the position taken by counsel is untenable. The authorities produced on their side are overborne by decisions which establish for all United States courts the rule that an indictment, to be valid, must tender an issue of fact by setting forth the acts constituting the particular crime which the grand jury intend to charge. This is consonant with the general rule of pleading under equity and code systems, requiring the facts constituting a cause of action to be stated. The words of a statute defining a crime are in most cases insufficient to describe an individual case, for the reason that the statute, being prospective, must employ broad and comprehensive terms, inappropriate to distinguish a single case from all others which may be prosecuted under it. In an opinion by Mr. Justice Jackson, the principle which I invoke is ably expounded, as follows:

"The act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the states and foreign countries were not only illegal, but should constitute criminal offenses against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime in making contracts in restraint of trade misdemeanors, and in-

dictable as such. But the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmonds*, 96 U. S. 360; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512; *U. S. v. Trumbull*, 46 Fed. 755.

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in restraint' of such trade or commerce, or 'monopolized,' or 'attempted to monopolize,' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: 'Every offense consists of certain acts done or committed under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specifically set forth.' *U. S. v. Cruikshank*, 92 U. S. 542, 563." *In re Greene*, 52 Fed. 111.

I will not prolong this opinion by citing other decisions of the circuit and district courts, nor by making further reference to the decisions of the supreme court cited in the above quotation. The doctrine of those cases is fully upheld and applied to indictments founded upon section 5440, Rev. St., in the recent decision of that court in *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. In the opinion of the court in that case, by Mr. Chief Justice Fuller, it is said:

"This is a conviction for conspiracy, corruptly, and by threats and force, to obstruct the due administration of justice in the circuit court of the United States for the district of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital. *U. S. v. Hess*, 124 U. S. 483, 486, 8 Sup. Ct. 571. And in *U. S. v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, it was held, in an indictment for conspiracy under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. The courts of the United States have no jurisdiction over offenses not made punishable by the constitution, laws, or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated.

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means; and the rule is accepted, as laid down by Chief Justice Shaw in *Com. v. Hunt*, 4 Metc. (Mass.) 111, that, when the criminality of a con-

spiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while, if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

In the case of *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, the defendant was convicted under an indictment founded upon section 5480, Rev. St., and which in the main followed the words of that section in charging the offense. The supreme court held it to be insufficient, and not aided by the verdict. Section 5480 is a statute directed against "devising, or intending to devise, any scheme or artifice to defraud," to be effected by communication through the post office. It is like section 5440. The case is strictly analogous to the case at bar, and the opinion by Mr. Justice Field is a complete refutation of the argument made before me in behalf of the government. The following brief extract shows the scope and bearing of the decision:

"The averment here is that the defendant, 'having devised a scheme to defraud divers other persons to the jurors unknown,' intended to effect the same by inciting such other persons to communicate with him through the post office, and received a letter on the subject. Assuming that this averment of 'having devised' the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner, or party from whose possession it was taken. The doctrine invoked by the solicitor general—that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute—does not meet the difficulty here. Undoubtedly, the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

The only difficulty in the way of granting the motion to discharge the prisoner lies in the fact that a demurrer to the indictment has been heretofore overruled by the court, and the reasons for such ruling are to me unknown. The record shows, however, that, as to the questions argued upon the demurrer to the indictment against Perrin, McNee, and Benson, the judges were divided in opinion, and that case was on that ground taken to the supreme court, but remanded without a decision of the questions certified. *U. S. v. Perrin*, 131 U. S. 55, 9 Sup. Ct. 681. The indictment in that case differs from the one now under consideration in several respects, and particularly in the important fact that the surveying contract set forth in that case was let to Perrin, who was by the indictment charged as a co-conspirator. Possibly, owing to the number of cases pending against Benson at the time, this difference was not brought to the attention of the court. With all the light that has been shed by the untiring efforts of learned counsel, I have not been able to discover any grounds for lawfully treating this case as exceptional. I am constrained by the law and the decisions of the supreme court to hold that the indictment which the petitioner is now held to answer is of no validity.

He is therefore entitled to be discharged, and it is so ordered.

JONES v. HOLMAN et al.¹

(Circuit Court, E. D. Pennsylvania. December 12, 1893.)

No. 15.

1. PATENTS—INFRINGEMENT—FORMAL DIFFERENCES—EASEL ALBUMS.

Differences in the length of the transverse rod to which an easel album is hinged or pivoted, and consequent differences in the distance between the standards supporting such rod, and also the use of one instead of two eyes on the album, for engaging with the rod, are merely formal differences, and do not avoid infringement.

2. SAME.

Nor is infringement avoided by the addition of a hinge at the foot of the standards for the purpose of transferring the strain from the back of the book, all the elements of the combination being retained.

3. SAME—VALIDITY—PARTICULAR PATENTS.

The Jaeger patent, No. 432,411, for an easel album, is valid as to the particular device comprised in the combination claimed, and is infringed by defendant.

In Equity. Suit by Joshua R. Jones against William A. Holman and others for infringement of a patent. Decree for plaintiff.

Augustus B. Stoughton and H. E. Garsed, for complainant.
Hector T. Fenton, for defendants.

DALLAS, Circuit Judge. This case has been argued and considered on pleadings and proofs. It is a suit for infringement of letters patent No. 432,411, dated July 15, 1890, granted to Christian Jaeger, and now owned by the complainant. As stated in the specification:

"The invention relates to easel albums; and its object is to provide an improved album which is simple and durable in construction and permits of opening the leaves of the book and inserting the pictures without injury to the book or the stand, as is frequently the case with easel albums as now constructed. The invention consists of a book pivoted by one of its covers to the stand. The invention also consists of certain parts and details, and combinations of the same, as will be described hereinafter, and then pointed out, in the claims."

The claims alleged to be infringed are as follows:

"(1) In an album, the combination, with a stand provided with standards and a transverse rod held on the same, of a book pivoted on the outside, and at or near the middle of one of its covers to the said rod, substantially as shown and described."

"(3) In an album, the combination, with a stand, of a fixed rod supported on the said stand and a book provided on one of its covers with bearings engaging the said fixed rod to permit the said book to swing on the said fixed rod as a fulcrum, substantially as shown and described.

"(4) In an album, the combination, with a stand provided on top with an incline, of a fixed rod supported on the said stand, a book adapted to rest with its back on the said incline, and eyes secured at or near the middle of one of the covers of the said book and engaging the said fixed rod, substantially as shown and described."

The defenses set up are:

First, that the patent is invalid; and under this defense the following questions are raised:

¹ Rehearing pending.

"(a) The question of novelty as respects the device claimed in the first and third claims in question of the patent in suit; (b) the same question, in a more limited sense, of patentable novelty in view of the state of the art, as respects the device claimed in the fourth claim of the patent in suit; (c) the question of patentable combination as distinguished from aggregation, as respects the matter of the fourth claim."

Second, that the patent, even if valid, has not been infringed by the defendants.

As to the first of these defenses, the evidence fails to satisfy me that the presumption of the validity of the patent has been rebutted or in any manner overcome; and as to the second defense, I have reached the conclusion that infringement by the defendants has been proven. Whether the claims involved should be liberally, or fairly but restrictively construed, has been debated but need not be decided. It is enough, for the purposes of this case, to say that, apart from any question as to the invention being, in the broadest sense, wholly new, the patentee was, at least, the first and original inventor of the particular device or organism comprised in the combination claimed, and consisting of a transverse rod, (first claim,) or a fixed rod, (third and fourth claims,) held on standards provided on the stand, (first claim,) or supported on the said stand, (third and fourth claims;) the said rod being pivoted on the outside of a book, and at or near the middle of one of its covers, (first claim,) or engaging bearings provided on one of the covers of the book, to permit it to swing on the said fixed rod as a fulcrum, (third claim,) or engaged by eyes secured at or near the middle of one of the covers of the said book, (fourth claim,) "as substantially shown and described." It may be conceded that these several parts, separately considered, were not new, yet, with regard to the patented combination, they were, for, by the device which they composed, the purpose of the invention was made feasible, and the result attained, if not wholly novel in itself, was certainly better accomplished, and by means essentially different from any which had previously been known. A stand provided with an incline is open to the defendants as well as to the complainant. They both use it, and, if this were all, neither could rightfully complain of the other; but the true question is whether the defendants use the same, or substantially the same, combination as that of the complainant, and this actually depends upon the identity, in the sense of the patent law, of the two book-swinging mechanisms. There are structural differences between them, but some of these are, manifestly, unimportant, and those only which are most seriously insisted upon will be referred to. The complainant's rod extends across the entire width of the cover of the book, or, perhaps, slightly beyond the edge of the cover on each side; while the defendants' rod, which is placed midway between the two edges of the cover, is in length about one-third of the width of the cover; and, consequently, the supports for the rod, which, in both arrangements, are at its two ends, are further apart in the complainant's than in the defendants' device; and for the two short eyes of the former a single eye is substituted in the latter. These differences, however, are, I think, obviously merely formal; but to them there is added

a further diversity, which is worthy of more consideration. The complainant's device is hinged only between the top of the standard, or support, and the exterior of the cover, but in the defendants' there is a hinge also at the lower end of the support, hinging it to the base or stand. The object and function of this lower hinge, as stated by the defendants' expert, is "to transfer the strain from the binding edge or back of the book to the said hinged junction between the upright rod and the supporting stand; but it has also the disadvantageous tendency to cause the book, when closed, to slip from the stand, and, as it seems to me, there is but slight, if any, advantage secured by the transference of strain referred to. Even, however, if the function claimed to be performed by this additional hinge was undoubtedly, and in the highest degree, beneficial, by reason of its facilitating the working of the hinge of the complainant, and making it perform its assigned part in the combination better, yet, by making such addition, the defendants could acquire no right to appropriate the patented invention. As I have before said, there are some structural differences between the two mechanisms, but the important fact remains that every element of the complainant's combination is present in the defendants' device, and the latter produces substantially the same result as the former. This is infringement, and it is not justified by showing that the defendants have added something, whether improving or otherwise, of their own.

A decree in favor of the plaintiff, in the usual form, may be prepared and submitted.

GILBERT v. REINHARDT NUMBERING MACHINE CO. et al.

(Circuit Court, E. D. New York. December 7, 1893.)

1. PATENTS—INFRINGEMENT.

One who appropriates the idea of a patent, and perhaps improves upon the invention, but without really reducing the number of elements in the combination, is an infringer.

2. SAME—INVENTION—NUMBERING MACHINE.

The Bowman patent, No. 166,681, for an improvement in consecutive-numbering machines, shows invention, and is valid.

In Equity. Suit by William J. Gilbert against the Reinhardt Numbering Machine Company and others for infringement of a patent. Decree for complainant.

Edward C. Davidson, for plaintiff.

Edward A. Greeley, for defendants.

WHEELER, District Judge. This suit is brought upon the third claim of letters patent No. 166,681, dated August 17, 1875, and granted to Thomas S. Bowman for an improvement in consecutive-numbering machines. In these machines the nine numbers are placed on the faces of wheels, for units, tens, hundreds, and so on, hung on a shaft in a box, and are brought up to place to print the numbers consecutively from 1 upward by automatic contrivances

moving the wheels along around the shaft consecutively one after another. Ciphers are not wanted so constantly as the figures are which print units, but only for printing tens and multiples of tens. If they are made stationary on the wheels with the numbers, they print ciphers when not wanted. To avoid this, M. Duchateau, in a certificate of addition made January 26, 1865, to French patent No. 16,299 of April 26, 1856, describes placing the cipher on a movable stem dropping into a recess in the shaft when not wanted, and brought out when wanted by the movement of the shaft, in a machine having three numbering wheels moved by hand. In Bowman's patent the ciphers are each placed on such a movable stem having a stud, which a cam around the shaft that is stationary holds down by a projection when the cipher is not wanted, and works against and moves, carrying the stem and bringing the cipher up to place, when it is wanted. In the defendants' machine the cam is made on the shaft, and by a projection holds the stem down when the cipher is not wanted, and, working against the stud, brings the cipher up to place when it is wanted. Bowman could not, at the time of his invention, be the first inventor of dropping the cipher out of the way when not wanted in a numbering machine, for Duchateau had before that done the same thing. He could be, and appears to have been, an original and the first inventor of means for doing it in his more complex and extensive automatic machine. These means are the combination of the wheel carrying the numbers, the stem carrying the cipher, with its stud, the cam, and the shaft supporting the wheel and cam, which is the combination of this third claim. This claim, therefore, seems to be valid.

The cam formed on the defendants' shaft is the same, in form and operation, as that formed about Bowman's shaft, and the defendants' shaft and cam upon it are equivalents of Bowman's shaft and cam about it; the shape of the foot of the defendants' stem makes it operate like the stud of Bowman, and it is the equivalent of his stem and stud; and these parts in each machine are combined with like numeral wheels. The patent under which the defendants operate may be an improvement upon Duchateau's as improved by Bowman's, but it does not appear to be an improvement upon Duchateau's independent of Bowman's. The defendants do not come within *Railway Co. v. Sayles*, 97 U. S. 554, but are rather brought within *Imhaeuser v. Buerk*, 101 U. S. 647. The defendants appear to have taken Bowman's idea, and not really to have reduced the number of elements of the combination of this claim. The stud and stem appear to be really one piece with two names. The defendants, therefore, appear to infringe. Let a decree be entered for the orator.

In re CILLEY.

(Circuit Court, D. New Hampshire. December 11, 1893.)

No. 400.

1. REMOVAL—CASES REMOVABLE.

The right of removal is restricted by section 2 of Acts 1887-88 to the classes of cases in which original jurisdiction is given by section 1.

2. SAME—DIVERSE CITIZENSHIP.

The right of removal on the ground of diverse citizenship is limited by Acts 1887-88 to suits of a civil nature "at common law or in equity."

3. SAME—PROCEEDINGS TO PROBATE WILLS.

A proceeding to establish and probate a will is not a suit "at common law or in equity," and is therefore not removable under Acts 1887-88.

Petition of Horatio G. Cilley for the removal of a probate appeal on the ground of local prejudice. Petition dismissed.

For prior reports relating to this litigation, see 46 Fed. 892, and 1 C. C. A. 522, 50 Fed. 337.

Statement by ALDRICH, District Judge:

This cause was before the circuit court at the May term, 1892, (COLT, Circuit Judge, and ALDRICH, District Judge, sitting) upon a rehearing of a motion to remand to the state court, which had previously been denied. The removal was on the ground of diverse citizenship, and within the limit in which a party may remove a proper cause as a matter of right, and was subsequent to the act of 1887. The proceeding removed was a probate appeal from the decree of the probate court in the county of Merrimack, and state of New Hampshire, allowing and establishing a certain instrument as the last will and testament of one Matilda P. Jenness, wherein the contestant (which is the petitioner) alleged undue influence as ground of appeal, and issues of fact thereon were framed for the jury in this court; and upon reargument and reconsideration the cause was remanded, the court, at the August term, announcing its conclusion orally, in substance, as follows, (COLT, Circuit Judge, and ALDRICH, District Judge, concurring):

"The general question is whether the decree of the probate court admitting the will to probate shall be affirmed, and the immediate question comes, upon a rehearing ordered by the court, under the motion to remand on the ground that such proceeding was not removable, and that this court therefore has no jurisdiction. Upon the former argument of the question involved in the motion to remand, which was denied, due consideration was not given to the effect of section 2 of the acts of March 3, 1887, and August 13, 1888. Upon reargument and reconsideration, we are of opinion that the acts referred to are restrictive in respect to the right of removal, and that section 2, under reasonable construction, operates to narrow or withdraw such right in certain classes of cases. Judicial decision since 1887 sustains this view. If we were to assume, for the purpose of determining this question upon reargument, that prior to March 3, 1887, proceedings to establish wills were removable after reaching such a stage as to be termed a 'suit' or 'controversy' within the meaning of the older statutes, we should still be of opinion that such right did not exist in this cause at the time of the removal, for the reason that the effect of section 2 of the acts referred to was to withdraw such right in this class of cases. In determining this question it is not necessary at this time, and would not be useful, to refer to reasons which prompted this restrictive legislation. It is evident, however, if the right of removal ever existed in will cases of this character, that congress, upon such considerations of public policy, convenience, economy, and a proper administration of justice in such affairs as seemed to it controlling, intended to withdraw such right, and leave this class of probate business to the courts of the states; and we have, therefore, no hesitation in accepting such legislation as intended to settle this mooted question of jurisdiction against the right of removal, at least in proceedings of this character."

All prior orders denying the motion to remand were vacated, the motion was granted, and the cause remanded to the state court. At the time this conclusion was announced the court intimated its purpose to file an opinion stating its reasons more at length. The remand was distinctly upon the ground that the federal court had no jurisdiction of the subject-matter involved.

William L. Foster and Harvey D. Hadlock, for petitioner.
Streeter, Walker & Chase and Bingham & Mitchell, for executor.
Before COLT, Circuit Judge, and ALDRICH, District Judge.

ALDRICH, District Judge, (after stating the facts.) The party aggrieved is now before the court upon petition for removal upon the ground of local prejudice, and, the former remand being for want of jurisdiction of the subject-matter, presents no new question. But, in view of the magnitude of the case, the practical importance of the question, and the fact that learned counsel have pursued the supposed right of removal with unusual earnestness and apparent confidence, we have thought best to carefully re-examine the jurisdictional question in the light of further argument, and to state our reasons at length.

We will first dispose of the position taken by the petitioner on reargument, that the right of removal exists under article 3, § 2, of the constitution of the United States, and cannot, therefore, be abridged by congress or denied by the court. This position is not tenable. The constitution declares the lines within which congress may confer jurisdiction, but the ground and limit of actual jurisdiction to be exercised by the courts are to be found in the acts of congress, and not in the constitution. It is not necessary to inquire as to the extreme limit of the constitutional scope of judicial power. Within its scope, whatever that may be, congress may confer jurisdiction, and so much of the constitutional grant of judicial power as is not bestowed upon the federal courts by legislative provision remains dormant. In other words, congress is to define and describe to what extent the judicial power is to be exercised by the federal courts. *McIntire v. Wood*, 7 Cranch, 504; *Kendall v. U. S.*, 12 Pet. 524, 616; *Cary v. Curtis*, 3 How. 236, 245; *Bank v. Roberts*, 4 Conn. 323; *Bank of U. S. v. Northumberland Bank*, Id. 333; *Turner v. Bank*, 4 Dall. 10; *Ex parte Cabrera*, 1 Wash. C. C. 235; *Sheldon v. Sill*, 8 How. 441, 449; *U. S. v. Haynes*, 29 Fed. 691, 696. There is authority to the point that the purpose of the act of 1875 was to make the jurisdiction of the circuit court coextensive with the constitutional grant of judicial power, except in cases in which the supreme court had exclusive jurisdiction, (*Insurance Co. v. Champlin*, 21 Fed. 85, 89; *Sawyer v. Parish of Concordia*, 12 Fed. 754;) but, however this may be, such was not the purpose of the acts of 1887-88.

There is a wide difference between the removal provisions of the act of 1875 and the acts of 1887-88, as will be seen upon examination. The act of March 3, 1875, provided, through section 1:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds," etc.

Section 2 provided:

"That in any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, etc. * * * or in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states," etc.

It will be observed that the second section, which authorizes removal, is broader than the first section, which grants original cognizance upon the circuit courts; and herein lies the difference between the acts of 1875 and 1887. It is manifest that under the act of 1875 suits or controversies, not originally cognizable in the circuit court, might ripen into a suit removable under section 2. It will be seen that in describing suits of a civil nature at law or in equity, removable under section 2, there is no reference to the preceding section, and there is, therefore, in section 2 no reference to the suits of a civil nature, at common law or in equity, described in section 1. In other words, under section 2 there is no reference to *common-law suits or proceedings in equity*. And it will be further seen that in the last part of section 2 the provision is, "When in any suit mentioned in this section there shall be a controversy," etc. The removability, therefore, under the act of 1875, was to be determined upon the force of section 2, without any reference to the jurisdictional grant of section 1, or to the common-law phrase used therein. Under this section there was strong ground for holding that original jurisdiction was not the test of removability, and that any controversy between citizens of different states, which had taken the form of a suit of a civil nature at law or in equity, might be removed; and the weight of authority unquestionably sustains this view. But the present jurisdiction of this court depends upon the acts of 1887-88, and not upon the act of 1875. We must, therefore, look to the acts of 1887-88 for the purpose of determining whether jurisdiction exists to administer justice in a probate proceeding of this character.

Sections 1 of the acts of 1875 and 1887-88 are, in substance, the same; but, as has been observed, there is a wide difference between section 2 of the acts of 1887-88, which authorizes removals, and section 2 of the act of 1875. Section 2 of the acts of 1887-88 first provides:

"That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section," may be removed.

It next provides:

"That any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of the state."

It would seem that the first two clauses of section 2 contain all the jurisdictional grant embodied in the second section, and describe and limit the same, and in both instances refer directly to suits of a civil nature pending in the state courts of which the federal courts are given jurisdiction by the preceding section. It is true that section 2 further provides that:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove. * * *

—And this is followed by the further clause that, where a suit is now pending, or may hereafter be brought, it may be removed on the ground of local prejudice, etc. But it does not seem to us that this enlarges the limit stated in the second clause, for the reason that there are no suits "mentioned in this section," aside from those embodied in the first and second clauses of the section, in both of which reference is made, as has been observed, to the preceding section; and we must assume that the third clause of section 2, which gives the right of removal to one of several defendants, and the fourth clause, which gives the right of removal of a suit on the ground of local prejudice, have reference to cases included within the first and second clauses. *Malone v. Railroad Co.*, 35 Fed. 625, 626; *In re Pennsylvania Co.*, 137 U. S. 451, 454-456, 11 Sup. Ct. 141. In other words, the third clause gives the right of removal to one of several defendants, and the fourth clause gives the right of removal on the ground of prejudice and local influence; or, in other words still, the first and second clauses of section 2 define the classes of cases which may be removed, while the third and fourth clauses merely give the right of removal in the same class of cases to particular parties and upon particular grounds. The only enumeration of removable cases is in the first part of the section, and it is reasonable to assume that, if it was intended to enlarge the classes in the latter part of the section, which gives the right of removal to one of several defendants as a matter of right, and to all at any time before trial, if local prejudice is established, it would have given some intimation of the particular cases which were intended to be covered, and which were not included within the general terms embodied in the first and second clauses.

We are not unmindful of the fact that there is contrary judicial expression in some of the circuits; but, having in mind that this distinct point has been determined by the supreme court in the case last mentioned, and that the statute of 1887 was "mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States," (*Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303,) and, as has been often declared by the supreme court, was "to contract, not to enlarge, the jurisdiction," (*Shaw v. Mining Co.*, 145 U. S. 444, 449, 12 Sup. Ct. 935; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. 141,) "to restrain the volume of litigation pouring in to the federal courts, and to return to the standard of the judiciary act," (*Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. 207,) we are not left in doubt as to the proper construction of the section under con-

sideration. And it follows as a result that, as that part of section 2 which defines and limits the removable causes makes reference to the jurisdiction given by the preceding section, we must look to the preceding section for the purpose of ascertaining our authority in respect to the case now before us. Through that part of section 1 which is material to this case we find that congress has provided that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature *at common law or in equity*, in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds \$2,000.

There is no question in the case before us as to the fact that a controversy exists having some of the forms of a suit between citizens of different states, and that the sum involved exceeds the statutory limit. The only question, therefore, to consider is whether the proceeding is either a suit of a civil nature at common law or in equity, (*Reed v. Reed*, 31 Fed. 49,) within the meaning of the act of congress which describes and limits the jurisdiction of circuit courts; and upon this general question it becomes necessary for us to inquire—First, as to the sense in which the term is used; and, second, as to the nature of the proceeding. As said in the court of appeals in this circuit in *Richmond v. Atwood*, 5 U. S. App. 151, 2 C. C. A. 596, 52 Fed. 10, 22: "We must assume that congress used the term * * * in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts." We may also look to the system of procedure as understood and practiced in England, from which we borrow, so far as the same is not repugnant to our institutions. It is not to be presumed that congress, in limiting or describing the judicial power to be exercised under the constitution, used these words in any narrow or local sense; but, on the contrary, in the broad common-law sense in which equity and common-law jurisprudence is understood in this country and in England.

In statutes where congress expressly enumerates, such enumeration is, of course, controlling; but where this course is not adopted, and common-law terms and phrases are employed, then the intention is to be ascertained in the light of the system to which reference is made. It may be within the discretion of congress, under the constitutional grant of judicial power, to confer jurisdiction over a controversy of this character. But has congress done this? Was it so intended by the act of 1887? The intention of congress is the rule of construction, and it is only where the intention is clear that courts will enlarge their jurisdiction, and include a class of cases over which jurisdiction has not theretofore been exercised, and especially would this be so where federal interference would be against public policy, the common understanding for a hundred years, and when the assumption of jurisdiction would seriously interfere with the prompt administration of justice in the courts of the state. Probate proceedings to establish wills have never, in England or this country, been distinctively classed on either the common-law or equity side of jurisprudence; and neither courts of law nor equity,

exercising their functions under what is known as the common-law and equity system of jurisprudence, have interfered, except on special and exceptional grounds, like restoring a lost will, construing doubtful provisions of wills already established, or by auxiliary proceedings to enjoin, etc. Mr. Justice Bradley, in the case of *Broderrick's Will*, 21 Wall. 503, forcibly states the general rule that courts of equity will not interfere with the probate of wills:

"Whatever may have been the original ground of this rule," he says,—page 509,—"(perhaps something in the peculiar constitution of English courts,) the most satisfactory ground for its continued prevalence is that the constitution of a succession to a deceased person's estate partakes in some degree of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding," etc.

Again, he says, (page 517:)

"On the establishment or nonestablishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so."

Recurring to the English system, it will be seen that the high court of chancery at an early day declared that it had no jurisdiction to determine the validity of a will, either of real or personal estate. *Jones v. Jones*, 3 Mer. 161; *Jones v. Frost*, Jac. 466; *Ryves v. Duke of Wellington*, 9 Beav. 579. The last case is of peculiar force, for the reason that it involved the will of George III., and it was said that, looking at the origin of the jurisdiction of the ecclesiastical court in matters of probate, it was clear that that court could have no jurisdiction of the will of a sovereign, and that there was, therefore, an unusual call for the interposition of chancery relief. The Duke of Wellington put in a general demurrer "for want of equity, and for that the matters contained in the bill are not cognizable by this court." Lord Langdale, master of the rolls, in disposing of the demurrer, which was sustained, observed that:

"It is not denied that in ordinary cases this court has no jurisdiction to determine upon the validity of a will of personal estate, and that in all cases in which parties apply for the construction of a will, or for payment of legacies under a will, this court proceeds only on the foundation of a will proved in a court of competent jurisdiction. * * * I do not think that it is necessary, or that it would be useful, on this occasion, to trace the history of the jurisdiction exercised by other courts in the establishment of the validity of testamentary instruments, or the history of the jurisdiction of this court in making decrees for the payment of debts and legacies, and for taking the accounts which are ancillary to those objects. The court does interfere for the protection of property *pendente lite* for probate; * * * but relief, under a will produced, is given only in cases where grants have been made of probate or of letters of administration. * * * It was argued that, if no remedy can be obtained here, the law of England does not afford any remedy for an alleged wrong such as is stated on this record. I may observe that the absence of a remedy for a supposed wrong in another place is not, of itself, any reason for this court assuming a jurisdiction on the subject."

In conclusion the master of the rolls says:

"I am of opinion that there is nothing to take this case out of the ordinary rule, which requires a will to be proved in a proper court before relief is given under it in this court."

In a recent case in the chancery division, (*Pinney v. Hunt*, 6 Ch. Div. 98,) decided since the judicature act of 1873, which confers like jurisdiction on all divisions, the question was under discussion as to whether chancery should grant relief, and Sir George Jessel, master of the rolls, said:

"The jurisdiction I am asked to exercise is that of granting probate. * * * Now, it does appear to me to be exceedingly inconvenient for many reasons that any judge except a judge in the probate division should grant probate. In the first place, a question of a disputed will can be much better tried before a judge who has had experience in such matters, and in a division in which all the proceedings incident to the grant of probate, such as citations, and so forth, are accustomed to be taken, than before a judge who has had no such experience, and in a division not possessing the requisite machinery for dealing with such business."

It must be borne in mind that we are examining this question not for the purpose of ascertaining whether a will proceeding, when issues are framed for the jury under the New Hampshire practice, takes some of the forms of a suit at law or proceeding in equity, but for the purpose of ascertaining whether, as a matter of substance, proceedings to establish a will so clearly belong to "suits of a civil nature at common law or in equity" as to justify the conclusion that congress intended to confer jurisdiction through the use of the general common-law terms employed, and upon this question there would seem to be no doubt.

It probably will not be contended that a will contest is a suit of a civil nature at common law, for the reason that an action at law to prove and establish a will is an unknown proceeding. In proceedings to establish wills there is no writ or summons or pleadings. And it must also be assumed that such proceedings are not suits in equity, within the meaning of section 1 of the judiciary acts. At the time of the adoption of the constitution, as well as at the time of the enactments of the various judiciary acts thereunder, the probate of wills was distinctively understood as belonging to the ecclesiastical and probate courts in England, and to the probate courts in this country. Jurisdiction to probate wills and grant administration in the provinces was withdrawn from the spiritual courts and conferred upon probate courts as early as 1687, (2 N. H. Provincial Papers, pp. 16, 17; 3 Colonial Records Conn. pp. 423, 424; Acts and Laws Province of N. H. 1696-1725, pp. 5, 102-104; Provincial Laws 1771, pp. 6, 106, 107;) and in New Hampshire, previous to the adoption of the constitution, the appeal was to the governor and council. When the appeal was to the governor and council there was no trial of issues by jury, and it was nearly 50 years after the adoption of the constitution and the transfer of the appellate jurisdiction to the court as the supreme court of probate that such right was created in will cases, and then it was left in the discretion of the court; and in those respects will proceedings were not suits of a civil nature at common law. See *Smith*, (N. H.) 450; *Patrick v. Cowles*, 45

N. H. 553, 555; Act 4, Geo. I., Prov. Laws, pp. 20, 22; *Higbee v. Bacon*, 11 Pick. 423; *Stearns v. Fiske*, 18 Pick. 27; *Wood v. Stone*, 39 N. H. 575. See, also, Laws N. H. 1830, pp. 374, 375; Laws N. H. 1792, p. 39; Laws N. H. 1815, p. 202, § 15; *Id.* p. 206, § 2; *Id.* p. 223, § 4; Laws N. H. 1830, p. 348, § 9. Probate jurisdiction in this country, and ecclesiastical and probate jurisdiction in England, as a separate and distinct branch of the law, have had as distinct and definite a meaning as common-law or equity jurisprudence or as admiralty jurisdiction, and a construction which would force proceedings of this character within the common-law terms used by congress would be contrary to the spirit of the admonition of Chief Justice Marshall, who, in speaking of the power intrusted by the constitution and laws of the United States to federal courts, said (*Fisher v. Cockerell*, 5 Pet. 248, 259) that "we must tread the direct and narrow path prescribed for us."

We have been forcibly admonished by learned counsel that we should give "clear and definite answer" to certain points made in the last printed argument submitted, and of our duty not to shrink from jurisdiction which the constitution has conferred in controversies which arise between citizens of different states; but counsel should ever bear in mind the view expressed by the late Chief Justice Chase in *Ex parte McCordle*, 7 Wall. 515, that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the constitution and the laws confer."

The supreme court has repeatedly and uniformly disclaimed any jurisdiction over proceedings to probate or establish wills. In *Tarver v. Tarver*, 9 Pet. 174, 180, decided in 1835, it was held that a bill in equity could not be sustained on the ground that the probate was void, that an original bill would not lie for that purpose, and that the remedy was by an appeal according to the provisions of the law of Alabama. The case of *Fouvergne v. City of New Orleans*, 18 How. 470, was a bill in equity setting forth undue influence and fraud in the execution of a will, and in procuring a sham decree of probate, and it was expressly said that the decree was to be treated as the judicial act of a court of competent jurisdiction; that courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will; and that an original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. And in the more recent case of *Ellis v. Davis*, 109 U. S. 485, 494, 3 Sup. Ct. 327, the supreme court reviews the question of equity jurisdiction both in this country and in England, and distinctly affirms the case of *Broderick's Will*, *supra*, in the following unmistakable language:

"It is contended, however, for the appellants," says Mr. Justice Matthews, "that the bill ought to have been maintained for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far, at least, as it gave effect to the will as a muniment of title. It is well settled that no such jurisdiction belongs to the circuit courts of the United States, as courts of equity; for courts of equity as such, by virtue of their general authority to enforce equitable rights and remedies, do not admin-

ister relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of Broderick's Will, 21 Wall. 503. It was elaborately considered and finally determined in England by the house of lords in the case of Allen v. McPherson, 1 H. L. Cas. 191."

In a still more recent case in the sixth circuit (*Ball v. Tompkins*, 41 Fed. 486) the court undertakes to state the controversies respecting estates over which courts of equity exercise jurisdiction in England and this country, and expressly excludes from equity the probate of wills. *Simmons v. Saul*, 138 U. S. 439, 459, 460, 11 Sup. Ct. 369, was a suit in equity to set aside letters of administration upon a succession, and the supreme court, applying to letters of administration the doctrine established in the case of Broderick's Will, that courts of probate have exclusive jurisdiction, affirmed the decree of the circuit court dismissing the bill, for the reason that a court of equity will not entertain jurisdiction on the ground of fraud to set aside the granting of letters of administration.

With a view of ascertaining whether proceedings to establish wills are commonly classed and known as suits at common law or in equity, and therefore such as could be originally brought in the circuit courts of the United States under the act of congress conferring "original cognizance, concurrent with the courts of the several states," we may well look to the decisions of the state courts regulating their own jurisdiction. In Vermont, courts of probate are treated as having exclusive jurisdiction of the settlement of estates to the same extent that jurisdiction of matters of contract and tort is given to the common-law courts, and courts of chancery disclaim jurisdiction over the subject-matter of probate, (*Adams v. Adams*, 22 Vt. 50; *Boyden v. Ward*, 38 Vt. 628, 632;) and courts of law, as such, exercise only the appellate jurisdiction created by statute, (*Holmes v. Holmes' Estate*, 26 Vt. 536,) asserting no general jurisdiction to hear and determine the merits, (*Goff v. Robinson*, 60 Vt. 633, 15 Atl. 339; *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993.) In Maine the courts early expressed a like understanding, and forcibly re-enforced such view (*Given v. Simpson*, 5 Greenl. 303, 307) upon the ground that a system peculiar in itself was by law established for regulating and enforcing the settlement of estates by the judge of probate, and that the exercise of equity jurisdiction in such cases would disturb and derange the system, and for these reasons the court signified its disinclination to extend its equity jurisdiction by construction. "It is enough," says the court, "for us to take cognizance of those cases which are clearly embraced by the language which the legislature has used in the delegation of our equity powers." In Massachusetts, even on appeal, courts of equity cannot exercise equity jurisdiction over the subject-matter, (*Grinnell v. Baxter*, 17 Pick. 383,) and as to proceedings in the probate court, when, upon the face of the papers, such court has jurisdiction, the supreme court has no equity jurisdiction, even if the same was void for fraud, (*Jenison v. Hapgood*, 7 Pick. 1; *Peters v. Peters*, 8 Cush. 529, 536; *Wolcott v. Wolcott*, 140 Mass. 194, 3 N. E. 214.) In Rhode Island, courts of equity, as such, decline to interfere with the appellate jurisdiction exercised by the supreme

court of probate. It would be inferred from *Blake v. Butler*, 10 R. I. 133, that courts of equity exercise concurrent statutory jurisdiction with the supreme court of probate; but we have not been able to discover anything in the decisions by the Rhode Island courts which would indicate that the courts of equity classed probate proceedings as within original equity jurisdiction. See, also, recent case of *Mitchell v. Hughes*, (Colo. App.) 32 Pac. 185; Pom. Eq. (Ed. 1881,) §§ 77, 171, 1158, as well as section 1154, and note, where jurisdiction exercised by the courts of equity of the various states is discussed. Looking to New Hampshire, from whence this proceeding comes, we find that the probate courts are created by statute, and exercise distinct and exclusive jurisdiction over proceedings to establish wills; that the remedy of parties aggrieved by the decree of a judge of probate establishing a will is not by common-law suits or suits in equity, but by statutory appeal to the supreme court of probate, which is designated as such, and where the case "is to be tried in this, the supreme court of probate, according to the principles adopted and the rules applied for the trial of the same questions in the probate court." *Boardman v. Woodman*, 47 N. H. 120, 132; *Laws N. H.* 1815, p. 206, § 2; *Id.* p. 223, § 4; *Laws N. H.* 1830, p. 348, § 9. And, the decree not being vacated by the appeal, the adjudicated will remains established until and unless the decree is reversed by the supreme court of probate. In New Hampshire there is no common-law or equity suit for the establishment or disestablishment of wills, the only jurisdiction in this respect being statutory and probate, and, as such, is a branch of jurisprudence distinct from law and equity as administered in that state. As a result, a decree admitting a will to probate remains as a decree of a court having exclusive jurisdiction, (*Poplin v. Hawke*, 8 N. H. 124, 126, 127; *Strong v. Perkins*, 3 N. H. 517, 518; *Barstow v. Sprague*, 40 N. H. 27, 30, 31; *Ayer v. Messer*, 59 N. H. 279, 280; *Symmes v. Libbey, Smith*, [N. H.] 137,) and is binding upon the world, unless some party aggrieved, within the statutory limit as to time, successfully pursues his only remedy to vacate the same, which is statutory, appellate, and local. While such a decree stands in the probate court, and while a proceeding is pending in the supreme court of probate to the end, if successful, of vacating such a decree, the petitioner seeks to remove the same to the federal court, on the ground that by virtue of such appeal it has become a suit or controversy within the acts of congress authorizing removal.

We cannot determine this question by the application of that large class of cases like *Boom Co. v. Patterson*, 98 U. S. 403, 406, which liberally construe the words "suit" or "controversy," used in the removal acts of the older statutes. We look upon the broad provisions of the second section of the act of 1875, and the decisions thereon, as to the meaning of the words "suit" and "controversy," as superseded by the second section of the act of 1887 and the decision of the supreme court in *Re Pennsylvania Co.*, 137 U. S. 451, 454-456, 11 Sup. Ct. 141, where it is distinctly held (and on careful consideration, as Mr. Justice Bradley observes) that the cases described in the third and fourth clauses of section 2 are

only special cases comprised in the preceding clauses of the same section; and the preceding clauses, for their description and limit, referring to suits of a civil nature at common law or in equity named in section 1, over which the federal courts have original cognizance, concurrent with the courts of the state, we must look to that section alone for jurisdictional warrant. And in view of the common understanding as to the meaning of the phrase, "suits of a civil nature at common law or in equity," in England and in the various courts of this country, state and federal, we have no doubt as to our duty to adopt a construction which excludes probate proceedings to establish wills.

The case of *Reed v. Reed*, 31 Fed. 49, was a will case, and contains a satisfactory and logical discussion by Judge Welker of the provisions of the statute which we are now considering, and the result reached is that since the act of 1887 federal courts have no jurisdiction of a proceeding to contest the validity of a will in a proceeding coming from the state of Ohio. In the well-considered case of *Yuba Co. v. Pioneer Gold Mining Co.*, in the ninth circuit, decided in the same year, and reported 32 Fed. 183,—a case in the circuit court,—in which Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin all sat and concurred, it was stated as clear in the minds of the judges sitting that by the act of 1887 "congress only intended to authorize the removal of such cases as could be brought originally in the United States courts and in the court to which the removal is to be made."

It is not suggested in the case before us, nor could it be claimed with any show of reason, that a cause to prove and establish a will could be originally brought in the federal courts.

The adoption of the construction that the common-law term employed in section 1 of the statute describes and limits the grant of judicial power and the cases removable under section 2 does not involve the assumption that federal jurisdiction in law and equity is thereby limited to remedies afforded by such courts at the old common law; on the contrary, it is understood that jurisdiction extends beyond and includes the enlarged remedies under statutory, common-law, and equity expansion, and such jurisdiction as is ordinarily exercised by common-law courts and courts of equity in the state from which the cause may come. *Railroad Co. v. Whitton*, 13 Wall. 270, 287; *Denneck v. Railroad Co.*, 103 U. S. 11; *Ellis v. Davis*, 109 U. S. 485, 497, 3 Sup. Ct. 327; *Gaines v. Fuentes*, 92 U. S. 10, 20, 21. But applying the statute in this modern and broader view to a state like New Hampshire, where the common-law and equity courts, as such, are not clothed with statutory jurisdiction in respect to the probate and establishment of wills, and where such matters are exercised exclusively by the probate courts, such proceedings are not included within its terms or spirit. Moreover, in construing a statute of this character, and ascertaining the intent of congress, if the intention were doubtful, we might and ought to consider the common understanding, as well as the consequences which would result,—which view would best harmonize with the theory of our government, and tend in the highest de-

gree to promote the administration of justice,—and upon this phase of the question the reasons are many and weighty why probate matters should be left with the state courts. It is not necessary for us to enlarge upon the reasons of public policy, economy, convenience, speed, and the process necessary for the adjustment of such affairs, stated in the various decisions in this country and in England during the past 100 years as reasons for leaving such proceedings with the ecclesiastical and probate courts free from the interference of courts of law and equity, except when exercising jurisdiction in aid thereof.

There is another rule of construction which applies with force, and that is this: that the express term, "suits of a civil nature at common law or in equity," used for the purpose of describing classes, implies a negative to the exercise of jurisdiction over any other class of cases. The enumeration includes only suits at common law and in equity, and therefore excludes all other classes, upon the well-known maxim, "*Expressio unius est exclusio alterius*," as well as upon the rule of construction adopted by the supreme court respecting its own appellate powers that, while such powers are given by the constitution, they are limited and regulated by statutes, (*Durousseau v. U. S.*, 6 Cranch, 307,) and that, congress having described the jurisdiction, such description implies a negative to the exercise of such appellate power named in the constitution as is not comprehended within the acts of congress, (*Id.* 314; *U. S. v. Young*, 94 U. S. 259; *Ex parte Vallandigham*, 1 Wall. 251; *Railroad Co. v. Grant*, 98 U. S. 401.)

In conclusion, upon this branch of the case, we must remark that we are quite content to act upon the supposition that when congress intends to clothe the federal circuit courts with probate jurisdiction—a jurisdiction which the profession and the people since the organization of the government have looked upon as properly and rightfully residing exclusively with the probate courts of the states—it will not leave the matter to doubtful and dubious construction, but will convey its intention through clear, apt, and unmistakable language.

Original and unquestionable jurisdiction will be jealously guarded; but there is a broad distinction between cases within the provisions of the federal statutes as to original jurisdiction and cases brought before the courts under the removal provisions thereof. In the removal class there is no fundamental right involved. The right of removal is a privilege which congress may confer, limit, or withhold. The constitutional grant of judicial power was intended as a reasonable safeguard, among other things, against local prejudice; but congress has never undertaken, contrary to the theory of common law and equity, to confer jurisdiction so broadly as to interfere with the proof and probate of wills, which, in a sense at least, are local proceedings in rem, over which there is no common-law jurisdiction. It was with regard to public policy, convenience, economy, and the local character of this class of affairs that in England and in this country the broad and somewhat elastic chancery jurisdiction has not included controversies relating to the

execution and establishment of wills. It has always been considered that the necessary and reasonable speed and convenience referred to by Mr. Justice Bradley in the Broderick Will Case, *supra*, were of more importance than the privilege or opportunity for long drawn out legal controversy. The settlement and distribution of estates involve machinery peculiar to probate courts, and the estates are rare where there is no diverse citizenship among the heirs; and in the majority of probate cases, if the petitioner's contention is true, the question as to whether a will should be probated could be removed to the federal courts with all the necessary delays incident to such conditions. It is a matter of no little consequence to the convenience of citizens and the ordinary administration of justice in the state courts, whether proceedings of this character are left with the convenient forum of the state probate courts, where for more than a century it has been understood they belong, or whether they are to be wrested therefrom, and made subject to federal jurisdiction and regulation; and, as has been already observed, it is to be presumed that when the lawmaking power desires to accomplish such a result it will not leave its purpose in doubt. Again, upon the view most favorable to the petitioner, it is at least doubtful whether cases of this class are so distinctively a branch of the common law and equity as to warrant assumption of jurisdiction; and, circuit courts being courts of limited jurisdiction, and having only such powers as are expressly conferred by congress, jurisdiction should clearly appear; and the rule is that where there is doubt the case should be remanded to the state court, where jurisdiction is not questioned.

The petitioner places great stress upon a class of cases like *Gaines v. Fuentes* and *Ellis v. Davis*, which put in issue the validity of wills. An examination of these cases will disclose that they are not inconsistent with the repeated declarations of the supreme court that federal courts have no jurisdiction over the probate of wills; and the apparent confusion arises from the fact that the cases either came from the territorial courts or from states where by statute courts of equity have been clothed with jurisdiction to entertain bills to set aside wills on the ground of fraud. *Gaines v. Fuentes*, 92 U. S. 10, was a direct proceeding to annul a will already established, based upon a local law vesting the ordinary courts with jurisdiction to that end. Mr. Justice Field, in sustaining jurisdiction in that case, reaffirms the doctrine of the case of *Broderick's Will*, that by the general jurisdiction of courts of equity, as established both in England and in this country, independent of the statutes, a bill will not lie to set aside a will or its probate. "And," he says, (page 21,) "whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But," he says, "that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the federal courts, sitting in states where such statutes exist, will also entertain concur-

rent jurisdiction in a case between proper parties;" thus distinctly putting the decision upon the local law conferring equity jurisdiction, and disclaiming that jurisdiction exists over probate proceedings coming from a state where courts of equity are not clothed with such statutory power. And *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, was a bill in equity to recover property and to set aside a will already established. The court, in its opinion, expressly distinguishes the case then under consideration from those involving proceedings to establish wills, over which it disclaims jurisdiction, and likewise puts the decision sustaining jurisdiction to administer relief in that particular case upon the ground that the law obtaining in the state authorized suits in equity to annul and set aside the probate of a will.

Other cases, like *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906,—have been urged as controlling upon this question. We cannot look upon this class of cases, however, as involving the question which we now have under consideration. *Hess v. Reynolds* was an individual claim presented for allowance in the probate court, and did not involve any question as to the probate of the will. *Clark v. Bever* was a suit against the administrator, based upon a claim against the estate, and in no way put in issue the validity of the will or its probate. *Byers v. McAuley*, in its nature and in the relief sought was somewhat different, in this respect: that it was a bill in equity, originally brought in a circuit court of the United States, to establish a claim against an estate, and for a division of the property; and it was alleged, among other things, that the will was null and void, and that there were two sets of claimants; and the prayer was that the will and the probate be declared void and of no effect; that the administrator be enjoined from disposing of the real estate, from collecting rents therefrom, and that some suitable person be appointed to take charge of it until partition; that a partition be made among the various parties interested, etc. The circuit court undertook, in a measure, to regulate the administration of the deceased person. In the course of the opinion of the supreme court it is stated as a conclusion that the circuit court erred in taking any action or making any decree looking to the mere administration of the estate. It was, however, further held by a majority of the court that the state court, having proceeded so far as the administration of the estate, carries it forward to the time when distribution may be made; in other words, that the debts had been paid, and the estate was ready for distribution, and, no adjudication having been made as to the distributees, that the circuit court might entertain jurisdiction in favor of the nonresident citizens, and determine and award their shares in the estate. Further than that it was not at liberty to go. And that, the federal courts having no original jurisdiction in respect to the administration, the debt or claim thus established must take its place and share in the estate as administered by the probate court.

In seeking to apply the principle involved in the last class of cases to the question under consideration, it must be borne in mind that there is a broad distinction between suits by and against administrators or executors, which may be variously maintained at law or in equity in the state courts, or upon original or removal jurisdiction in the federal courts when diverse citizenship exists, and purely probate proceedings to establish wills in a probate court in a state where such court has jurisdiction exclusive of the courts of law and equity.

Holding these views, we must adhere to our conclusion expressed at the August term, 1892, that the circuit court has no jurisdiction of the subject-matter of the proceeding to establish the Jenness will, and as this petition, in the absence of an express order from this court, did not restore the original cause, but left it in the state court to which it was remanded, it only remains for us to dismiss the petition, and it is so ordered.

COLT, Circuit Judge. I fully concur with Judge ALDRICH in the reasoning and conclusion reached in this opinion.

KNIGHT v. FISHER.

(Circuit Court, E. D. Pennsylvania. November 10, 1893.)

No. 10.

1. BANKS—DEPOSITS—INDIVIDUAL AND TRUST FUNDS—SET-OFF—RECEIVERS.

Debts of a partner and his firm to a bank cannot in equity be set off by a receiver of the bank against trust moneys, which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed.

2. TRIAL TO COURT—AGREED STATEMENT—WAIVER.

A stipulation in an action of assumpsit to submit the case to the court on an agreed statement of facts, with like effect as though the same had been found by a jury, judgment to be entered for the party which the court finds entitled, waives all questions as to the remedy adopted, and judgment may be entered for the party having the equitable right, without inquiring whether the same could be enforced at law.

At Law. Action of assumpsit brought by Robert B. Knight, to the use of Burton Binns, assignee for the benefit of creditors of the Benevolent Order of Active Workers, against Benjamin F. Fisher, receiver of the Spring Garden National Bank. Judgment for plaintiff.

The case was submitted under the following stipulation and statement of facts:

It is hereby agreed by and between the parties to the above case that the following facts shall be submitted to the court for its opinion and judgment, with like effect as though the same had been found by the verdict of a jury. R. B. Knight, being about to leave the city of Philadelphia, gave on the twenty-eighth day of April, 1891, to N. T. Lewis, two thousand dollars, for safe-keeping. This money, with other money of the firm of N. T. Lewis & Sons, was, upon the thirtieth day of April, 1891, deposited to the credit of said firm in the Spring Garden National Bank, against which they had

the full right to draw checks at will. The bank officials had no notice that the money did not belong to the firm of N. T. Lewis & Sons, or that it had been handed to the said Lewis to keep for the said Knight. On the eighth day of May, 1891, the Spring Garden National Bank failed, and closed its doors, and subsequently the defendant was appointed receiver thereof. Upon the thirtieth day of April, after the deposit made upon said day, there stood to the credit of N. T. Lewis & Sons, upon the books of the said bank, the sum of \$2,557.72, and at the time of the failure and appointment of the receiver as aforesaid there remained to the credit of said N. T. Lewis & Sons the sum of \$3,002.75 upon the books of the said bank, and at no time between those dates was there less than \$2,000 on deposit. The said Knight has not received any payment whatever on account of the two thousand dollars, either from the bank or the said Lewis.

The said Lewis, at the time of the failure, was the holder of \$500 of the stock of the Spring Garden National Bank, and was duly assessed by the comptroller of the currency in said sum of \$500, which, with interest from the 2d day of January, 1892, remains due and unpaid. He was further indebted upon a note dated March 30, 1891, and payable July 2, 1891, for \$1,000, discounted March 30, 1891, by the said bank, for the said firm of N. T. Lewis & Sons, and by the said bank transferred to the clearing house association as collateral security for clearing-house certificates, which note remains due and unpaid. He was further indebted upon a note of Mary E. Gill, dated February 14, 1891, payable four months after date, for \$52.64, upon which a payment of \$27.57 has been made, the balance remaining due and unpaid, the said note having been discounted for the credit of N. T. Lewis & Sons, February 17, 1891. The defendant has refused and still refuses to pay the amount of the deposit, or a dividend thereon, either to Knight or Lewis. On the eighth day of March, 1893, the said Knight executed an assignment of all claims held by him against both N. T. Lewis and the defendant, to Burton Binns, Esq., assignee for the benefit of creditors of the Benevolent Order of Active Workers, as per copy hereto annexed.

If, on the above facts, the court shall be of opinion that the receiver is entitled to set off the said liability of Lewis as a stockholder of the Spring Garden National Bank, and the amount of said note of \$1,000 and interest thereon from dates of maturity, against the claim of the plaintiff, then judgment to be entered for the defendant, but otherwise for the plaintiff, for the sum of two thousand dollars, with interest and costs. Each party reserves the right to take a writ of error from the decision of the court.

Henry Budd, for plaintiff.

Ellery P. Ingham, for defendant.

BUTLER, District Judge. The case is here on an agreed statement of facts. The only question is whether the defendant is entitled to set off the assessment made on Mr. Lewis' stock, and the \$1,000 note discounted prior to the deposit sued for. If he is so entitled judgment must be entered (under the agreement) for the defendant, otherwise for the plaintiff. Any question which might have arisen respecting the remedy adopted, (a suit at law) is waived. If the money may be recovered in equity he is entitled to judgment; for in such case it is the plaintiff's and the proposed set-off cannot be allowed. If the note had been discounted after the deposit and therefore presumably on the faith of it, or the defendant's situation respecting it, or respecting the assessment, had been prejudiced by reason of the deposit being in Lewis & Sons' name, the result would be otherwise. Of course, the defendant cannot discharge a debt due the plaintiff by crediting it with a debt due by Mr. Lewis. If, as before suggested he had suffered disadvantage from the deposit being in Lewis & Sons' name, he would have a defense to

this extent. But he suffered no disadvantage. He did nothing whatever on the faith of the deposit, and has no just cause to complain of its payment to the plaintiff, if it is his.

We have nothing to do, therefore, but to decide whether the money, as between him and Lewis & Sons, is his. Mr. Lewis was his trustee for the \$2,000—holding it for safe-keeping. He deposited it in bank, presumably in pursuance of his duty, though in his firm's name. It remained there until the bank closed, (a very few days later) and was then delivered to the receiver with other funds of the bank. Possibly it might be contended that the terms of the agreement do not render it clear that the money remained in the bank, though Lewis & Sons' deposits at no time thereafter fell below \$2,000. No such suggestion, however, has been made. On the contrary the case was presented by both parties on the hypothesis that the money did continue in the bank; and this is manifestly what the agreement intended to express. Two thousand dollars remained there continuously; and in the very short period which elapsed between the deposit and the bank's failure, it is improbable that many changes occurred in the amount. The fact however if contested, might not be important. Money bears no earmark, and it is sufficient in such cases to trace the fund, as this is traced. The general subject has been so frequently and so fully discussed by the courts that nothing can profitably be added to what has been said. In the following cases it has been discussed with reference to the varied circumstances which they present: *Frazier v. Bank*, 8 Watts & S. 18; *Bank v. Jones*, 42 Pa. St. 536; *Stair v. Bank*, 55 Pa. St. 364; *Bank v. King*, 57 Pa. St. 202. Some English cases (suits at law) among them *Sims v. Bond*, 5 Barn. & Adol. 389, and *Tassell v. Cooper*, 9 C. B. 509, seem on first blush to be inharmonious with the foregoing authorities; but this arises from the fact that in England equity was not administered in common-law courts or through common-law forms, at the time; otherwise the apparent conflict would not exist. In *Pennell v. Deffell*, 23 Eng. Law & Eq. 460, the rule as administered there by chancery is stated and applied. It does not differ from that applied in the Pennsylvania cases cited. Without inquiring whether the plaintiff's right to follow and recover his property may be enforced by an action at law in this court, it is sufficient under the agreement as we have seen, that he certainly may do so in equity—in other words it is sufficient to find that the property is his.

Judgment will therefore be entered for the plaintiff.

UNITED STATES, v. MITCHELL.

(District Court, N. D. Ohio, W. D. December 12, 1893.)

No. 826.

CENSUS—REFUSAL TO ANSWER QUESTIONS—CORPORATE OFFICERS.

The provision of the act of July 6, 1892, imposing a penalty for refusal to answer questions upon officers of corporations engaged in pro-

v.58f.no.8—63

ductive industry, from which or from whom answers "are herein required," is ineffective, because there is no provision, in that or any other act, requiring such corporations or their officers to answer the questions.

At Law. Indictment of Jethro G. Mitchell for refusing to answer questions put to him by a census official. On demurrer to the indictment. Sustained, and indictment quashed.

Allan T. Brinsmade, U. S. Dist. Atty.

Frank Hurd and Joseph Cummings, for defendant.

RICKS, District Judge. The defendant is the treasurer of the Mitchell & Rowland Lumber Company, a corporation organized under the laws of Ohio, and on the 20th day of April, 1893, engaged in "a productive industry," to wit, the manufacture of lumber and lath, in this district and division, and in the first supervisor's district of Ohio. He is indicted under an act of congress approved July 6, 1892, which is "An act amendatory of an act entitled 'An act to provide for the taking of the eleventh census,' for refusing and failing to make answers to certain questions propounded to him by David A. Alexander, a special agent of the census office, who was duly employed, appointed, commissioned, and sworn to obtain information in the first supervisor's district of Ohio from corporations engaged in any productive industry, which information was called for and specified in a special schedule, No. 5, approved by the secretary of the interior, in accordance with the provisions of the act of congress named.

The questions which the defendant so refused to answer are set forth in the indictment as follows: A question as to the name of the corporation of which said defendant was then and there the treasurer; a question as to when the establishment of which defendant was treasurer commenced operations; a question as to the kind of goods manufactured by said corporation; a question as to the capital invested in logging, in mill plant, and in live capital; a question as to labor and wages; a question as to material used; a question as to months in operation; a question as to the number of hours in the ordinary day of labor; a question as to the power used in manufacture; a question as to the transportation of logs, how transported to mill, quantity transported during the year, cost of transportation, miles of logging railway used; a question as to number of acres of timbered land, or standing timber, owned by said corporation; a question as to what sawing machinery the said corporation possessed; a question as to whether colored persons had capital invested in the establishment of which the defendant was treasurer. These are the material averments of the indictment, sufficiently set forth for the purpose of considering the questions now involved.

The first defense interposed is that the acts of congress upon which the indictment is predicated do not make it an offense for the president, or other officers named, of a corporation or firm engaged in any productive industry, to refuse to answer the inquiries contained in the schedules prepared by the census bureau, and propounded by the representatives of the census superintend-

ent. Congress unquestionably intended to impose upon such officers the duty to answer such questions, and to prescribe a penalty for a refusal so to do. Do the acts impose such duty? The act of March 3, 1879, (1 Supp. Rev. St. p. 471,) under which the census for 1880 was taken, in section 14, required that the heads of families, or, in their absence, any other member or agent, should, if thereto requested by the census enumerator, etc., "render a true account of every person belonging to such family, in the various particulars required by law," and provided a punishment for a refusal or failure to do so. The second paragraph of the same section provided "that every president, treasurer * * * or managing director of every corporation from which answers to any of the schedules provided for by this act are herein required, who shall, if thereto requested, * * * neglect or refuse to give true and complete answers to any inquiries authorized by this act * * * shall forfeit and pay," etc. This was the first provision of law that seemed to contemplate compulsory answers from corporations to questions propounded by enumerators or other officers of the census bureau. The first paragraph above quoted not only required the census enumerators to obtain from heads of families, or from their agents or representatives, the information required by law, but imposed a duty upon such persons to give the information required, with a penalty for failing or refusing so to do; but the blank forms and schedules furnished by the secretary of the interior to enumerators for ascertaining statistics and facts concerning products of industry provided only for such information as the persons interested voluntarily imparted. The second paragraph, as already quoted, provided both a penalty and punishment for officers of corporations "from which answers to any of the schedules provided for by this act are herein required," who shall, if thereto requested by the supervisor, enumerator, etc., refuse or fail to answer any inquiries authorized, etc. Section 17 of the same act extended the scope of the schedules used in the tenth census, and provided that the superintendent of the census shall require and obtain from every railroad, express, telegraph, life insurance, and fire and marine insurance company the facts specifically set forth in the law as to the business of each of said kind of public or quasi public corporations. This was the first provision of any legislative act authorizing a census to be taken, which contained a clause requiring the superintendent of census to obtain information of the character indicated from such corporations. In a note by the editor and compiler of the supplement (volume 1) to the Revised Statutes, referring to this act, it is said:

"This act seems to supersede all the provisions of the Revised Statutes on the subject, retaining, by section 17, the schedules set forth in Rev. St. § 2206."

The only provision of law in force prior to the act of March 3, 1879, above referred to, relating to the compulsory answers to the questions of census enumerators, was section 2191 of Revised Statutes, which provided:

Every person more than twenty-one years of age belonging to any family residing in any subdivision and in case of the absence of the head and other members of any such family, then any agent of such family shall upon the request of the marshal or his assistant, render a true account to the best of his knowledge of every person belonging to such family, in the various particulars required herein, and the tables hereto subjoined; and for any refusal whatever to answer either of the inquiries authorized by law, such persons shall be liable to a penalty of thirty dollars, to be sued for and recovered in an action by the assistant marshal for the use of the United States."

This provision of the statutes was substantially re-enacted in the first paragraph of section 14 of the act of March 3, 1879, and the second provision, as before quoted, was no doubt intended to provide a punishment for officers of corporations who refuse to comply with the law. The next legislation, in order of time, was the act of March 1, 1889, (25 Stat. 760.) In that act the second paragraph of section 14, last above referred to, is amended by the second paragraph of section 15, and extended as to the officers to be included, and repealing the penalty part of the punishment, and extending the latter to fine or imprisonment. This paragraph of section 15 was again amended by the act of July 6, 1892, (27 Stat. 86,) which reads as follows:

"An act amendatory of an act entitled 'An act to provide for the taking of the eleventh census.'

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that sections 15 and 17 of the act entitled 'An act to provide for taking the eleventh and subsequent censuses,' approved March 1, 1889, be and the same are hereby amended so that the superintendent of census shall be required to obtain from every incorporated and unincorporated company, firm, association, or person engaged in any productive industry, the information called for and specified in general and special schedules heretofore approved, or to be hereafter approved by the secretary of the interior. And every president, treasurer, secretary, agent, director or other officer of every corporation engaged in such productive industry, and every person, firm, manager, or agent of unincorporated companies, and members of firms, associations or individuals likewise engaged in such productive industry from which or from whom answers to any of the inquiries contained in the said schedules are herein required, who shall if thereto requested by the superintendent of census, supervisor, enumerator, or special agent, or each or any of them, wilfully neglect or refuse to give true and complete answers to any inquiry or inquiries contained in the said schedules, or shall wilfully give false information in respect thereto, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum not exceeding ten thousand dollars, to which may be added imprisonment for a period not exceeding one year, and all acts or parts of acts in conflict herewith are hereby repealed."

These several acts clearly indicate that it was the intent of congress to impose a duty upon the officers of corporations engaged in any productive industry to answer such questions as the schedules contain, or such as might be propounded by the enumerators, special agents, or other persons duly authorized by the superintendent of census to gather the information desired. But a careful examination of all the acts published impels me to the conclusion that no such duty was imposed. The act of July 6, 1892, was evidently passed upon the assumption that the answers to inquiries "herein required" were to be compulsory because of some duty imposed by

some other section. The language in all the acts cited clearly implies that, in some other sections of the act, provisions were contained which required the corporations and firms named to answer the questions contained in the schedule. The offense contemplated by the act is refusing to answer questions propounded in the printed schedules, which it was assumed the law required to be answered, and which the officer requested to be answered; but, as before stated, no such duty was imposed by either of the acts. A duty of that character is imposed by a distinct provision of law upon the head of a family, or the other persons required to make answer in his absence, and the requirement as to them is clearly defined to be to "render a true account, to the best of his or her knowledge, of every person belonging to such family, in the various particulars required by law."

By section 17 of the act of March 3, 1879, as amended by the act of March 1, 1889, the duty is imposed upon the superintendent of census to "require and obtain" from every railroad, telegraph, express and insurance company described in that act, the information therein designated. Under the act upon which this indictment is based, the superintendent of the census is "required to obtain * * * the information called for and specified in the schedules, * * * to be approved by the secretary of the interior." Here the superintendent is required to obtain information "from firms engaged in productive industries." In the case of the railroad, telegraph, and other corporations covered by the act of 1879, the superintendent is directed to "require from every railroad corporation the following facts." In the one case, the superintendent is required to obtain information; in the other, the railroad companies are required to give information. In the one case, a duty is imposed upon the superintendent; in the other, it is imposed upon the corporation. But it may be said that congress manifestly intended to impose such a duty, and that it is clearly implied from the law. But this is a criminal proceeding, and, to confer jurisdiction upon the federal courts in such cases, an offense must be clearly defined and created by statute. We have no jurisdiction over any other offenses. In the case of *U. S. v. Hudson*, 7 Cranch, 32, Mr. Justice Johnson, speaking for the supreme court, said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." In *U. S. v. Lancaster*, 2 McLean, 431, the court declared: "Nothing can be punished, under the laws of the United States, which is not made criminal by statute." This limits the jurisdiction of the federal courts to statutory offenses. We cannot extend the law to cover a failure to do an act required to be done only by implication of law. To make the failure or refusal to perform a duty a criminal offense cognizable in this court, the act of congress must clearly define that duty and declare the punishment. That has not been done.

The next objection to the indictment is that "the act of congress under which said pretended indictment is founded is unconstitutional and void, for the reason that congress had no constitutional

authority to pass said act." The authority for such legislation is based on article 1, § 2, par. 3, of the constitution, which provides:

"Representatives and direct taxes shall be apportioned among the several states which may be included in the Union according to their respective numbers. * * * The actual enumeration shall be made within three years after the first meeting of congress and within every subsequent term of ten years, in such manner as they shall by law direct."

Article 1, § 9, par. 4, provides:

"No capitation or other direct tax shall be laid unless in proportion to the census of enumeration hereinbefore directed to be taken."

It is contended that the object of the enumeration is to ascertain the numbers so as to establish a basis for representative apportionment and for direct taxes. Direct taxes are either capitation taxes or land taxes, and, when levied by congress, it fixes so much as lies among the different states according to their numbers, not according to their property or wealth; so representation is based not upon property or wealth, but upon numbers. Therefore, to accomplish the object in view, it is not necessary to inquire as to property, or wealth, or business. Chief Justice Marshall in *Loughborough v. Blake*, 5 Wheat. 317, declared:

"The direct and declared object of the census is to furnish a standard by which representatives and direct taxes may be apportioned among the several states which may be included in this Union."

It is further contended that congress has only such legislative powers as are expressly conferred, and it cannot be claimed that a power to take an enumeration for the purposes above declared confers, by implication, a power to ascertain the value of property or the methods of using it.

It is further earnestly contended that the legislation hereinbefore considered, seeking a compulsory answer to inquiries about business and property, is violative of certain provisions of the bill of rights and the constitution. Article 4 of the bill of rights provides:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause," etc.

It is urged that the demand of a special agent of the census bureau, under the act of congress, from the defendant, of his books and papers, that he might search them for information, would be a violation of this provision of the bill of rights, and that there would be no difference between such a demand and the requirement to compel him to furnish the same information at his own expense, upon penalty of fine or imprisonment for failure so to do. In either case, the books and papers of the citizen are searched and seized. Article 5 of the bill of rights provides:

"Nor shall any person be deprived of life, liberty or property without due process of law, nor shall private property be taken without just compensation."

These reasons are urged with great force against the validity of this legislation.

In view of the conclusion reached under the first objection to this indictment, I might possibly pass this graver objection without further consideration of the claims of counsel, as above stated. But as future legislation will be necessary to remedy the defect found in existing statutes, should this opinion be affirmed by the supreme court, it may not be amiss to suggest that there may be a limit to the power of congress to compel a citizen to disclose information concerning his business undertakings, and the manner in which they are carried on. This limit must relate, not only to the kind of information he may properly refuse to disclose, because it may be equivalent to the appropriation of private property for public use without just compensation, but also to the extent of the information required, as well as to the time within which it shall be given. Certain kinds of information valuable to the public, and useful to the legislative branches of the government as the basis for proper laws, have heretofore been voluntarily given, and may properly be required from the citizen, when it is not of property value, or when the collection, compilation, and preparation thereof does not impose great expense and labor for which compensation is not provided. It is not infrequent, however, that answers to questions propounded in some schedules, if fully and properly prepared, involve the collection and compilation of facts that require the labor of a large force of clerks for days and weeks, entailing great expense and embarrassment to the ordinary business of the citizen. Is it within the power of congress to make such answers compulsory, and require the citizen to neglect his usual business, with loss, and to prepare this information at a great personal expense, without proper compensation? Or if a citizen, by his long experience in a special line of business, and by his superior organizing and administrative ability, has so systematized it that he can carry it on at a much less expense and with greater facility than others, is it right to compel him to disclose the information so acquired, and thereby open to his rivals in trade the methods by which he has been able to outstrip them in the sharp competition for business? Is not the system so established, and the knowledge so acquired, as much a property right to him as the land and shop in which he conducts his business? and can he be compelled to part with the former without due compensation more justly than with the latter? The zeal with which such information is sometimes solicited to maintain favorite theories of public officials, or to afford the basis for discussing economical questions, often leads to excesses, and imposes upon the citizen duties for which no just compensation is afforded, either in money, or in his proportion of the reward of the good results to follow to the public.

As before stated, when such information is required as the basis for proper legislation or the just enforcement of the public laws, the power to compel its disclosure may exist, and, if unusual expense attends its preparation, proper remuneration to the citizen can be made; but the suggestion that information having a property value may be demanded, which the citizen may not be obliged to impart without due compensation, so earnestly pressed by the

learned counsel in this case, still remains undisposed of, and a proper subject for consideration by congress in the future legislation that may be needed to enforce such demands by the census bureau. Of course, these suggestions are not intended to apply to the power of congress to compel answers to questions, propounded to the officers of railroads, telegraph, and insurance companies, corporations of a public character, over the business methods of which the legislative power may be asserted. As to such corporations, the public good requires that wholesome and strict supervision should be exercised, and all the information needed as the basis for such regulation and control should be produced when required. In view of the conclusion reached, it is not necessary to consider other objections urged to the indictment.

The demurrer will be sustained upon the first proposition considered, and the motion to quash is allowed.

UNITED STATES v. SYKES.

(District Court, W. D. North Carolina. October 7, 1893.)

1. OFFICE AND OFFICER—APPOINTMENT—DEPUTY COLLECTOR.

A deputy collector is authorized to act as such when his commission has been signed and placed in the mail, and he is notified thereof by telegram.

2. CRIMINAL LAW—MISDEMEANOR.

When a person commits a misdemeanor under the instructions of another, it is only necessary, in order to implicate the latter, that his instructions have been substantially complied with.

3. SAME—DISTILLED SPIRITS—UNLAWFUL REMOVAL—AIDING AND ABETTING.

The fact that the statute makes the aiding and abetting of another in the removal of illicit spirits a distinct offense does not prevent a person so aiding and abetting from being convicted as a principal in the removal, under the rule making all participants in misdemeanors liable as principals.

4. SAME.

One who, knowing that certain casks of whisky are without revenue stamps, obstructs an officer attempting to seize the same, in order that opportunity may be given for another to escape therewith, is guilty under the statute.

5. SAME—EVIDENCE—ACCOMPLICES.

The rule that a conviction should not be had on the uncorroborated testimony of an accomplice applies when witnesses introduced by defendant confess themselves to be confederates in the crime.

6. SAME—PRESUMPTIONS—BURDEN OF PROOF.

Proof that illegal sales of whisky frequently occur on a man's premises and about his house raises a presumption of fact against him, and places the burden on him to show that the acts were without his knowledge or approval, or that he was powerless to prevent them.

At Law. Indictment of L. G. Sykes for the unlawful removing and selling of spirituous liquors. Verdict of guilty.

Clement Manley and D. A. Covington, for the United States.

James T. Morehead and Jas. E. Boyd, for defendant.

DICK, District Judge, (charging jury.) In the argument for the defense it was insisted that the evidence disclosed on the part of

pretended officers of the law acts and circumstances of high-handed violence very similar to the outrages of lynch law. Lynch law is abhorrent to a court of justice, and should be discountenanced and opposed by all good citizens. Lynch law is defiance of law. The evidence in this case tends to show defiance of law on the part of the defendant. There is a state law that prohibits the sale of spirituous liquors within four miles of the State University, situated at Chapel Hill, and the evidence shows that the defendant had for a long period of time carried spirituous liquors within such prohibited limits, and persistently sold the same, contrary to law. If he had paid the special tax required of retailers, and obtained a license from the federal government, he could not be prosecuted in this court for making sale under such license, but he would be liable to prosecution in the state courts for violation of a law of the state, and his United States license could not be availed of as a defense. The uncontroverted evidence in this case shows that in December last the prosecuting witness, George T. Winston, president of the State University, being informed that a quantity of spirituous liquors were about to be brought to Chapel Hill, applied to the collector of internal revenue in that district, residing at Raleigh, for a special commission authorizing Merrit, as deputy collector, to make seizure of such spirituous liquors if they should be found in unstamped packages. About six hours before the temporary detention and subsequent seizure of such whisky the collector sent a telegram to President Winston, informing him that the requested appointment had been made, and a commission had been duly signed and placed in the mail, to be transmitted to the deputy at Chapel Hill. The telegram was shown to the deputy collector before he attempted to detain the whisky that was in the wagon in the street in front of the residence of the defendant. No formal seizure was made at that time, as the defendant remonstrated, and made demand of the officer to show his commission and authority for detaining the wagon and whisky. During this contention, John B. Sykes, the son of the defendant, who had this wagon in charge, drove off the team rapidly, and probably would have escaped if the wagon had not come in contact with an express wagon in the street. About that time Merrit received his commission as deputy collector from the post office, and he at once made a seizure of the wagon and its contents. I am of opinion that the deputy collector had legal authority to detain the wagon and make seizure of the same and the illicit packages of whisky. As soon as his commission was signed and placed in the post office for transmission by mail, and he was notified by telegram, he became deputy collector, with full authority to make the seizure. The actual receipt of the commission was not essential to his investiture of the office.

He made no invasion of the premises of the defendant, as the wagon was in the public street; and he did not go into the house for the purpose of making a personal arrest, as he had no such authority as deputy collector. I think he acted prudently in not, at that time, making seizure of the wagon, as he was not a well-known officer, and was not able to show his commission when demand was

made by the defendant; but he could in no respect be held liable as a trespasser. When he subsequently made seizure he had his commission in possession, which was visible and conclusive evidence of his authority to seize the wagon and its contents, including the two jugs of whisky carried off by defendant.

In the argument for the defense the active zeal of President Winston was severely criticised. You have the right to pass upon the weight of his testimony, and give it such credit as you may deem proper; and in doing so you must not be influenced by my opinion upon the subject. After giving you this caution, I have the right to express my opinion as to his conduct in this prosecution. He is the president of the State University, and has under his charge and supervision a large number of boys and young men committed to his care by parents and guardians who expect him to guard such students against temptations that may lead them into intemperate and immoral habits. The evidence shows that he has been very vigilant and diligent in this prosecution, and it was his imperative duty to be so. With the information which he possessed as to whisky being brought to Chapel Hill for the purpose of sale, if he had failed to do everything within his power to prevent the violation of a state law expressly enacted for the protection of the moral habits of students, he would have shown himself to be unworthy of the high public trust conferred upon him. Indifference about such matters would have been culpable negligence, and failure of effort to prevent or remove such a dangerous nuisance after full knowledge of its existence would, in a moral point of view, have been criminal disregard of official duty. His position as president of the university shows public opinion as to his high character; and his clear, intelligent, and candid testimony commends itself to your careful consideration. I have given you my personal opinion, but you have the right to give such credit to his testimony as you may think that it deserves.

All the testimony shows that there was in the wagon, when seized, three 10-gallon casks, without the stamps affixed required by law. It is conceded that John B. Sykes, the son of the defendant, is guilty of the misdemeanor of removing said casks of spirits. In misdemeanors there are no accessories, either before or after the fact, all persons concerned in them being considered in law as principals. When the person who actually commits the crime acts under the instructions of another, it is not necessary, in order to implicate the latter, that the instructions be proved to have been precisely followed; it will be sufficient to show that they have been substantially complied with. If a person knows that a misdemeanor has been committed, and afterwards opposes the apprehension of the wrongdoer, or obstructs an officer of the law in the execution of his legal duty in relation thereto, or advises and aids the offender to make his escape, and carry off the subject and evidence of the crime, he becomes guilty of the crime proved to have been previously committed.

The counsel of the defendant requested me to instruct you that the defendant was not liable to conviction under this count in the in-

dictment, as the statute which makes the removal of illicit distilled spirits a criminal offense expressly makes the aiding or abetting of such removal a separate and distinct offense. The statute does make the aiding or abetting in the removal of distilled spirits, on which the proper tax has not been paid, a substantive and distinct criminal offense; but it does not do away with the well-settled and long-established rule of law making all participants in misdemeanors liable as principals, although a conviction or acquittal of one of these offenses could be pleaded in bar to a prosecution for the other.

I will again state to you the principles of law which I think are applicable to this case: that in misdemeanors any person who advises, procures, aids, or abets in the commission of the offense, or who, having knowledge that such offense has been committed, in any way assists the wrongdoer in concealing his crime, or in making his escape from the officers of the law, is a principal; the general rule of law being that whatsoever participation in the transactions, either before or after the fact, would make the party an accessory in felony, will make him a principal in a misdemeanor, and he may be so charged in a bill of indictment. The evidence tends to show that John B. Sykes employed a horse and wagon belonging to his father, the defendant, in the removal of the unstamped packages of whisky; that they were carried, in the nighttime, to the gate of the yard of defendant; that the son knew that he was followed and watched by President Winston; that when the wagon was stopped at the gate the son went into the house, and had a conversation with the defendant; that both of them came out of the house into the street, where the wagon was; that the defendant opposed the detention and seizure by the officer; that while the officer was showing some papers to the defendant, John B. Sykes got in the wagon, and drove off rapidly, until he was stopped by coming in contact with the express wagon; and that defendant objected to seizure when made, and carried off the two jugs of whisky that were in the wagon, claiming them as his property. Now, gentlemen of the jury, if you are fully satisfied from all the facts and circumstances mentioned in the evidence that the defendant, by advice, instruction, or other assistance, aided his son in procuring and removing such illicit whisky, then you can properly return a verdict of guilty against the defendant. If you are fully satisfied from the evidence that after the whisky had been brought to the house of the defendant he knew that the casks of whisky were without stamps affixed, and he obstructed the officer of the law in the execution of his legal duty, in order that his son might have an opportunity of making escape with the wagon and its contents, then you can properly find a verdict of guilty on that view of the case.

The defendant introduced as a witness his son, John B. Sykes, the principal actor in the illegal transaction, for the purpose of showing that he had given him instructions that only tax-paid whisky should be purchased from the distiller, and that it was to be put in properly stamped packages. The witness testified that part of the whisky in all the casks belonged to his father, who had given

him instructions to purchase tax-paid whisky; that it was drawn by the distiller from a stamped barrel, and that his father did not know that the whisky had been put in unstamped casks. On cross-examination it appeared that his testimony on the examination in chief was in conflict with his oral and written declarations and confessions, which tended to show that he had acted in all respects under the advice and instructions of his father in the commission of the crime of removal of the whisky. The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury, and they may believe and act upon such evidence without any confirmation of his statements. But it is the duty of the judge to advise the jury to consider such testimony with great caution, and not regard it as worthy of credit without corroboration by other evidence material to the issues before them. In doing so the judge does not withdraw the case from the jury by positive direction, but only advises them not to give entire credit to such unsupported testimony. These principles and rules of law are well settled in cases where accomplices are introduced as witnesses in the prosecution of defendants. I differ in opinion from the counsel of defendant, as I think that the same principles and rules of law, founded in expediency, reason, and justice, should be applied when a defendant introduces witnesses who confess themselves to be confederates in the crimes alleged in cases on trial.

When a person is found in possession of, or is shown to be culpably connected with, spirituous liquors in packages of more than five gallons' capacity, without the stamps required by law being affixed, the burden of proof is on him to show that such spirits are tax-paid, and were put in unstamped casks without his knowledge, procurement, or connivance. The law requires such packages to be properly stamped, and, if they are without such stamps affixed, the law presumes that they are illicit. A presumption of law is one which a judge draws from the language or principles of the law and from particular facts or evidence, unless or until the truth of such inference is disproved. Such presumption derives its force from the law, and it should only be rebutted by clear and satisfactory proof to the contrary. I advise you that the presumption of law arising in this case should not be overcome by the uncorroborated testimony of an accomplice, who confesses himself to have been the actor in the illegal transaction.

The second count in the indictment charges that the defendant sold spirituous liquors without having paid the special tax required by law, and procured a license authorizing such sale. There is no direct evidence of any specific sale made by the defendant. He admitted to President Winston that he sold whisky, and expected to continue the business. His son—his own witness—testified that he had often carried quantities of whisky to the house of defendant for him. Other witnesses testified that they had sent persons to the house of defendant with empty bottles, which were returned filled with whisky. One witness testified that he and other persons were in the habit of meeting at a blacksmith shop, and mak-

ing arrangements (which he called "patching") to procure whisky, by sending to the house of defendant, which was near said shop; that such arrangements were made more than 25 times; that he saw the agents sent go into the yard of defendant, and one time into the house; that such agents took the money contributed by way of patching, and went with empty bottles, which were returned filled with whisky. As you listened carefully to the testimony, I will not further repeat its details. Presumptive and circumstantial evidence is often as satisfactory proof as direct and positive testimony. Presumptions of fact depend on inferences to be drawn by a jury in ascertaining one fact from the proved existence of another, without the aid of any rule of law. This process of finding out the truth of matters of fact in controversy in a trial at law belongs to the exclusive province of a jury. They may be properly aided by the advice and instruction of the judge, but he should not control them by positive directions, as the whole matter should be left to their free and independent determination. Presumptions of fact have been classified by text writers and judicial decisions as strong, probable, and slight. When a fact proved always accompanies a fact sought to be proved, it gives rise to a strong presumption that may control a jury in their investigation. When the fact proved usually accompanies the fact sought to be proved a probable presumption arises. Slight presumptions, which arise from the occasional connection of distinct facts, are generally disregarded by a jury. Presumptions of fact which the law recognizes must be immediate inferences from the facts proved, and must be such as sensible men, influenced by observation, experience, and reason, would draw from clearly established facts that usually accompany the matter at issue.

The common law, constitutional and statute law make ample provision to secure a man's house from unauthorized invasion. He is also invested with the privileges, duties, and powers of a master in controlling his household; and the law presumes that he will not allow any illegal transaction to be carried on upon his premises which he has the power to prevent. There is also a presumption of fact, drawn from human experience, that illegal transactions cannot be habitually and for a long period carried on upon his premises without his knowledge and acquiescence. When it is proved that illegal transactions frequently occur upon his premises, the burden of proof is upon him; and if he desires to free himself from the responsibilities of such transactions he must show that such acts were done without his knowledge and approval, or he was powerless to prevent them.

I have instructed you as to the questions of law involved in this case, and I have endeavored to advise you correctly as to the proper methods of investigating the issues of fact submitted to you for determination. If my opinions as to the questions of law involved are erroneous in the particular points presented in the exceptions made and noted by the counsel for defendant, such opinions can be reviewed and reversed in the supreme court; and I have allowed counsel time to prepare and tender their bill of ex-

ceptions for my signature. If you are satisfied from the testimony, beyond a reasonable doubt, that the defendant is guilty in the manner and form charged in the bill of indictment, you should render a verdict of "Guilty;" and if you are not so satisfied your verdict should be "Not guilty."

Verdict, "Guilty."

JONES v. BERGER et al.

(Circuit Court, D. Maryland. November 16, 1893.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—PRIOR DAMAGES.

A simple assignment of "all right, title, and interest" in the invention secured by a patent does not include a right to damages for prior infringements.

2. SAME—LICENSE BY PAROL.

A license to use a patent, not exclusive of others, need not be recorded, and may be granted by parol; and a subsequent assignee of the patent takes title subject to such licenses, of which he must inform himself as best he may.

3. SAME—INFRINGEMENT—DEFENSES—PLEADING.

In a suit for infringement by an assignee of a patent a plea which sets up an oral license from the assignor will be strictly construed, and held insufficient if it fails to state the actual consideration for the license, or allege payment of accrued royalties, or an excuse for non-payment.

In Equity. Suit by Joshua R. Jones, trading as the National Publishing Company, against Frederick Berger and others, for infringement of a patent. On objections to sufficiency of the plea. Plea overruled.

Augustus B. Stroughton and H. E. Garsed, for complainant.

H. T. Fenton, for respondents.

MORRIS, District Judge. The plea avers that from the date of the patent, July 15, 1890, to the date of making the parol license set up as a defense, to wit, April 27, 1892, the defendant did not infringe; and that on April 27, 1892, Christian Jaeger, the then owner of the patent, for a good and sufficient consideration did grant a parol license to the defendants for three years to use the patent for a royalty of 50 cents for each dozen of the patented articles; and that since the granting of the license to them the defendants have not used the invention otherwise than as authorized by the license.

The first objection urged to the defendants' plea is that as to a portion of the period of the alleged infringement, to wit, from the date of the patent to April 27, 1892, the plea simply denies the fact of infringement. Such denial is proper only by answer, and is not proper by plea; but in this case the point seems immaterial, as by the complainant's title it appears that he is not entitled to sue for infringements prior to April 27, 1892. On that date the complainant acquired title from Christian Jaeger by an assignment which conveyed "all the right, title, and interest which Jaeger had in the said invention as secured to him by his letters patent and by the assign-

ments thereof." This language is appropriate to the simple assignment of a patent right, and its meaning is satisfied by the transfer of the invention without transferring any right of action for past infringements. The rule is that to pass the right to sue for past infringement words must be used in the assignment which expressly transfer to the assignee the right of action. *Moore v. Marsh*, 7 Wall. 515; *Emerson v. Hubbard*, 34 Fed. Rep. 327; Walk. Pat. § 277; 2 Rob. Pat. §§ 781, 942. As the complainant's title discloses that he cannot maintain a suit for infringement prior to April 27, 1892, the first clause of the plea is not material.

It is objected to the plea of a license that it is not sufficient in that it alleges "a good and sufficient consideration" without alleging what the consideration was, and that it alleges a license conditioned upon the payment of a royalty, and does not allege that the royalty has been paid, or excuse its nonpayment. I think both these objections to the plea are good. There would seem to be no doubt that a license to use a patent not exclusive of others need not be recorded, and may be by parol. *Hamilton v. Kingsbury*, 17 Blatchf. 264; *Dalzell v. Manufacturing Co.*, 149 U. S. 315, 13 Sup. Ct. Rep. 886; *Brooks v. Byam*, 2 Story, 525; Walk. Pat. § 303; Rob. Pat. §§ 809, 817; *Potter v. Holland*, 4 Blatchf. 206. A subsequent assignee takes title to the patent subject to such licenses, of which he must inform himself as best he can at his own risk. Rob. Pat. § 817.

But I think the objection that the plea does not state what the actual consideration was, and does not allege that the defendants have paid the royalty, or state any excuse for nonpayment, is well taken. Strictness is required in a plea which sets up oral license made by the assignor of the patent. It is an incumbrance upon the assignee's title of which he has no record notice, and there are special reasons why the plea should set out the facts with particularity. When the license is dependent upon the payment of a royalty, the facts with regard to the payment should be averred, as, unless the defendant has complied with the terms of his license, his plea does not defeat complainant's whole remedy. The complainant may still be entitled to an injunction or other relief. 2 Rob. Pat. §§ 782, 822; 1 Daniell, Ch. Pr. 677.

In the present case the citizenship of the parties gives this court jurisdiction, independently of the subject-matter; and the ruling in *Hartell v. Tilghman*, 99 U. S. 547, would not necessarily defeat all relief to complainant.

For the reasons stated the plea is ruled bad.